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[1] Died, Oct. 12, 1942.

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[1] Died July 6, 1942.

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[2] On leave of absence to enter military service.
[3] Designated to sit in Appellate Department, Superior Court, Aug. 29, 1942.

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20 Cal.2d 488

ROUTH v. QUINN et al.

L. A. 18215.

Supreme Court of California.
June 30, 1942.

1. Officers 🔑116

A public officer is liable to respond in damages to one specially injured by his neglect to perform or for negligent performance of an official ministerial duty to the extent of such special injury.

2. Taxation 🔑564

A purchaser of personal property at a delinquent tax sale may not recover damages suffered as result of alleged negligence of assessor in computation of amount of tax, since in tax sales the doctrine of "caveat emptor" applies in all its vigor. Pol.Code, §§ 3820–3823.

See Words and Phrases, Permanent Edition, for all other definitions of "Caveat Emptor".

3. Taxation 🔑734(12)

A purchaser of personal property at tax sale takes risk of any defect in proceedings in the taxation process and no warrant of validity or regularity of proceedings exists.

4. Taxation 🔑820

The statute authorizing recovery from county by purchaser of amount paid at tax sale in excess of taxes lawfully due must be strictly complied with and permits only recovery there authorized. Pol.Code, § 3898.

5. Negligence 🔑2

An indispensable factor to liability founded on negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured or to a class of which he is a member.

6. Negligence 🔑6

A duty imposed by a statute may not be foundation for actionable negligence in performance of that duty unless it is owed to the person injured or to a class of which he is a member.

7. Negligence 🔑6

A violation of a statute is "actionable negligence" only as to those persons for whose benefit or protection it was enacted.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Negligence".

8. Taxation 🔑564

The duty of tax assessor to exercise care in the computation of tax is not owed to a purchaser of property at delinquent tax sale, but only to public as an entity in making secure the public revenue and expediting taxation process and possibly to owner of property upon which tax had been levied. Pol.Code, § 3823.

9. Sales 🔑269

The doctrine of "caveat emptor" relates to existence of warranties in the sale of property.

10. Taxation 🔑734(12)

Purchaser of property at delinquent tax sale is bound to inform himself of the regularity of the tax proceeding, and he assumes risk of any error in the computation of the tax.

11. Taxation 🔑570(1)

Assumption of risk by purchaser at delinquent tax sale of error in computation of tax precludes purchaser from recovering damages suffered as result of alleged negligence in computation of tax, from tax assessor, his deputy and bondsman.

12. Negligence 🔑113(1), 116

Assumption of risk, like contributory negligence, ordinarily must be pleaded as a defense and may not be ground for sustaining a demurrer to the complaint; but, where it appears as a matter of law on the face of the complaint, a demurrer is sustainable on that ground.

13. Pleading ⚷225(2)

Where basis of action of purchaser of property at tax sale against tax assessor, his deputy and bondsman, for damages suffered by purchaser due to invalidity of sale was negligence in calculation of amount of tax claimed against property involved, and where no cause of action existed for such alleged negligence, refusal to permit purchaser to amend complaint to which demurrer had been sustained was not an abuse of discretion.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by O. B. Routh against John R. Quinn and others to recover damages suffered due to invalidity of delinquent tax sale. From a judgment of dismissal, plaintiff appeals.

Affirmed.

For prior opinion of District Court of Appeal, see 118 P.2d 34.

Combs & Murphine, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Gordon Boller and A. Curtis Smith, Deputies County Counsel, all of Los Angeles, for respondents.

CARTER, Justice.

The controversy presented by this appeal is whether a tax assessor, his deputy and bondsman are liable to a purchaser of personal property at a delinquent tax sale for damages suffered by him due to the invalidity of the sale, alleged to have resulted from negligence on the part of the assessor and his deputy in the computation of the tax payable.

Plaintiff appeals from a judgment of dismissal entered after defendants' demurrer was sustained without leave to amend.

Plaintiff charged in his complaint that on June 24, 1938, defendants county tax assessor and his deputy sold to plaintiff certain personal property consisting of a dehydrating plant by means of a delinquent tax sale at public auction for $250; that the delinquent tax for which the property was sold was assessed against said personal property, the correct amount of which was $83.57; that the assessor and his deputy "negligently * * * claimed a tax (on said property) of $84.36 at * * * said sale * * *; that said excessive sum was claimed by * * * an error carelessly and negligently made by defendants * * * in the computation of said tax; that said defendants negligently computed said tax in that they failed to carry the same out to the correct number of decimal places in the computation thereof"; that as a result of the erroneous computation the sale was void and the owner of the property, Becker, recovered judgment for $4,500 against plaintiff for the wrongful conversion of said property. Plaintiff now claims damages resulting from the negligence of defendants in the sum of $14,500 consisting of the above-mentioned judgment, the expense of defending the action brought by Becker, and other damages flowing from that action. Plaintiff received a bill of sale for the property from the assessor which recited that it was sold pursuant to sections 3820, 3821 and 3822 of the Political Code.

[1] Plaintiff relies upon the general proposition that a public officer is liable to respond in damages to one specially injured by his neglect to perform or negligent performance of an official ministerial duty to the extent of such special injury. 21 Cal.Jur. 908.

Plaintiff points to section 3823 of the Political Code as imposing the duty upon the tax assessor to correctly compute the amount of the tax on personal property. Assuming that such a duty is imposed upon the assessor, and that the act of computing the amount of the tax, that is, the application of the rate of tax to the assessed value of the property is a purely ministerial function, still we are of the opinion that plaintiff has failed to state a cause of action.

[2-4] The fundamental principle from which springs the reasons why a purchaser at a delinquent tax sale may not recover damages suffered as a result of the alleged negligence of the assessor in the computation of the amount of tax, is that in tax sales the doctrine of caveat emptor applies in all its vigor. A purchaser of property at a tax sale takes the risk of any defect in the proceedings in the taxation process. No warranty of the validity or regularity of the proceedings exists. See Holland v. Hotchkiss, 162 Cal. 366, 373, 374, 123 P. 258, L.R.A.1915C, 492; 61 C.J. 1304; 4 Cooley on Taxation, 4th ed., § 1553; 77 A.L.R. 824; 116 A.L.R. 1408. Prior to the amendment in 1913 of section 3898 of the Political Code, it was the rule in this state

that the purchaser at a tax sale could not recover from the county or state the amount paid, although the sale was void because of some irregularity in the process of the levy or collection of the tax or the sale of the property. Coleman v. Los Angeles County, 180 Cal. 714, 182 P. 440; Loomis v. County of Los Angeles, 59 Cal. 456; Brooks v. Tulare County, 117 Cal. 465, 49 P. 469; Holland v. Hotchkiss, supra; Moyer v. Wilson, 166 Cal. 261, 135 P. 1125. That rule was founded upon the application of the doctrine of caveat emptor. See Brooks v. Tulare County, supra. The rule was relaxed by the 1913 amendment to section 3898 of the Political Code with respect to the recovery from the county by the purchaser of the amount paid at the tax sale in excess of the taxes lawfully due. See Pol. Code, § 3898; Coleman v. Los Angeles County, supra. But that statute must be strictly complied with and permits only the recovery there authorized. See Coleman v. Los Angeles County, supra. There is no statute authorizing recovery against the tax assessor. If the money paid at the sale by the purchaser cannot be recovered from the county or state except by statutory authority, surely for the same reason, caveat emptor, no recovery could be had against them for the negligence of their officers in the computation of the tax. While plaintiff's action is against the tax assessor as an individual, rather than the county, the same rule extends to protect the assessor. See Foster v. Malberg, 119 Minn. 168, 137 N. W. 816, 41 L.R.A.,N.S., 967, Ann.Cas. 1914A, 1116. Reason supports that conclusion inasmuch as the assessor is merely the agent for the county and is not purporting to pass any title in his individual capacity. The doctrine of caveat emptor being the basis for the absence of liability, the same doctrine would protect both the political entity and the officer. It is for that reason distinguishable from the cases where the state is not liable for a tort but the officer is, the non-liability being based upon the doctrine of sovereign immunity.

[5-7] It is an elementary principle that an indispensable factor to liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured, or to a class of which he is a member. Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013; 19 Cal.Jur. 550, 551. A particular application of that rule finds expression in the principle that a duty imposed by a statute may not be the foundation for actionable negligence in the performance of that duty unless it is owed to the person injured, or to a class of which he is a member, or stated another way, a violation of a statute is actionable negligence only as to those persons for whose benefit or protection it was enacted. King v. San Diego Electric R. Co., 176 Cal. 266, 168 P. 131; 19 Cal.Jur. 635; Restatement, Torts, §§ 286, 288.

[8, 9] We have assumed that the duty to exercise care in the computation of the tax is imposed upon the tax assessor by section 3823 of the Political Code. But that duty is not owed to a purchaser of property at a delinquent tax sale. Such duty would be owed only to the public as an entity in making secure the public revenues and expediting the taxation process as distinguished from the individual members of the public, and possibly to the owner of the property upon which the tax had been levied. There may well be a duty, under proper circumstances, upon the officer making the tax sale of land to execute a proper deed to the purchaser, when the taxation proceedings leading to the sale have been regular and valid (Webster v. Somer, 159 Cal. 459, 114 P. 575; Fox v. Townsend, 152 Cal. 51, 91 P. 1004, 1007; Smart v. Peek, 213 Cal. 452, 2 P.2d 380), but the computation of the tax in such a case is made, of course, before there is a sale, and before the purchaser becomes entitled to an instrument of transfer. These conclusions with respect to the duty of care necessarily follow from the application of the doctrine of caveat emptor to the purchaser. While that doctrine relates to the existence of warranties in the sale of property, which, of course, are contractual in nature, it seems clear that if there are no warranties made by the state with reference to the regularity in computing the tax, there are none made by the assessor, the agent of the state. If they do not warrant or make any holding out as to the regularity of that computation, as to the purchaser, neither is under any duty of care with respect to him. As he is not entitled to any assurance of the regularity of the tax proceedings, he is not entitled to insist that due care be exercised by the assessor or the county. The statute does not impose such a duty upon him as to the purchaser. Nor is there any other source from which such a duty may arise. Sound public policy dictates that no such intoler-

able burden shall be placed upon a tax assessor that will make him liable for any error he may make in the computation of the tax. The multitude of transactions with which he must deal and the great probability that mathematical error may well creep into the calculations regardless of his competency and efficiency, refutes the wisdom of imposing such duty upon him.

[10, 11] A further ground for the absence of liability of the tax assessor flows from the application of the doctrine of caveat emptor. The essence of that doctrine is that the buyer beware; that he is bound to inform himself of the regularity of the tax proceedings, and that he assumes the risk of any error in the computation of the tax. Assumption of the risk out of which an injury arose by the person injured has consistently been held to bar recovery in an action for the injury alleged to have been negligently caused. See 19 Cal.Jur. 583.

[12] It is true that assumption of risk, like contributory negligence, ordinarily must be pleaded as a defense and may not be the grounds for sustaining a demurrer to the complaint, such as is now before us. But where, as in the case of contributory negligence, that negligence appears as a matter of law on the face of the complaint, a demurrer is sustainable on that ground. Nicolosi v. Clark, 169 Cal. 746, 147 P. 971, L.R.A.1915F, 638.

Courts in two other states have on various grounds denied recovery from a tax official by a purchaser at a delinquent tax sale in actions where improperly performed duty was charged. Foster v. Malberg, supra; Hamilton v. Valiant, 30 Md. 139. Although the action in the Foster case was against the tax official and the sureties on his bond, the discussion there in denying liability is particularly pertinent. The officer failed to give proper notice of the tax sale, with the result that it was void to the purchaser's injury. The basis of nonliability was founded upon contributory negligence, lack of proximate cause, and absence of duty of care, all emanating from the application of the doctrine of caveat emptor. The Foster case was cited with approval in Judd v. City of St. Cloud, 198 Minn. 590, 272 N.W. 577.

It follows, of course, under the circumstances, that if the assessor is not liable neither is his deputy or bondsmen.

[13] Plaintiff complains that the court abused its discretion in refusing to permit him to amend his complaint. There was no abuse of discretion. From plaintiff's complaint the basis of plaintiff's action is clear, that is, negligence in the calculation of the amount of the tax claimed against the property involved. Inasmuch as we have determined that no cause of action exists for such alleged negligence, there are no circumstances under which an amendment would serve any useful purpose.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

20 Cal.2d 467

STATE BOARD OF EQUALIZATION et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

S. F. 16678.

Supreme Court of California.

June 30, 1942.

1. Contempt 🔑67

Certiorari will lie to review an order in a contempt proceeding.

2. Courts 🔑475(1)

Where petition for prohibition restraining superior court from taking further proceedings in contempt hearing was denied by District Court of Appeal without written opinion, certiorari proceeding brought in Supreme Court before expiration of 30 days after denial of the petition for prohibition, to annul contempt judgment, did not involve same matter as that involved in prohibition proceeding, and hence Supreme Court was not without jurisdiction of certiorari proceeding on ground that a proceeding involving same matter was pending in District Court of Appeal. Const. art. 6, § 4c.

3. Judgment 🔑715(3)

An order of District Court of Appeal denying, without written opinion, a petition for writ of prohibition restraining superior court from taking further proceedings in contempt hearing, was not "res judicata" in subsequent certiorari proceeding to review judgment of contempt, since District Court of Appeal in the prohibition proceeding did not necessarily pass on issues involved in certiorari proceeding. Const. art. 6, § 4c.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

4. Judgment ⚷715(3)

The rule that ex parte denial by District Court of Appeal, without a written opinion, of an application for writ of prohibition, is a "final adjudication" of facts stated in the petition, did not preclude Supreme Court from reviewing on certiorari a judgment of contempt entered after such a denial by the District Court of Appeal of petition for writ of prohibition to restrain superior court from taking further proceeding in contempt hearing. Const. art. 6, § 4c.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Adjudication".

5. Prohibition ⚷3(3)

Prohibition will not be granted to prevent superior court from proceeding in a contempt matter merely on ground that superior court has erred in the proceeding out of which alleged contempt grew, and remedy of petitioner in such a case is to present his defense on hearing of contempt proceeding, and then, if found guilty of contempt, to apply to higher court for certiorari or habeas corpus.

6. Courts ⚷475(1)

Where petition for certiorari filed in District Court of Appeal to review a contempt order was voluntarily withdrawn, constitutional provision relating to 30-day period after decision of District Court of Appeal is pronounced, in which that decision becomes final was inapplicable, and Supreme Court had jurisdiction of a subsequent certiorari proceeding to review the order, which was filed within 30 days after the voluntary withdrawal of the petition filed in District Court of Appeal. Const. art. 6, § 4c.

7. Contempt ⚷67

Where main issue presented in certiorari proceeding to review contempt judgment of superior court was payment of salaries of certain civil service employees as ordered by mandamus judgment entered against the State Board of Equalization, the State Personnel Board and its executive officer, members of the boards, and the State Comptroller, that the State Board of Equalization adopted resolution declaring intention to comply with all terms of writ of mandate did not require dismissal of certiorari proceeding as involving a "moot question", in view of fact that parties other than the Board of Equalization were affected by the contempt order.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

8. States ⚷59

A civil service employee who is unlawfully prevented by the state from performing duties of his position is entitled to recover only amount of salary which accrues during period he is unlawfully prevented from performing his duties, after deducting from the total accrued amount any compensation he has received in private or public employment during such period.

9. Mandamus ⚷172

Generally, determination of question concerning deductions to be made from amount recoverable by state civil service employee who has been unlawfully discharged, because of compensation received by employee in other employments, should be made by trial court in mandamus proceeding brought by employee to require reinstatement and payment of accrued salary.

10. Mandamus ⚷178

Judgment stating what writ of mandate should contain is controlling over the writ.

11. Mandamus ⚷178

Mandamus judgment was required to be interpreted, if possible, without doing violence to its express language, so that it did not command public officers to perform unlawful acts.

12. Mandamus ⚷186

A mandamus judgment requiring reinstatement of civil service employees and payment of accrued salaries was construable as requiring deduction of compensation received by employees from other employment, and hence contempt order which commanded payment of accrued salaries without taking into consideration such other compensation was in excess of jurisdiction.

13. Mandamus ⚷186

Where mandamus judgment ordered reinstatement of civil service employee to a certain position at fixed salary, Supreme

Court, in contempt proceeding based on violation of mandamus judgment, was concerned only with enforcement of the judgment, and was without power to command that employee be placed in higher position and paid higher salary than that required by the judgment, even if there was proper compliance with all requisites to reclassification or promotion to that position.

14. Mandamus 🔑185

Where civil service employee is ordered to be reinstated and paid accrued salary, in mandamus proceeding, it is proper to require on enforcement of mandamus judgment that the employee receive compensation of position to which he was reinstated, including any blanket increases in that compensation, but there should not be included therein any promotion to a higher position.

15. Mandamus 🔑186

Where mandamus judgment ordered reinstatement of and payment of accrued salary to civil service employee, contempt order based on violation of the judgment properly took into consideration in fixing amount to be paid to employee, fact that there was an entire salary range adjustment consisting of blanket increase of minimum salaries, but improperly included individual salary increases which would ordinarily accrue during the period that employees were deprived of their positions. St.1937, p. 2094, § 70.

16. States 🔑63

Reinstated civil service employees, who had been improperly discharged, were not entitled to benefit of periodic individual salary increases which they might have earned if they had been working, since such increases would have been based on efficiency and, although employees were lawfully entitled to perform the duties of their positions, they were not performing them and therefore were not available for observation necessary to ascertain their efficiency. St.1937, p. 2094, § 70.

17. Contempt 🔑67

Order of contempt requiring certain state officers to perform specified acts before certain date and providing that, on failure to perform such acts, the officers would be guilty of contempt and should be imprisoned until complying with order, was a "final order" in contempt proceeding which was reviewable by certiorari. Code Civ.Proc. § 1222.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

In Bank.

Certiorari proceeding by the State Board of Equalization of the State of California and others to review an order of the Superior Court of Los Angeles County adjudging the petitioners guilty of contempt.

Order annulled.

Earl Warren, Atty. Gen., Robert W. Harrison, Chief Asst. Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for petitioners.

Robert W. Kenny, Morris E. Cohn, Howland & Prindle, Clayton Howland, and Everett Prindle, all of Los Angeles, for respondent.

PER CURIAM.

Petitioners seek to have annulled a judgment of contempt rendered for an alleged violation of a writ of mandate issued upon a judgment in a mandamus proceeding. Petitioners are The State Board of Equalization and The State Personnel Board, and the members of those boards, and the executive officer of the latter board, and the State Controller.

On March 29, 1940, respondent Superior Court of Los Angeles County rendered a judgment in a mandamus proceeding commanding petitioners to reinstate Robert A. Brown, Lewis Torrance, George McNamara, John T. Brady, Daniel H. Hudelson, William Magee, and Willard Long, Sr., to their positions as civil service employees of the State of California with The Board of Equalization, and to pay the salaries of those employees. The writ of mandate was issued on April 3, 1940. On February 17, 1941, the judgment was affirmed on appeal by the District Court of Appeal, Second District, Division Two; a hearing by this court was denied on April 17, 1941. Brown v. State Personnel Board, 43 Cal.App.2d 70, 110 P.2d 497. Pursuant to the terms of the judgment and on June 6, 1941, the salaries of all the employees which had accrued from the time of their dismissal to the entry of the judgments were paid to the employees, but none of the salaries accruing subsequent thereto were paid.

The writ of mandate directed the reinstatement of the employees Brown and Hudelson to their respective positions of Supervising Liquor Control Officers, Grade 2, employees Torrance, Brady and Long to their respective positions of Liquor Control Officers, and employees McNamara and Magee to their respective positions of Investigators. It was ordered that the petitioners be paid their salary from the date of dismissal until reinstatement less certain deductions; and that the respondents therein, petitioners here, show to the superior court on April 17, 1940, that they have obeyed the writ.

Pursuant to the affidavit of employee Brady, an order to show cause why the petitioners should not be punished for contempt for failure to obey the writ with respect to all of the employees except Long, was issued in the mandamus proceeding on July 19, 1941. It was made returnable August 4, 1941. Brady's affidavit charged that there had been no payment of any salary since the judgment was entered and that the employees had not been reinstated.

After a hearing on the order to show cause, and on October 9, 1941, the superior court made an order finding that petitioners had wilfully failed to comply with the writ of mandate, and that unless there was paid to the employees the sums named therein by October 30, 1941, and employee Brown offered the position of Chief Liquor Control Officer or District Liquor Control Officer, the petitioners would be guilty of contempt and imprisoned until they had performed. It is a review of that order which is here involved.

[1-4] This court's jurisdiction to entertain the present proceeding is challenged. On October 8, 1941, the day before the contempt order was made, petitioners petitioned the District Court of Appeal for a writ of prohibition to restrain the superior court from taking further proceedings in the contempt hearing. On the same day that court denied the petition without written opinion. Respondents assert that inasmuch as the same issues were raised by that petition the matter was still pending in the District Court of Appeal when, on October 24, 1941, application was made to this court for the writ of certiorari here involved; that the matter was pending in the District Court of Appeal until its order of denial of the petition became final thirty days after its rendition, and that in the interim this court had no jurisdiction; that when that order did become final it was res judicata on the issues now presented. That position is not tenable. The two proceedings were separate and distinct, the one for prohibition in the District Court of Appeal was before the contempt order here in question was made, and was an endeavor to restrain the Superior Court from further action, and was before the court at a time when it could not be assumed by the District Court of Appeal that the superior court would make an order in excess of its jurisdiction; rather, its assumption would be to the contrary; the present proceeding was initiated to review the contempt order after it was made and the superior court's action on the matter was known. The superior court undeniably had jurisdiction to hear the contempt proceeding, and, therefore, up to the time it made its decision it could not have been said to be without jurisdiction and thus subject to restraint by prohibition. Certiorari, however, is appropriate to review an order in a contempt proceeding, the basic inquiry being whether the court acted in excess of its jurisdiction. Thus the same proceeding was not pending in the District Court of Appeal when application was made for the present writ, nor was the order of denial res judicata because the District Court of Appeal did not necessarily pass upon the issues here involved. The writ of prohibition may have been refused because the District Court of Appeal did not assume at that time that the superior court would make any order in excess of its jurisdiction. While it has been held that the ex parte denial by an appellate court without a written opinion of an application for a writ of prohibition is a final adjudication of the facts stated in the petition (Reilly v. Police Court, 194 Cal. 375, 228 P. 860), from the foregoing discussion it is obvious that such rule is not applicable under the present circumstances. See O'Brien v. Olson, 42 Cal.App.2d 449, 109 P.2d 8.

[5] With particular reference to the res judicata argument, it is pertinent to observe that the District Court of Appeal in denying the petition for the writ of prohibition may have done so on the ground that such was not the proper remedy, rather than that petitioners' claims were without merit. In so doing it would have been proceeding in accordance with the rule that "prohibition will not be granted in an appellate court to prevent the superior court from proceeding in a contempt matter merely upon the ground that the court has erred in the proceeding out of which the alleged contempt grew. The remedy of the petitioner in such a case is to first present his defense upon the hearing of the contempt proceeding, and then, if found guilty of contempt, to apply to a higher court

for a writ of certiorari or habeas corpus. Wessels v. Superior Court, 200 Cal. 403, 253 P. 135; Commercial Bank v. Superior Court, 192 Cal. 395, 397, 220 P. 422; Drew v. Superior Court, 43 Cal.App. 651, 655, 185 P. 680." Monjar v. Superior Court, 12 Cal. 2d 715, 717, 87 P.2d 694, 695.

[6] Respondent as a further basis for its challenge of this court's jurisdiction herein, points out that after the contempt order of October 9, 1941, was made, but before the petition for review was filed in this court, petitioners applied to the District Court of Appeal for a writ of certiorari to review the proceedings of the superior court in the contempt matter and respondent filed its answer thereto. That petition for certiorari in the District Court of Appeal was voluntarily withdrawn without prejudice by petitioners before the District Court of Appeal acted upon it and before the present proceeding was commenced, but respondent contends it was still pending therein when the present proceeding was commenced in this court because such dismissal would not become final until thirty days after its entry, and the petition was filed in this court before the expiration of that period. We cannot agree. The thirty days is the period after the decision of the District Court of Appeal is pronounced in which that decision becomes final. Cal.Const. art. VI, sec. 4c. In the instant case the proceeding for a review in the District Court of Appeal was voluntarily dismissed by petitioners before any judgment was pronounced by that court, therefore there was no judgment to become final thirty days after its pronouncement and no proceeding was pending therein awaiting decision. Los Angeles Drug Co. v. Superior Court, 8 Cal.2d 71, 63 P.2d 1124; Fitts v. Superior Court, 6 Cal.2d 247, 57 P.2d 518; and Reilly v. Police Court, supra, cited by respondent all concerned situations where a judgment had been pronounced by the District Court of Appeal.

[7] Respondent asserts that the issue has become moot. That contention is based upon the action of The State Board of Equalization in adopting a resolution on October 24, 1941, the day application was made to this court for the instant writ; the resolution declares an intention on the part of The Board of Equalization to comply with all of the terms of the writ of mandate. There are other parties, however, who were affected by the contempt order, namely, the State Controller and The Personnel Board and the members thereof. As to them the proceeding is not moot. The main issue presented is the payment of the salaries, a matter with which the State Controller is directly concerned.

The judgment in the mandamus proceeding, the violation of which must necessarily be the basis of the contempt order, directed the following: That employee Brown be reinstated as Supervising Liquor Control Officer, Grade 2, and receive as salary from the date of his dismissal to the date of the judgment the sum of $205 per month, and at the same rate after the judgment until Brown shall have been reinstated, and after reinstatement Brown shall receive $205 per month until the salary is changed or Brown is laid off or dismissed. With respect to the other employees, the judgment was substantially the same stating the salary and position to be as follows: Hudelson, Supervising Liquor Control Officer, Grade 2, with a salary of $225 per month; Torrance, Brady and Long as Liquor Control Officers with a salary of $150 per month; McNamara and Magee as investigators with a salary of $150 per month. On June 6, 1941, all of the employees were paid the salaries specified in the judgment as having accrued at the date thereof. On July 26, 1941, and before the hearing on the contempt citation, employees Brady, Torrance, Magee and McNamara were ordered to report for duty on July 28, 1941; the first three reported for duty as ordered and have held their positions since that time. McNamara requested a leave of absence, he being employed privately. It was understood by him that the request would be denied unless he furnished a certificate showing his employment was necessary to national defense; he did not furnish such a certificate and has continued in private employment. Employee Hudelson was inducted into the United States Army on March 3, 1941, and has remained there since. Employee Long is not a party to the contempt proceeding, he having left his position, his salary having been paid in full. On July 3, 1941, The State Personnel Board attempted to reclassify the position of Brown from Supervising Liquor Control Officer, Grade 2, to Chief Liquor Control Officer, also known as District Liquor Administrator. It is alleged in the petition and not denied that he was reinstated on September 22, 1941, as Supervising Liquor Control Officer and he has since held that position.

The contempt order of October 9, 1941, commanded the payment of salaries to the employees from the date of the judgment to the date of their reinstatement, or their separation from state employment by their acceptance of employment elsewhere as the facts with respect to each employee indicated; the amount was expressed only in a lump sum. The total amount ordered paid was in excess of an amount calculated at the rate specified in the judgment ordering the issuance of the writ of mandate. In addition, it was ordered that Brown be paid henceforth $300 per month. Since the judgment in the mandamus proceeding, The Personnel Board has changed the classification of Chief Liquor Control Officer to District Liquor Control Administrator. In 1938 The Personnel Board had adopted a resolution fixing the salary range of a chief liquor control officer at $300 to $380 per month.

On October 9, 1941, petitioners offered to pay to the employees the back salary less the sums they had earned in other pursuits, private, or public, from the date of the mandamus judgment to the time of reinstatement. The chief controversy appears to be whether such earnings should have been deducted from the salary payable and thus whether petitioners were justified in refusing to pay more than the accrued salaries less that deduction. The answer to that issue hinges upon the proper interpretation of the mandamus judgment, and whether such deductions are proper.

[8-12] Considering the latter question first, the rule is now well settled that a civil service employee is entitled to recover only the amount of salary which accrues during the period he is unlawfully prevented by the state from performing the duties of his position, after deducting from the total accrued amount any compensation he has received in private or public employment during such period. Wiles v. State Personnel Board, 19 Cal.2d 344, 121 P.2d 673; Kelly v. State Personnel Board, 31 Cal.App.2d 443, 88 P.2d 264. Ordinarily the determination with reference to those deductions should be made by the court in the mandamus proceeding. See Wiles v. State Personnel Board, supra. That brings us to a consideration of whether the matter was adjudicated in the mandamus proceeding in the instant case. Several factors might possibly indicate that the mandamus judgment settled that issue adversely to petitioners, and that therefore, petitioners were in contempt for insisting on making the deductions. The judgment made deductions of compensation received by the employees in other public service in fixing the amount of salary accrued up to the date of the judgment. The judgment declared that the records of The State Personnel Board should be corrected to show that the employees had a continuous civil service status and "to be entitled to receive the salary thereof;" that each receive the amount specified "per month for each and every month, and at the same rate for each fraction of a month, following date of rendition of judgment, until petitioner shall have been reinstated in his position * * * and thereafter and upon said reinstatement petitioner shall be entitled to receive the sum of (amount stated) per month as and for salary in the occupancy and performance of the duties of said position until said salary shall have been changed or petitioner dismissed or laid off from said position as provided by law." In stating what the writ of mandate should contain, the judgment provided that warrants should be issued in the amount of the stated salary and "for the further sum of (amount stated) for each and every month, and proportionately at that rate for each fraction of a month subsequent to date hereof, to and until said (employee) * * * shall have been reinstated in his position." It will be noted that the writ of mandate issued contains substantially the same language; in any event the judgment for the writ is controlling. It does not necessarily follow, that because the specified salary was ordered to be paid, no lawful deductions could be made. The judgment should be interpreted if it may be, without doing violence to the express language, so that it does not command that the public officers perform an unlawful act. It is the law, as heretofore stated, that deductions should be made for compensation received in other employment while the employees were unlawfully excluded from their positions. Therefore, to order officials to pay public funds in violation of that rule would be unlawful. Such expenditure of public funds would be illegal and contrary to law. In the light of those principles we believe the judgment properly interpreted means that there should be deducted from the salaries accruing between the date of the judgment and reinstatement, the compensation received from other employment. Therefore, the contempt order which commanded the pay-

ment of such accrued salaries without taking into consideration that factor was in excess of the jurisdiction of the court. In this connection respondent further urges, however, that the petitioners should have at least paid the amount less the deductions. Warrants were offered to the employees on October 9, 1941, the date of the contempt order, but prior to its entry, insofar as it was known what other compensation had been received, and it appears that negotiations were conducted between the employees and the state officials with relation to the amounts, if any, that had been received.

Respondent refers to the delay of the petitioners in reinstating the employees, that is, in waiting until July 28, 1941, after the order to show cause in the contempt citation was issued. But they were reinstated before a hearing in the contempt proceeding, and it was conceded by the employees at the hearing that there was no issue of contempt with regard to the reinstatement. Furthermore, the contempt order stated that the petitioners shall be guilty of contempt unless they made the payments set forth therein on or before October 30, 1941; there was no adjudication that they would be guilty of contempt if they failed to reinstate the employees. That had already been done.

[13, 14] Particularly with respect to employee Brown it appears that the mandamus judgment ordered that he be reinstated to the position of Supervising Liquor Control Officer, Grade 2. He was reinstated in the position of Supervising Liquor Control Officer in September, 1941. It is alleged in petitioners' petition and not denied that the two above-mentioned positions are one and the same, and the salary range therefor is $200 to $260 per month. The contempt order, however, commanded the payment of $300 per month to Brown and apparently fixing Brown's classification as a Supervising Liquor Control Officer, Grade 3, also known as Chief Liquor Control Officer and District Liquor Administrator, the salary range of which is $300 to $380 per month. Presumably that was done on the basis of a resolution of The State Personnel Board dated July 3, 1941 , classifying Brown as a Chief Liquor Control Officer, and a resolution of The Board of Equalization to create such a position in the Los Angeles district. There is a conflict as to whether the money became available for that position or the allowance thereof was approved by the Director of Finance. On September 22, 1941, The Board of Equalization reinstated Brown to the position of Supervising Liquor Control Officer, formerly known as Supervising Liquor Control Officer, Grade 2. The court exceeded its jurisdiction in its contempt order in so ordering the salary for the position of Chief Liquor Control Officer to be paid to Brown. The mandamus judgment ordered that he be reinstated to Supervising Liquor Control Officer, Grade 2, that position is now known as Supervising Liquor Control Officer and carries a lower salary. The judgment in addition to directing reinstatement ordered that Brown be paid the named salary, that is, in the range for the last-mentioned position, until reinstatement "thereafter according to law." It also provides "and upon said reinstatement (Brown) shall be entitled to receive the sum of $205.00 per month as and for salary in the occupancy and performance of the duties of said position until said salary shall have been changed * * *." Under those circumstances it was not within the proper purview of the contempt order to command him to be placed in the higher position even assuming their proper compliance with all the requisites to a reclassification or promotion to that position. The court was concerned in that proceeding with enforcing the judgment, and it cannot be said that by reason of that judgment the court may for all time in the future determine by contempt proceeding that the employee is receiving his proper classification and advancement. If Brown is entitled to a higher classification and greater salary and has been denied it, he has his remedy in appropriate proceedings. While it is proper as will hereafter appear to require an enforcement of the mandamus judgment that the reinstated employee receive the compensation of the position to which he was reinstated including any blanket increases in that compensation, there should not be included therein any promotions to a higher position. That is a separate and distinct matter that the mandamus judgment did not purport to embrace. Subsequent promotions are dependent on factors not litigated in the mandamus proceeding and are not automatic and therefore a contempt proceeding in execution of the judgment is not the proper method of determining those issues.

[15, 16] It appears that there was an entire salary range adjustment which consisted of a blanket increase of the minimum salary, and the contempt order took that increase into consideration in fixing the amount to be paid the employees for the period after the entry of the judgment in the mandamus proceeding. Petitioners do not question the propriety of such procedure, but insist that the periodical step ups or individual salary increases which would ordinarily occur during that period should not have been included in fixing the amount payable to the employees. It is apparent from the contempt order when the amounts there stated are compared with the period stated to be covered thereby, that those amounts are in excess of that amount which would be reached on a computation based upon either the rate fixed in the mandamus judgment or on a rate fixed by considering an increase by a general salary range adjustment. It is obvious therefore that the contempt order was in excess of the jurisdiction of the court in requiring the payment of accrued salary in excess of that specified in the mandamus judgment as interpreted to include the blanket increase by salary range adjustments. If the excess was due to the addition of the periodic individual salary increases, the order is equally vulnerable because those increases are dependent upon the attainment of a certain percentage of efficiency by the individual employee. It is provided in the State Civil Service Act: "The board [Personnel Board] shall provide for intermediate [between blanket salary readjustments] steps within such limits to govern the extent of the salary adjustment which an employee may receive at any one time. After completion of the first year in a position, each employee shall receive a salary adjustment equivalent to one of such intermediate steps during each year when his service rating, as shown by the current or last performance report shall be equal to or higher than a reasonable percentage to be fixed by rule of the board." Stats.1937, pp. 2085, 2094, sec. 70. Manifestly, no rating of efficiency could be made prior to the reinstatement of the employees. Although they were lawfully entitled to perform the duties of their positions they were not performing them and therefore were not available for the observation necessary to ascertain their efficiency.

[17] Respondent asserts that the proceeding here is premature because the order of contempt is not final. There is no doubt that the order of October 9, 1941, was a final order in a contempt proceeding, as is contemplated by section 1222 of the Code of Civil Procedure. The order adjudges "that unless within twenty days from the date hereof, that is to say, on or before the 30th of October, 1941, the respondents hereinafter named do and perform the acts hereinafter specified, the said respondents so failing in the said respective performances shall be guilty of contempt in disobeying and in failing to obey the lawful orders of this Court as aforesaid, they and each of them having the power to obey the said orders." Thereafter follow the salary payments to be made and heretofore mentioned. Then it is ordered that: "Upon the failure of the said respondents or any of them within the time aforesaid to perform and do the acts hereinabove specified said respondent or respondents so failing shall be, as of the 30th day of October, 1941, guilty of contempt; and the said respondents and each of them so failing and so adjudged in contempt shall be imprisoned in the County Jail of the County of Los Angeles until such respondents so guilty of contempt shall have complied with the orders aforesaid, and to that end a warrant of commitment shall on the 30th day of October, 1941, issue against the said respondents so adjudged guilty of contempt." It is clear the order was a final order in a contempt proceeding such as is reviewable by writ of certiorari.

For the foregoing reasons the order of October 9, 1941, herein is annulled.

TRAYNOR, J., did not participate herein.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. TRACY et al.

Civ. 13568.

District Court of Appeal, Second District, Division 2, California.

June 18, 1942.

Hearing Granted Aug. 10, 1942.

1. Trusts 🔑270

Where trust document recited that trustor should have exclusive possession and use of trust estate during his life without accounting to trustee and that the latter, on trustor's death, should distribute the trust estate as the trustor might designate in his will, the trustee had duty to distribute the estate as directed by the trustor's will.

2. Action 🔑6

In the performance of trustee's duty to distribute trust estate as directed by trustor's will, the trustee, which was faced with divergent claims of a character possessing legal substantiality, was entitled to safeguard itself against legal liability caused not by its own acts but by that of others, by bringing declaratory judgment action.

3. Executors and administrators 🔑513(9)

An adjudication made by probate court on intermediate account of executor was not "final" except as to parties over which the court had jurisdiction and to the extent that distribution was made under the probate court's order.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Adjudication".

4. Judgment 🔑707

Where trustee of an express trust created by decedent was not made a party to probate proceedings in which executor obtained an adjudication concerning rights to decedent's property, and was not served with process in that proceeding, the Probate Court's order did not "estop" trustee from seeking, in equity, an adjudication of its duties as trustee in regard to a third party who contended that probate court's adjudication was void.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

5. Action 🔑6

Where executor who was also residuary legatee demanded that trustee assign and transfer trust estate to parties found entitled thereto by construction placed on will by the Probate Court in a proceeding to which the trustee was not a party, and a third party contended that the adjudication of the probate court was void and demanded that trustee convey an interest in the estate to third party, the trustee could maintain declaratory judgment action for declaration of the rights of the parties to the trust estate and for declaration of trustee's duties in regard thereto.

6. Trusts 🔑227

The trustee of an express trust, which brought declaratory judgment action for declaration of rights of parties in the trust estate and of trustee's duties in regard thereto was entitled to be reimbursed out of the trust estate for its expenses including attorney's fees which were properly incurred by it in executing the trust. Civ. Code § 2273.

7. Appeal and error 🔑1071(1)

Where trial court's findings made on issues necessarily involved in the action were adequate to sustain its judgment, that the findings went beyond the issues was immaterial.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Declaratory judgment action by the Security First National Bank of Los Angeles as trustee, etc., against Mark Tracy and others for adjudication of rights of certain parties in trust property and the duties of the plaintiff as trustee in regard thereto. From an adverse judgment the defendant Ernest P. Wellman appeals.

Affirmed.

Winterer & Ritchie, of Los Angeles, for appellant.

Ralph G. Miller, of Los Angeles, for plaintiff and respondent.

HANSON, Justice pro tem.

This is another companion case to Larrabee v. Tracy et al., 126 P.2d 947, and Salvation Army v. Security-First National Bank of Los Angeles, 126 P.2d 953. The appeal is submitted upon a single record made in this and the cases mentioned, notwithstanding they were not consolidated in the court below for trial. In the instant case, however, neither the issues nor the errors assigned are the same as in the two cases mentioned. The questions here are two, viz.: (1) whether this action for declaratory relief was maintainable, and

(2) whether attorney fees could properly be allowed to respondent Security-First National Bank of Los Angeles.

The facts upon which the questions involved turn are these: On August 7, 1930, Mark H. Rice conveyed all the real estate he then owned to the Security-First National Bank of Los Angeles, and the latter, on its part, executed and delivered its declaration of trust to evidence the trust upon which it had received title to the property involved. By the terms of the trust document it was recited that the trustor should have the exclusive possession and use of the trust estate during his life without rental or other accounting therefor to the trustee, but that the latter should, on the trustor's death, distribute the trust estate as the trustor, might designate in his last will. Upon the death of the trustor the trustee, anticipating that the estate would be promptly closed by appellant, the executor who had been named by the will and appointed as such by the court, consented that the executor might take possession of and manage the real estate involved in the trust and account to it for rents, issues and profits. At intervals between the date of the appointment of the executor in 1931 and the filing of the instant action for declaratory relief in the court below the trustee made numerous demands upon the executor that he close the estate. Not only did the executor fail to accede to these demands, but, after he had filed his third account current and had procured from the probate court its approval and an adjudication that Edith Larrabee was not entitled to any portion of the estate, he made demand upon the trustee, both in his capacity as executor and as residuary legatee, that the trustee assign and transfer the trust estate to the parties found entitled thereto by the construction placed by the probate court upon the will of Rice. Inasmuch as Edith Larrabee had contended that the adjudication by the probate court was void, she made demand upon the trustee that it assign and convey to her the interest which, by the terms of the will, her mother would have received if living at the time of the trustor's death. In view of these adverse claims made upon it, the trustee instituted in the court below the instant action for declaratory relief, asking an adjudication of the rights of the parties involved in this appeal and its duties in the premises. In its complaint it averred, among other things, that it had been required to retain counsel to institute the action and present it to the court, and so it prayed that it might be awarded a reasonable sum with which to compensate its attorney, payable out of the trust fund. It will suffice to say that appellant, by his answer, averred that the will had been construed by the probate court; that that court had held Edith Larrabee had no interest in the estate; that such adjudication was binding upon her and upon the trustee, and by reason thereof there was no occasion for an action for declaratory relief. The answer further averred that attorney fees as prayed were not allowable in a declaratory relief action. With this preliminary statement as to the factual situation we turn to the contentions which are here made by appellant.

[1-5] First. It was the duty of the trustee to distribute the trust estate as directed by the last will of the trustor. In the performance of that duty it was entitled, where it was faced with divergent claims of a character possessing legal substantiality, to safeguard itself against legal liability caused, not by any act of its own but by that of others. The adjudication which had been made by the probate court on an intermediate account was not final except as to the parties over which the court had jurisdiction and to the extent that distribution had been made under the probate court's order. As the trustee was not made a party to the probate proceedings, or served with process, the probate court's order did not bind it nor estop it from seeking in equity an adjudication of its duties as the trustee of an express trust. As to that trust the probate court possessed no jurisdiction. That there was a substantial, actual legal controversy between Wellman, in his capacity as executor and as residuary legatee, and Edith Larrabee is plain. The trustee, accordingly, was entitled to bring and maintain its action for declaratory relief.

[6] Second. The contention here made by appellant that the trial court was without authority to allow attorney fees in a declaratory relief action is readily answered. The trustee sought such fees, not on the theory that it was entitled to them in a declaratory relief action as such, but by virtue of the fact that it was a trustee of an express trust, and therefore under Civil Code section 2273 entitled to be reimbursed out of the trust estate for its

expenses, including attorney fees, which were properly incurred by it in executing the trust. It is not open to debate that the statute mentioned permits of an allowance of the character of that which is here involved. In re Duffill's Estate, 188 Cal. 536, 206 P. 42.

[7] Appellant's further contention that the findings went beyond the issues is of no significance, as the findings the trial court made on the issues necessarily involved in the action are adequate to sustain its judgment. Other errors assigned, which have not been argued, require no notice on our part.

Judgment affirmed.

MOORE, P. J., and McCOMB, J., concurred.

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52 Cal.App.2d 840

WEBB et al. v. SEABOARD TRANSP. CO. et al.

Civ. 13762.

District Court of Appeal, Second District, Division 2, California.

June 24, 1942.

Appeal and error 🔑**801(1)**

Where all grounds of a motion to dismiss an appeal were supported by a certificate of the clerk of the superior court setting forth the facts required by Rule of the District Court of Appeal, appeal was dismissed. Rules of District Court of Appeal, rule 6.

◆

Appeal from Superior Court, Los Angeles County.

Action by Jessie Webb and others against the Seaboard Transportation Company. From an adverse judgment, plaintiffs appeal. Defendant filed motion to dismiss appeal.

Appeal dismissed.

Hansen & Sweeney, of Los Angeles, for appellants.

Tripp, Penney & Callaway, of Los Angeles, for respondents.

PER CURIAM.

The respondents having served and filed their motion to dismiss the appeal in the above entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited,

It is ordered that this appeal be, and the same hereby is, dismissed.

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52 Cal.App.2d 839

HIGGINS et al. v. P. H. GREER CO., Inc.

Civ. 13734.

District Court of Appeal, Second District, Division 2, California.

June 24, 1942.

Appeal and error 🔑**801(1)**

Where respondent served and filed motion to dismiss appeal, supported by certificates of clerk of superior court setting forth the facts required by rule of District Court of Appeal, and it appeared that all of grounds stated in the motion were supported by such certificate and by authorities cited, appeal was dismissed. Rules of District Court of Appeal, rule 6.

◆

Appeal from Superior Court, Los Angeles County.

Suit by Dorothy Dean Higgins and others against P. H. Greer Co., Incorporated. From an adverse judgment, the plaintiffs appeal. On motion to dismiss appeal.

Appeal dismissed.

Benjamin Elconin, of Los Angeles, for appellants.

W. I. Gilbert, Jr., of Los Angeles, for respondent.

PER CURIAM.

The respondent having served and filed his motion to dismiss the appeal in the above entitled matter, supported by a certificate of the Clerk of the Superior Court setting forth the facts required by Rule VI of this Court, and it appearing that all of the grounds stated in the motion are supported by said certificate and by the authorities cited, it is ordered that this appeal be, and the same hereby is, dismissed.

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53 Cal.App.2d 838

VILLA RIVIERA, Inc., v. MORTGAGE GUARANTEE CO. et al.

Civ. 13667.

District Court of Appeal, Second District, Division 2, California.

June 26, 1942.

Appeal and error 🔑773(2)

An appeal would be dismissed, where, time for filing briefs having elapsed, an order to show cause why appeal should not be dismissed for want of prosecution was issued, and on return date there was no appearance on behalf of appellant either by brief or oral argument. Rules of the Supreme Court and District Courts of Appeal, rule 5, § 3.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge. Appeal dismissed.

Proceeding by Villa Riviera, Incorporated, against the Mortgage Guarantee Company and others. From the judgment, the plaintiff appeals.

Appeal dismissed.

Loeb & Loeb, of Los Angeles, for appellant.

Fleming & Robbins and C. S. Tinsman, all of Los Angeles, for respondents.

PER CURIAM.

March 17, 1941, the transcript on appeal was filed. Thereafter, the time for filing briefs having elapsed, an order to show cause why the appeal should not be dismissed for want of prosecution was issued, returnable June 24, 1942. On the latter date there was no appearance on behalf of appellant, either by brief or oral argument.

Therefore, pursuant to the provisions of section 3, rule V, Rules of the Supreme Court and District Courts of Appeal, it is ordered that the appeal from the judgment herein be, and the same hereby is, dismissed.

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52 Cal.App.2d 832

In re LEVI'S GUARDIANSHIP. STURGEON v. LEVY.

Civ. 13601.

District Court of Appeal, Second District, Division 3, California.

June 24, 1942.

Hearing Denied Aug. 20, 1942.

1. Insane persons 🔑21

Where alleged incompetent requested in writing that her daughter be appointed her guardian and was present at hearing, son who objected to appointment of a guardian was afforded opportunity to examine alleged incompetent as a witness, and alleged incompetent was granted privilege of testifying but did not take the stand, it was not necessary that alleged incompetent should be examined as a witness. Probate Code, § 1461.

2. Insane persons 🔑2

On petition for appointment of a guardian on ground that alleged incompetent was 88 years of age and unable to care for herself and property, the finding of the court was not required to be based on medical testimony. Probate Code, § 1461.

3. Insane persons 🔑2, 30

Where, in addition to alleged incompetent's written request that daughter be appointed guardian, there was evidence that alleged incompetent was about 89 years old and unable to care for her property without assistance and that she had transferred property to a mentally ill daughter and had attempted to have it returned, appointment of guardian was proper as against contention that written consent was ineffectual. Probate Code, § 1461.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Proceeding in the matter of the guardianship of the person and estate of Carrie F. Levi, an incompetent person, wherein Edna L. Sturgeon filed a petition for appointment of a guardian and A. F. Levy objected to the appointment of a guardian. From an order appointing a guardian of the person and estate of Carrie F. Levi, an incompetent person, A. F. Levy appeals.

Affirmed.

A. F. Levy, in pro. per., for appellant.

Spray, Davis & Gould, of Los Angeles, for respondent.

PARKER WOOD, Justice.

This appeal is from an order appointing a guardian of the person and estate of the mother of appellant.

The petition for appointment of a guardian recited in substance that the alleged incompetent was 88 years of age and unable to care for herself and property and that she had requested in writing that petitioner, her daughter, act as such guardian.

Appellant objected to the appointment of a guardian upon the ground that his mother was well able to care for herself and her property; that an unnatural and mentally ill daughter of the alleged incompetent (not petitioner) persuaded her to deed her whole property to said daughter in trust to be reconveyed upon request. In support of such objection he filed his affidavit which stated that he had lived with his mother during the past thirteen years and that petitioner, his sister, had seen her about once a month during that time; that his mother was under the complete domination of said mentally ill daughter at all times; that his mother had just returned from a hospital when she signed the request for a guardian and at that time petitioner told her to sign the guardianship paper, then they could get the property back for her and she would not have to go to court.

Appellant asserts that the order is erroneous for the reasons (1) that the alleged incompetent was not examined by the court at the hearing, and (2) that the finding of the court was based upon testimony of lay witnesses rather than upon medical testimony.

[1] The proceeding was based upon section 1461 of the Probate Code. The alleged incompetent was present at the hearing and had requested in writing that petitioner be appointed guardian of her person and estate. She was not called as a witness or questioned at all except as shown by the following excerpt from the reporter's transcript:

"Mr. Levy: Just a moment, if your Honor please, I would like to put my mother on the stand because I want her to testify, it is very important.

"The Court: Well, she has that right I think.

"Q. By Mr. Levy: Mother, would you want to take the stand and say what you wanted to do whether you want to have a guardian or not?

"Carrie F. Levi: I feel I am getting pretty old and I would rather have some help."

It thus appears that appellant was afforded an opportunity to examine the alleged incompetent as a witness and she was granted the privilege of testifying. Under such circumstances it was not a legal requirement that the alleged incompetent should be examined as a witness. In support of his contention that such examination must be had, appellant refers to section 1461 of the Probate Code which provides in part that the alleged incompetent, if able to attend, "must be produced at the hearing, * * *." As an interpretation of the above quoted part of said section, he cites the Matter of Coburn, 1913, 165 Cal. 202, 217, 131 P. 352, 358, which states that such language relative to producing the alleged incompetent at the hearing "seems to contemplate an examination." He also cites in re Guardianship of Waite, 1939, 14 Cal. 2d 727, 729, 97 P.2d 238, which quotes with approval said statement from the Matter of Coburn, supra. The facts in each of said cases were very different from those in the present matter. In the Matter of Coburn, supra, the alleged incompetent, over his objection, was called and examined as a witness and the court, in considering the alleged incompetent's claim on appeal that he should not have been compelled to be a witness against himself, made the statement that such language "seems to contemplate an examination."

In Re Guardianship of Waite, supra, the alleged incompetent requested permission to testify and the court denied the request, stating that the court did not want to hear any lay witnesses.

It therefore appears that these cases do not sustain appellant's contention.

[2] The further claim of appellant that the finding of the court in such a matter must be based upon medical testimony cannot be sustained. There is no such requirement.

[3] In support of his contention that the written consent of the alleged incompetent is ineffectual, he cites In re Sullivan, 1904, 143 Cal. 462, 77 P. 153. In that case it was stated at page 468 of 143 Cal., at page 155 of 77 P., that "if it is sufficiently shown by the record that the order in question was purely a consent order, it should be reversed for that reason also." The order appointing a guardian therein was reversed upon other grounds. In the present case, in addition to said written designation of guardian, three daughters testified in substance that the alleged incompetent was about 89 years of age, that she would best be served by a guardian, that she was unable without assistance to care for her property, that she transferred her property consisting of the house where she lived, the furniture therein and another house to a mentally ill daughter, that the daughter to whom the property was conveyed had given the mother much trouble in persuading her to convey the property, that the mother wanted the property returned to her and had attempted to have it returned. In this case there was a full hearing on the merits.

The order is affirmed.

SCHAUER, P. J., and SHINN, J. concurred.

52 Cal.App.2d 828

GARNSEY et al. v. POSTON et al.

Civ. 2849.

District Court of Appeal, Fourth District. California.

June 23, 1942.

Hearing Denied Aug. 20, 1942.

1. Boundaries 🔑3(3)

The rule that natural monuments control over courses and distances does not necessarily apply where the reference to a natural monument is incidental, the same is at an intermediate point, and no clear intention appears to make such calls locative.

2. Boundaries 🔑37(3)

In action to quiet title involving dispute as to boundary line between southeast quarter and southwest quarter of certain section, evidence sustained court's finding regarding true location of the quarter section corner stone.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action to quiet title by Felix R. Garnsey and others against Albert Poston and others. From the judgment, defendants appeal.

Affirmed.

George A. Malette, of San Diego, for appellants.

Sloane & Steiner, of San Diego, for respondents.

BARNARD, Presiding Justice.

The defendants have appealed from a judgment in an action to quiet title. They own land in the southwest quarter of a certain section 19. The respondents own land in the southeast quarter of that section. Each party holds title under a United States patent based upon an official survey made by one Sanford in 1884. The location of the southwest and southeast corners of this section, as originally fixed, are known and are not questioned. The only matter in dispute at the trial and here is as to the location of a quarter section cornerstone on the south line of section 19, as the same was placed by Sanford in his original survey. Admittedly, this stone is not now in the position where it was placed by Sanford. The respondents contend and the court found that the true location where this stone was placed by Sanford is at a point approximately midway between the southwest corner and the southeast corner of section 19. The appellants contend, on the other hand, that this stone was placed by Sanford at a point about 600 feet east of the point thus fixed by the court.

The appellants contend that a reference to Cottonwood Creek in Sanford's field notes is a reference to a natural monument which prevails over courses and distances therein set forth, and must be taken as conclusively determining the present controversy. This is based upon Sanford's field notes in which he states, in substance, that he started at the southeast corner of section 19 and proceeded west on the line between section 19 and the section to the south of it; that after going 40 chains, which would be 2640 feet, he set a temporary quarter section cornerstone; that he proceeded to the southwest corner of section 19 and then returned along the true line between section 19 and the section to the south of it; that after coming 40.53 chains to the point where he had set the temporary quarter section corner he "set granite rock 12 x 8 x 7 in mound of stone for 1-4 sec. cor. marked 1-4 on N. face. Impractical to set stone"; that he then went on to the southeast corner of section 19, which was 80.53 chains from the southwest corner of that section. In that last half mile he mentions Cottonwood Creek which he places at 42.07 chains from the southwest corner of section 19, but he also describes Cottonwood Creek as 37 links wide and about 1400 feet deep. While a creek appears upon the ground in that general location the one that is there in no way answers that description, and the one that is there is not in the position he describes considering the distances he names from known corners. The court found that this quarter section cornerstone was originally placed by Sanford at a point approximately in the middle of the south line of section 19, which corresponds exactly with Sanford's field notes except for the reference therein to Cottonwood Creek, a part of which is obviously incorrect.

[1] The appellants contend, however, that the reference to Cottonwood Creek should govern and that the other courses and distances in the field notes should be disregarded, with the result that the quarter section corner would be placed 1.54 chains (101 feet) westerly from Cottonwood Creek, and with the further result that this would throw the southern end of the middle line of the section 600 feet out of place, giving the east half of the section a very much larger acreage than the west half. The appellants cite Ferris v. Coover, 10 Cal. 589, as authority for the proposition that natural monuments must control over courses and distances. This is not always true, especially where the reference to a natural monument is incidental, the same is at an intermediate point, and no clear intention appears to make such calls locative. Mendenhall v. Paris, 84 Cal. 193, 23 P. 1095; Goss v. Golinsky, 12 Cal.App. 71, 106 P. 604, 606. The last-named case involved facts almost identical with those now before us. In that case the court said: "The calls for these natural objects are intermediate and apparently incidental calls, and are not referred to or marked in such manner as to identify them, or show that the original surveyor considered that they were controlling. Mendenhall v. Paris, 84 Cal. [193] 196, 23 P. 1095. It is clear that confusion would result if we attempt to locate the land from those natural objects, and hence resort must be had to the distances given as controlling. Hostetter v. Los Angeles T. R. Co., 108 Cal. 38, 41 P. 330. Since the marks of the government survey are obliterated, and the corner cannot be located by witnesses or by reference to identified monuments, the measurements indicated in the field notes should be followed. Stangair v. Roads, 41 Wash. 583, 84 P. 405. The irregular shape of the two sections, and the departure from the accepted method of surveying the government land involved in the adoption of appellant's contention, should lead to its rejection, in the absence of any reliable evidence that such an arbitrary and unusual proceeding was adopted in the original survey."

In the instant case, however, we have the testimony of one of the two chainmen who assisted Sanford in making this survey on August 13, 1884. He testified that the quarter cornerstone in question was placed at that time at the point which was accepted by the court as the true location of that stone, and that he thereafter saw the stone in that same location on numerous occasions over a period of many years.

It may be further observed that one of the respondents testified that after the dispute as to this boundary arose both parties agreed to employ a surveyor to locate the boundary, the parties to divide the cost, the boundary so found to be accepted by all parties, and the appellants to have the privilege of removing certain improvements from the land if the boundary was not fixed in accordance with their contentions. This was not denied by the appellants and the trial court so found. A surveyor was employed, the expense being divided between the parties, and his finding as to the location of the quarter section corner and of the boundary corresponds with the location of that corner as found by the court.

[2] The evidence sustains the court's finding and the rule contended for by the appellants is not controlling under the circumstances which here appear.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

52 Cal.App.2d 794

PEOPLE v. GRANT et al.

Civ. 12782.

District Court of Appeal, Second District, Division 3, California.

June 23, 1942.

Hearing Denied Aug. 20, 1942.

1. Forfeitures 🔑5

A "common-law forfeiture" or "judicial forfeiture" does not operate or take effect until, by a proper judgment in suit instituted for that purpose, the rights of state or government have been established, but, in case of a "statutory forfeiture" or "legislative forfeiture", the forfeiture takes place on the commission of the offense.

See Words and Phrases, Permanent Edition, for all other definitions of "Common-Law Forfeiture", "Judicial Forfeiture", "Legislative Forfeiture", and "Statutory Forfeiture".

2. Constitutional law 🔑303

Neither the Legislature nor the court can dispense with constitutional requirement of notice and hearing necessary for complete forfeiture.

3. Forfeitures 🔑7, 8

The only important difference between a "common-law forfeiture" or a "judicial forfeiture" and a "statutory forfeiture" or "legislative forfeiture" is that, in case of the former, the rights of the state date from the judicial determination, whereas, in the case of the latter, the rights of the state after such judicial determination date back to the time of the offense and cut off even the rights of a bona fide purchaser.

4. Forfeitures 🔑5

Actions for common-law type of forfeiture are in personam for a money judgment against defendant whereas suits for legislative forfeiture are in rem, not against owner or possessor of the property, but against the property itself which is treated as the real offender.

5. Constitutional law 🔑303

In either common-law or legislative forfeitures, judicial proceedings or special statutory equivalent thereof are essential to provide the "due process of law" without which the original owner cannot be deprived of his property.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

6. Limitation of actions 🔑35(1)

In the common-law type of forfeitures where action must be brought upon the statute for the forfeiture and penalty is to the state, the action is governed by the statute imposing limitation of one year on an action upon a statute for a forfeiture. Code Civ. Proc. § 340, subd. 2.

7. Limitation of actions 🔑35(1)

Where no action for forfeiture is required to be brought, or where statute prescribes period within which procedural steps must be taken, statute imposing limitation of one year on action on statute for forfeiture to state is inapplicable. Code Civ.Proc. § 340, subd. 2.

8. Forfeitures 🔑5

The provision of forfeiture statute for filing of information or bringing of action impliedly includes adoption of general procedure for acquiring jurisdiction in such proceedings. Pen.Code, § 325.

9. Constitutional law 🔑303

The provision of forfeiture statute for filing of information or bringing of action together with provision for issuance of an attachment against property is designed to provide constitutional "due process of law" essential to accomplish and uphold the forfeiture. Pen.Code, § 325.

10. Limitation of actions 🔑35(1)

Where action of state for forfeiture of defendant's money taken from slot machines which had been seized for operation contrary to law was not instituted until almost two years after the slot machines were seized, the action was barred by statute imposing a limitation of one year on action by state for "recovery of a forfeiture", since fact that action was in rem instead of in personam did not so change its character as to make a different statute of limitations applicable. Pen.Code, § 325; Code Civ.Proc. § 340, subd. 2; § 363.

See Words and Phrases, Permanent Edition, for all other definitions of "Recovery of a Forfeiture".

11. Limitation of actions 🔑165

The statute of limitations is to be employed as a shield and not as a sword.

12. Limitation of actions 🔑165

Where state's action for forfeiture of defendant's money taken from slot machines which had been seized because they were being operated contrary to law was barred by statute of limitations, defendant was entitled to recover possession of the money. Pen.Code, § 325.

13. Limitation of actions 🔑165

Where action of state for forfeiture of money taken from slot machines which have been seized because they were being operated by defendant contrary to law, and defendant's cross-action to recover the money, were tried on theory that money at time of its seizure belonged to defendant, and where state's action was barred by limitations, defendant's right to money could not be defeated on theory that he relied on illegal enterprise. Pen.Code, § 325; Code Civ.Proc. § 1963, subd. 11.

14. Appeal and error 🔑110, 782

An order denying a new trial in a civil action is not an "appealable order" and purported appeal therefrom was dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, San Luis Obispo County from an order denying a new trial. Ray B. Lyon, Judge. Judgment affirmed; appeal from order dismissed.

Proceeding by the People against Ernest A. Grant for forfeiture of money wherein the defendant filed a cross-complaint against the County of San Luis Obispo and others. From a judgment for defendant on his cross-complaint, the plaintiff and the cross-defendant appeal.

Affirmed.

Earl Warren, Attorney General, and J. Albert Hutchinson, Deputy Attorney General, for Appellants.

M. R. Van Wormer, of San Luis Obispo, for Respondent.

SCHAUER, Presiding Justice.

In the month of December, 1937, the sheriff of San Luis Obispo County seized certain slot machines which admittedly were being operated by the defendant contrary to the law of this state. The sum of $404.66 in coins was taken from such machines and deposited with the county auditor. Apparently the slot machines were destroyed, but for more than twenty-two months no action seeking forfeiture of the money was commenced. Finally, on November 1, 1939, this action was filed. In the complaint plaintiff set forth the above recited facts relative to the ownership and operation of the slot machines, their seizure and the deposit of the money, and asked for an attachment against, and declaration of forfeiture of, the deposited money pursuant to the provisions of section 325 of the Penal Code (hereinafter quoted). On November 3, 1939, defendant made written demand for the return of the money and thereafter filed a cross-complaint, alleging, among other things, that such money was his property and that it was being wrongfully detained. His answer to the complaint pleaded that plaintiff's action was barred by the provisions of subdivision 2 of section 340 of the Code of Civil Procedure, which, read with section 312 of the same code imposes a limitation of one year on "An action upon a statute * * * for a forfeiture or penalty to the people of this State." The case was tried upon the admissions in the pleadings and the stipulated facts. The trial court found that plaintiff's action was barred by the statute pleaded, that the money was owned by defendant and that it had been taken, detained, and deposited as alleged; concluded that cross-defendants' detention of the money became unlawful, and rendered judgment in favor of defendant on his cross-complaint.

On this appeal plaintiff contends (1) that this action is not governed by section 340 of the Code of Civil Procedure; and (2) that defendant cannot in any event recover on his cross-complaint, because his money had been put to an unlawful use. Neither contention can be sustained.

In amplification of its first point plaintiff asserts that the forfeiture provided for by section 325 of the Penal Code is a legislative or statutory forfeiture as distinguished from a common-law or judicial forfeiture and that the one-year statute (§ 340, Code Civ.Proc.) applies only to actions for the latter type. Actions of the type involved here, it is argued, are governed either by subdivision 1 of section 338 of the Code of Civil Procedure, applying to actions "upon a liability created by statute, other than a penalty or forfeiture," or by the four-year limitation declared by section 343 of the Code of Civil Procedure for actions not otherwise specifically limited.

[1-5] Certainly the courts do recognize the two types of forfeitures mentioned. It was said in People v. Broad, (1932) 216 Cal. 1, at page 4, 12 P.2d 941, at page 942, that "The distinction that exists between a common-law or judicial forfeiture and a legislative or statutory forfeiture is simply this: A common-law or judicial forfeiture does not operate or take effect until by a proper judgment in a suit instituted for that purpose the rights of the state or government have been established. But in the case of a statutory or legislative forfeiture the forfeiture takes place on the commission of the offense. But, after the commission of the offense resulting in the forfeiture, the title of the state is inchoate or incomplete until such time as there is a judicial determination of the forfeiture. Neither the Legislature nor the courts can dispense with the constitutional requirement of a notice and hearing. 25 Cal. Jur. [*sic*: Corpus Juris] 1175, § 65 et seq. *The only important difference between the two types of forfeiture* [italics added] is that in the case of the common-law or judicial forfeiture the rights of the state date from the judicial determination; while in the case of a legislative or statutory forfeiture the rights of the state, after such judicial determination, date back to the time of the offense, and cuts off even the rights of a *bona fide* purchaser." It should also be noted that there is a further distinction in that actions for the *common-law* type of forfeiture are *in personam* for a money judgment against a defendant while suits upon a *legislative* forfeiture are *in rem*, not against the owner or possessor of the property, but against the property itself, which is treated as the real offender. In either event, however, *the primary object of the proceeding is to obtain judicial declaration of the forfeiture.* In the one case (common-law) it results in a money judgment against a defendant, while in the other (legislative) it results in a decree confirming title. In either case, however, judicial proceedings or the special statutory equivalent thereof are essential to provide the due process without which the original owner cannot be deprived of his property.

There is a pure legislative type of forfeiture in which the statute itself not only transfers title of the forfeited property but within itself prescribes the notice to be given the former owner and the procedural steps essential to constitute compliance with the due process clause of the Constitution. An example of such a legislative forfeiture is provided by Act 6288a, Deering's General Laws (1937), page 3004 (Stats.1937, p. 169). This act sets up complete provisions for notice and procedure. No confirmatory action by the state is required but instead provision is made for an annulment suit within a limited period by persons whose lands have been improperly forfeited. Obviously this type of legislative forfeiture is not pertinent to the proceedings before us. Other examples of legislative forfeitures are found in sections 11610 to 11629 of the Health and Safety Code, St.1939, pp. 767–769, and sections 49 to 52 of the Alcoholic Beverage Control Act (Stats.1935, p. 1123; Act 3796, Deering's Gen.Laws (1937), p. 1719, at pp. 1755 to 1758).

[6] An example of the common-law or judicial type of forfeiture is furnished by section 3867 of the Political Code which provides that "Every county treasurer who neglects or refuses to * * * settle and make payment as required [by law] shall forfeit to the state of California one thousand dollars, to be recovered in an action brought by the attorney general * * *." Another example is furnished by section 3870 of the Political Code: "Every auditor who fails or refuses to make and transmit the report required [by law] forfeits to the state of California one thousand dollars, to be recovered in an action brought by the attorney general * * *." Other examples are found in Political Code sections 3322, relating to auctioneers; 3694, relating to county auditors; 3656, dealing with assessors; 3697, concerning persons served with subpoenas; and 4113, relating to county treasurers. Section 1992 of the Code of Civil Procedure provides a similar type of forfeiture, as does section 5460 of the Health and Safety Code, St.1939, p. 615. In all of the common-law type ex-

amples mentioned action must be brought upon the statute for the forfeiture. Such actions (in cases where the penalty is to the state) clearly are governed by the limitation period prescribed in subdivision 2 of section 340 of the Code of Civil Procedure, applying to "An action upon a statute * * * for a forfeiture or penalty to the people of this State." Plaintiff argues that the word "forfeiture" as used in the common-law type denotes practically the same meaning as "penalty" and asserts that the words "forfeiture or penalty" appearing in the limitation statute (Code Civ.Proc. § 340, subd. 2) are there used in their related or substantially synonymous sense rather than as implying distinctly different and unrelated meanings. They are used, it is contended, in the statute of limitation and in the common-law type of forfeiture statute in the sense of importing a requirement to pay the sum mentioned or as denoting the mulct, itself, and are not applicable to an action to confirm a legislative forfeiture. However, as is apparent from the examples thereof hereinabove cited, legislative forfeitures differ in the proceedings required and the material question before us is whether the action contemplated by section 325 of the Penal Code is an action upon a statute for a forfeiture as that language is used in subdivision 2 of section 340 of the Code of Civil Procedure.

[7-10] Where no *action* for a forfeiture is required to be brought, or where the statute itself prescribes the periods within which the procedural steps must be taken, certainly said section 340 of the Code of Civil Procedure would have no application, but let us now examine the provisions of section 325 of the Penal Code to ascertain exactly what procedure it contemplates. Its language is: "All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter [chap. IX, tit. IX, pt. I] are forfeited to the state, and may be recovered by information filed, or by an* action brought by the attorney-general, or by any district attorney, in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or if the suit be in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments issued from the district courts in civil cases."

Whether we regard that section as creating a legislative or a common-law type of forfeiture it is apparent at once that the declaration "All moneys * * * offered for * * * distribution in violation of any of the provisions of this chapter are forfeited to the state" is qualified by the ensuing clause "and *may be recovered* by information filed, or by an action brought by the attorney-general, or by any district attorney, in the name of the state." The same text cited by the Supreme Court in the Broad case, supra, states (25 C.J. 1176): "If the statute which provides for the forfeiture authorizes the proper officer to seize the thing named, or if a right to sue for the violation of the statute is given to anyone, title does not vest *ipso facto* by the prohibited act being done, but relates only to the time of seizure or to adjudging of the forfeiture in a suit begun. * * *" Supporting this statement, see New York Fire Dept. v. Kip, (1833) 10 Wend., N.Y., 266. The provision for filing of the information or bringing of the action, which impliedly includes adoption of the general procedure for acquiring jurisdiction in such proceedings (Niccoli v. McClelland, (1937) 21 Cal.App.2d Supp. 759, 763, 65 P.2d 853), together with the provision for issuance of an attachment against the property, is designed to provide the constitutional due process essential to accomplish and uphold the forfeiture. The jurisdictional and procedural step of bringing an action, by filing either an information or a complaint, upon which the attachment may issue and other appropriate proceedings be based, obviously is essential; the statute contains no other provision for notice to the defendant and without due process requirement the statute itself would be void. In the absence of compliance with such process the defendant cannot be deprived of his property. In other words, regardless of whether the Legislature in section 325 may (or may not) have created a legislative type of forfeiture so far as concerns having the forfeited title relate back to the date of the unlawful act upon judicial ascertainment of the facts, it has incorporated into the statute not merely special statutory proceedings but the requirement of resort to an action of apparently a type contemplated by section 340 of the Code of Civil Procedure. The mere fact that an action is *in rem* instead of *in personam* does not so change its character as to make a different statute of limitations applicable.

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*The current edition of Deering's Code uses the word "any"; the original official code shows the word "an".

The state here has chosen to proceed by filing a complaint rather than an information. Whether that action be regarded as an ordinary civil action or as a special proceeding of a civil nature, its object obviously is the same: it seeks *recovery of a forfeiture.* Precisely, it seeks the "recovery" mentioned in section 325 of the Penal Code, by the procedure therein alluded to, of the forfeiture therein declared. Section 363 of the Code of Civil Procedure provides that "The word 'action' as used in this title is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature." A holding that section 325 of the Penal Code does not require the bringing of an action, or of a special proceeding of a civil nature, *for a forfeiture,* would be sheer fiat. For the commencement of such an action or proceeding the Legislature has prescribed a limitation of one year. We cannot indulge in judicial legislation to prescribe a longer period; we must conclude that the trial court was correct in holding that plaintiff's action was barred.

Plaintiff states its second point as follows: "Assuming the applicable statutory limitation prevents an affirmative judgment for the state, may the court award the operator *and owner* of the machines *and coins* judgment for the return of the coins or their value?" (Italics added.) On the record as presented we find no tenable theory for answering that query other than in the affirmative.

[11, 12] Plaintiff asserts the well-known doctrine that "The Statute of Limitations is to be employed as a shield, and not as a sword; as a means of defense, and not as a weapon of attack." (Grant v. Burr, (1880) 54 Cal. 298, 300.) It argues further that by virtue of the statute and seizure of the money it succeeded to title to the money; that whether or not it brought any action to perfect its title is immaterial so far as defendant's right to recover is concerned; that its right to hold the money continues unabated as does the right of a mortgagee in possession, despite the barring by limitation of the right to foreclose his mortgage. As to the latter situation it is the law that "It can make no difference, in so far as the right of the creditor to continue to hold the security is concerned, that the obligation on account of which he holds it is barred by the statute of limitations." (Bridge v. Connecticut Mut. Life Ins. Co., (1914) 167 Cal. 774, 778, 141 P. 375, 377.) Plaintiff further argues that defendant should have no affirmative judgment upon his cross-complaint because thereby he is given recovery "of the means and the fruit of his unlawful operation of the slot machines in violation of the Penal Code."

But the difficulty with all of these contentions is that they are based on unsound premises. Defendant in his cross-complaint is not using the statute of limitations as a sword or otherwise. When the trial court was ready to determine the cross-complaint the statute had already been used as a shield; the court had found that plaintiff's action for a forfeiture was barred. In the action it was plaintiff, not defendant, who sought to "recover" title to the money. Defendant's title, except as it was attacked on the theory of forfeiture, was not *questioned* at the trial; it is *assumed* here on appeal in plaintiff's formal statement of the question involved. Although neither the complaint itself nor the stipulation of facts specifically mentions the ownership of the money, as distinguished from the slot machines in which it was found, the case was tried on the theory that its ownership was admitted. In his opening statement the district attorney said: "We have set forth in our complaint the fact that there is on deposit . . . the sum of $404.66; that this money was confiscated from slot machines . . . and that *the money* and machines *were then and there owned by the defendant,* Grant. The answer admits these allegations, so, as far as we are concerned, that is purely a legal argument." (Italics added.) Hence we have ownership in the defendant conceded except as he may have lost it by operation of the statute. But the statute cannot operate without due process of law and the only process provided is the bringing of the action with its ancillary (and perhaps jurisdictional) remedy of attachment. There was no taking of possession by plaintiff or its agents under a search warrant or by virtue of any authorization other than that provided by the statute. To hold that the statute divested defendant of his title or right of possession without compliance by plaintiff with the constitutional requirements of due process would be to give such statute unconstitutional power and effect. Since the plaintiff has not "recovered" the money, as that term is used in the statute (Pen.Code, § 325), and has lost all right to such recovery, the title and right to possession of such money remain in defendant free of any lien to the state.

The case is not similar to that where a mortgagee or pledgee has possession of property to secure a debt. The plaintiff itself has urged that this is a legislative or statutory forfeiture which affects the property directly rather than constituting any claim of personal debt against the defendant. There is no claim against the defendant *in personam;* he owes no money debt to the state. Either the precise property was itself forfeited or the state has no remedy in the premises against either the property or the defendant. Since the state has lost all right to forfeiture of the property it has no claim whatsoever against it and it never had a claim against the defendant personally. There is no debt for him to pay as a condition to becoming entitled to his money.

[13] The last phase of plaintiff's contention is likewise untenable. Defendant does not rely on any gambling enterprise to establish his ownership or right of possession. While it would seem an illogical inference to us to deduce that defendant had himself placed the coins in the slot machines, since obviously their very purpose is to procure coins from other persons, and although we recognize that if the money had been placed in the machines by patrons thereof defendant apparently would have to rely on the illegal operation of such machines as a basis for acquiring title to the money, still we are precluded by the record from any inquiry along that line. In view of the opening statement of the district attorney, and the other circumstances shown, it is apparent that the entire trial proceeded on the understanding that the money at the time of its seizure belonged to defendant except as the state is contended to have acquired title by the alleged forfeiture. Furthermore, the presumption declared by subdivision 11 of section 1963 of the Code of Civil Procedure "That things which a person possesses are owned by him," supports the finding of the trial court as to defendant's ownership of the money, independently of the statement of the district attorney. The defendant does not rely in this case upon the illegal enterprise. It is only the plaintiff which has sought to rely on that activity. The situation of the cross-defendants then certainly is no better than that of the bank which is spoken of in Kyne v. Kyne, (1940) 16 Cal.2d 436, 440, 106 P.2d 620, 622. The Supreme Court there said "* * * a bank will not be permitted to invoke the illegality of a contract between two individuals and thereby retain money which was the fruit of the illegal transaction and which was deposited by one of them for the account of the other."

The mere fact that money at some time subsequent to its mintage has been in a slot machine or a poker game does not render it permanently contraband so that the state may seize it wherever found. The plaintiff having by its own neglect lost its right to have this money declared forfeited because of the particular usage shown, has no more right to it than to any other money which at some time has been so used. We view with disfavor the implication in the argument of plaintiff on this point to the effect that seizures of the type involved here should be upheld even in cases where the purpose of the state is to ignore the constitutional provisions for due process of law but nevertheless continue to hold the seized money in order to compel its claimant to resort to the courts and to produce legal proof of his title or right of possession as a condition to recovery. It would be unworthy of our democratic form of government for the state or a governmental agency or officer to seek to evade the constitutional process for the purpose of placing a citizen at a tactical disadvantage in the defense of his property rights, and the anomaly would be the more striking where the state sought to justify its act upon the ground that the citizen was a gambler.

[14] Inasmuch as an order denying a new trial in a civil action is not appealable, plaintiff's purported appeal therefrom is dismissed.

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concurred.

52 Cal.App.2d 785

SUTTER–YUBA INV. CO. v. WASTE, County Auditor.

Civ. 6806.

District Court of Appeal, Third District, California.

June 19, 1942.

1. Waters and water courses 🔑222

Where a county treasurer, as trustee for a reclamation district, acquired title to land in the district after it was sold for delinquent assessments, a purchaser claiming under treasurer took title to land free of all liens and incumbrances except any prior or subsequent district assessment. Pol. Code, §§ 3466, 3480.

2. Taxation 🔑217

Property acquired by a reclamation district, which is an "agency of the state", is "state-owned property" and exempt from taxation. Const. art. 13 § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Agency of the State" and "State-Owned Property".

3. Taxation 🔑213, 215, 217

All land and property belonging to the United States, or to the state of California or any subdivision thereof, is exempt from taxation, regardless of whether it is held in a proprietary sense or is used in a governmental capacity. Const. art. 13, § 1.

4. Taxation 🔑217
Waters and water courses 🔑222

Where a county treasurer, as trustee for a reclamation district, acquired title to land in the district in 1936 after land was sold for delinquent assessments, and treasurer held title until October, 1940, when land was conveyed to a purchaser, the land was exempt from county taxes which were levied for 1938, 1939, and 1940, and hence purchaser could redeem land from previous valid assessment lien of district, free of invalid county taxes for such years. Pol. Code, §§ 3466, 3480; St.1939, p. 1346, § 4105; St.1941, pp. 1430, 2641, §§ 4101, 4986; Const. art. 13, § 1.

5. Mandamus 🔑154(4)

In mandamus proceedings to compel a county auditor to compute amount necessary to redeem realty, which was located in a reclamation district and which had been sold for delinquent assessments, and to compel auditor to issue petitioner a certificate of redemption of land free from assessments against land for county taxes, a petition alleging that title to land had been held by county treasurer, as trustee for district, during years in which the county taxes were assessed, stated a cause of action. Pol.Code, §§ 3466, 3480; St.1939, p. 1346, § 4105; St. 1941, pp. 1430, 2641, §§ 4101, 4986; Const. art. 13, § 1.

◆

Original mandamus proceedings by the Sutter-Yuba Investment Company, a corporation, against Helen Waste, as County Auditor, etc., to compel respondent to compute the amount necessary to redeem real property from a tax sale. On demurrer to the petition.

Demurrer overruled.

Rich & Weis and F. E. Carlin, all of Marysville, for petitioner.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., A. A. Kragen, Deputy Atty. Gen., and Joseph L. Heenan, Dist. Atty., and A. S. Powell, Deputy Dist. Atty., both of Marysville, for respondent.

PER CURIAM.

This is a petition for a writ of mandamus to require the respondent to compute the amount of delinquent assessment taxes necessary to redeem real property belonging to Sutter-Yuba Investment Company, and upon payment thereof to issue to it the certificate of redemption as provided by section 4105 of the Revenue and Taxation Code of California, St.1939, p. 1346, formerly section 3817 of the Political Code. The particular issue to be determined is whether the respondent may compel the owner of the real property to pay county taxes which were levied against the land in 1938, 1939 and 1940, while it was owned by Reclamation District No. 784, an agency of the State of California, as a prerequisite to the right of redemption.

The petition alleges that Sutter-Yuba Investment Company is a corporation which owns lot 3, section or block 12, of Farm Land Colony No. 1, in Reclamation District No. 784, in Yuba County, California, according to the map thereof on file in the recorder's office of that county. It further asserts that Reclamation District No. 784 was organized pursuant to law prior to January 1, 1921; that on said last-mentioned date the district was authorized to, and it did issue bonds in the aggregate sum of $834,000, secured by the lands within the district, as provided by section 3480 of the Political Code; that assessments were subsequently levied against said lands in the manner required by law, for the purpose of paying the principal and interest on said bonds as they matured; that the assessment against said lot No. 3 was not paid within the time allowed by law, and it became delinquent; that the county treasurer of Yuba County thereafter published notice of said delinquency and of the time and place of sale of said lot to satisfy the lien as required by section 3466 of the Political Code; that at said time and place of sale no other offer of purchase was made, and the county treasurer, as trustee for said district, then bid in the land for the full amount of the delinquent installment of taxes plus the interest and penalties provided for by law, and, on June 15, 1932, he issued and recorded the certificate of sale thereof; that after the expiration of the time allowed by law, no redemption of the land having been made, the county treasurer, on February 3, 1936, executed and recorded a deed thereof to himself "as Trustee" for said reclamation district, in accordance with said statute; that thereafter, by authorization of the board of directors of the reclamation district, the county treasurer, as trustee thereof, sold said lot at public auction, and conveyed the title to this petitioner, Sutter-Yuba Investment Company, on October 15, 1940.

It is further alleged that subsequent to the execution of the deed to lot No. 3, to the county treasurer of Yuba County, as trustee of the reclamation district, on February 3, 1938, and while said lot was in fact owned by said district, the county assessor of Yuba County illegally assessed said lot and levied county taxes against it for the years 1938, 1939 and 1940, no part of which was paid; that on March 18, 1942, on petition of the trustee of the reclamation district, and upon satisfactory proof of the invalidity of the said assessments, the board of supervisors of Yuba County, by resolution duly adopted, cancelled said levies of county taxes, as authorized by section 4986 of the Revenue and Taxation Code, St.1941, p. 2641, on the theory that the assessments against the reclamation district, as an agency of the State of California, were void under article XIII, section 1, of the Constitution of California.

The Sutter-Yuba Investment Company thereupon demanded of this respondent, as auditor of Yuba County, a statement of the amount of unpaid legal assessments against said land, necessary to procure redemption from the second installment of taxes for 1937, which was acknowledged to be a valid lien on said lot, and then tendered the sum of $20.26 in full payment thereof, claiming that the subsequent assessments of county taxes for 1938, 1939 and 1940 were illegally levied, and that they were cancelled by the board of supervisors. That tender was refused.

The petition for a writ of mandamus prays that the auditor of Yuba County be required to estimate, as required by law the amount of delinquent taxes necessary to redeem said land, which are a valid lien thereon, and that upon payment thereof the respondent be required to issue and deliver to the petitioner a certificate of redemption of said land free and clear of said invalid assessments of county taxes for the years 1938, 1939 and 1940.

The respondent filed a demurrer to said petition on the ground that it fails to state facts sufficient to authorize the issuance of the writ.

We are of the opinion the petition states a cause of action justifying the issuance of the writ of mandamus.

[1] Real property which has been sold for delinquent assessments may be redeemed by the original owner or by any successor or party in interest. (§ 4101, Rev. & Tax. Code, St.1941, p. 1430, formerly § 3780, Pol. Code.) The county treasurer of Yuba County was authorized by section 3466 of the Political Code to, and he did, take title to the lot in question, as trustee for the reclamation district, by deed dated February 3, 1936. That deed conveyed title to the treasurer, as trustee for the reclamation district, as provided by the seventh paragraph of the last-mentioned section, "free of all liens and encumbrances except any prior or subsequent district assessment." At the time of that conveyance to the treasurer as trustee, there was but one delinquent district assessment. No subsequent district assessment was levied against the property. No county taxes had then been assessed against the property. Indeed none could legally be assessed against the land for it

was then the property of a reclamation district, which is an agency of the State of California. Pursuant to the authorization of the board of directors of Reclamation District No. 784, and in accordance with said section 3466, the treasurer, as trustee, sold and conveyed the lot to this petitioner, Sutter-Yuba Investment Company, by deed dated October 15, 1940. The petitioner took title to that property "free and clear of all liens and encumbrances except any prior or subsequent district assessment." The last paragraph of the last-mentioned section provides in that regard: "Any parcel of land bid in and purchased by a county treasurer as aforesaid, as trustee of the district, may be sold and conveyed by him or his successors in office, at any time after the expiration of said redemption period at public or private sale, and with or without notice, to any person paying him the amount for which said parcel was bid in by said county treasurer at delinquent sale, with interest thereon at the rate of seven per cent per annum, compounded yearly from the date of said delinquent sale together with any call that has been made upon any prior or subsequent assessment; and the deed executed by the county treasurer in pursuance of such sale shall convey said property free of all liens and encumbrances except any prior or subsequent district assessment."

After the treasurer acquired title to the property, as trustee for the reclamation district, in February, 1936, and before the lot was sold and conveyed to the petitioner, Sutter-Yuba Investment Company, in October, 1940, the county assessor of Yuba County illegally assessed the lot for county taxes, for the years 1938, 1939 and 1940.

[2] The board of supervisors, upon satisfactory proof that the county taxes which were levied against said lot for the years 1938, 1939 and 1940, was authorized to, and it did cancel those assessments as illegal and void. These assessments were deemed to be void for the reason that the real property was then owned by Reclamation District No. 784, which was an agency of the State of California, and therefore exempt from such taxes, under the provisions of article XIII, section 1, of the Constitution. § 4986, Rev. & Tax.Code, formerly § 3804a, Political Code. Reclamation districts are agencies of the state. Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 53 P. 401; Housing Authority of County of Los Angeles v. Dockweiler, 14 Cal.2d 437, 453, 94 P.2d 794; Reclamation Dist. No. 551 v. County of Sacramento, 134 Cal. 477, 66 P. 668; River Farms Co. v. Gibson, 4 Cal.App.2d 731, 744, 42 P.2d 95; 24 Cal.Jur. 102, § 85. It has been held that the property acquired by a reclamation district, as an agency of the state, is state-owned property and therefore exempt from taxation. In the case of Reclamation District No. 551 v. County of Sacramento, supra, 134 Cal. at page 479, 66 P. at page 669, it was said in that regard: "The whole scheme of reclamation originates with the state, and is carried to a conclusion by agents of the state—the district, as we have already seen, being a public agency—in furtherance of public policy. The property mentioned in section 3471 [of the Political Code] is public property acquired by the agents of the state for state purposes, and, we think, is exempt from taxation as such."

In the preceding case from which we have last quoted, the county of Sacramento levied and collected county taxes, which were paid under protest, upon a pumping plant and an irrigation system which were constructed upon land owned by the district. Suit was brought by the reclamation district to recover the taxes paid under protest, and to declare the county assessment void. A demurrer to the complaint was overruled, and the defendant declined to answer. Judgment was rendered accordingly. From that judgment the county appealed. This court held that the district was exempt from county taxes, and affirmed the judgment, saying: "To allow the county to assess the works (i. e., the canals, ditches, drains, embankments, pumping plants, etc.) for general taxation purposes might lead to the sale of the works of reclamation, and the ultimate destruction or abandonment of an important undertaking of the state."

That language is peculiarly pertinent to the present case in which the assessor of Yuba County levied county taxes upon real property belonging to the reclamation district. If the improvements upon reclamation land are exempt from county taxes, certainly the land belonging to the district would also be exempt under the same provisions of law.

[3] It has been definitely determined by the Supreme Court that all land and property belonging to the United States, or to the State of California or any subdivision thereof, is absolutely exempt from taxation regardless of whether it is held in a propri-

etary sense, or is used in a governmental capacity. Anderson-Cottonwood Irrigation District v. Klukkert, 13 Cal.2d 191, 88 P.2d 685; Glenn-Colusa Irr.Dist. v. Ohrt, 31 Cal. App.2d 619, 624, 88 P.2d 763; Laguna Beach County Water Dist. v. County of Orange, 30 Cal.App.2d 740, 87 P.2d 46; 129 A.L.R. 481 note; art. XIII, § 1, Const. of Cal. In the Klukkert case, supra [13 Cal.2d 191, 88 P.2d 689], which is the latest decision of the Supreme Court on that subject, the facts are nearly identical with those of the present case. In that case, lands within the district were sold to the district for delinquent assessments. Subsequent to that sale the county assessor of the county in which the land was situated levied an assessment against the land for county taxes. Suit was commenced by the district to prohibit the county from collecting the taxes, or for cancellation thereof, as an illegal assessment. The trial court decided that the county taxes imposed a valid lien against the land. On appeal, that judgment was reversed. The Supreme Court held that the levy of county taxes was illegal and void under article XIII, section 1, of the Constitution, regardless of whether the land was held by the irrigation district in its governmental capacity or in a proprietary sense. Summing up its conclusions in the last paragraph of the opinion in that regard the court says: "Under the constitutional provision which makes ownership the sole test of exemption, *the use to which the property is put would be immaterial.*" (Italics added.)

In the case of Conley v. Hawley, 2 Cal.2d 23, 38 P.2d 408, upon which the respondent in this case relies, the contrary conclusion of the court is based on the case of La Mesa Lemon Grove and Spring Valley Irr. Dist. v. Hornbeck, 216 Cal. 730, 17 P.2d 143. But the latter Klukkert case specifically distinguishes that case from the La Mesa case in the following language: "In the light of the holding of this court in the recently decided cases, to which reference hereinbefore has been had, to-wit [citing several late cases] the decision that was rendered in the La Mesa case loses its importance as far as its applicability herein is concerned. Furthermore, in the La Mesa case, the court specifically left open the settlement of the question here presented, holding it unnecessary to re-examine the decisions in the cases entitled [citing several other cases] and therein declared that none of those cases dealt with the question there under consideration."

Supplementing the annotations found in 101 A.L.R. at page 787 note, to the effect that "where the exemption of property owned by the state or subordinate municipal bodies is express and unqualified, it cannot be taxed, irrespective of the use to which it is put," the later annotation, which is found in 129 A.L.R. at page 481, reaffirms that declaration, and supports it by citing the Klukkert case, supra, decided by the California court in 1939, together with several cases in other jurisdictions.

In the Ohrt case, supra, which was also decided in 1939, this court, in determining what property, belonging to the state or an agency thereof, is exempt from taxation under article XIII, section 1, of the Constitution, distinguishes between "property used exclusively" for public schools and property "belonging to the United States, the State of California," or any subdivision or agency thereof, and gives the reason for that distinction in almost the exact language used in the Klukkert case. In the Ohrt case [31 Cal.App.2d 619, 88 P.2d 766], we conclude by saying: "If the intention were to exempt from taxation only such property of the United States or the state of California as is actually used exclusively for the operation of those political entities, it would have been very easy to have thus expressed it. The intention appears to have been clearly otherwise expressed."

[4, 5] We therefore conclude that the lot which is involved in this proceeding was absolutely exempt from county taxes which were levied for the years 1938, 1939 and 1940, while that land was owned by the reclamation district, which is an agency of the State of California. Those assessments were illegal and void. The successor in interest, Sutter-Yuba Investment Company, which acquired title after those assessments were levied against the land, is therefore entitled to redeem the property from the previous valid assessment lien of the reclamation district, free and clear of the invalid county taxes for 1938, 1939 and 1940.

The petition states a good cause of action. The demurrer is overruled and the respondent is granted twenty days in which to answer.

In re SAN JOAQUIN LIGHT & POWER CORPORATION.

Civ. 2660.

District Court of Appeal, Fourth District, California.

June 23, 1942.

As Modified July 16, 1942.

Hearing Denied Aug. 20, 1942.

1. Corporations 🔑629

In absence of statutes permitting such a form of distribution, provisions in a public utility corporation's Articles of Incorporation, providing that in event of dissolution preferred stockholders were to be paid in full and that remaining assets should be divided and paid to holders of common stock according to their respective shares, could not be disregarded upon a voluntary dissolution of corporation and its main assets constituting the going business distributed in kind to corporation's majority common stockholder while compelling minority common stockholders to take the cash value of their proportionate share of the total assets. Civ.Code, § 400 et seq.

2. Corporations 🔑629

A plan of distribution, upon the voluntary dissolution of a public utility corporation, whereby corporation's minority common stockholders would be paid the value of their stock and remaining assets of corporation as a going business would be distributed to its majority common stockholder was not authorized by statute. Civ.Code, §§ 369, 400 et seq., 400a, 401, 401a, 401c, 403.

3. Corporations 🔑629

Under statutory provisions respecting dissolution of corporations, directors of a corporation may sell and convert into money all of the corporation's assets, and, after paying its debts, distribute the remainder among stockholders according to their respective rights, and a corporation's assets other than money may be distributed among its stockholders if this can be done fairly and ratably and in conformity with provisions of the articles and rights of shareholders. Civ. Code, §§ 401, 401a.

4. Corporations 🔑629

The language of the statutory provision respecting distribution of a corporation's assets to its shareholders upon dissolution implies that all common stockholders are to be treated alike and in proportion to their holdings of stock. Civ.Code, § 401a.

5. Corporations 🔑629

While the statute respecting distribution of a corporation's assets to its shareholders upon dissolution permits the distribution of assets other than money where this can be done fairly and ratably and in conformity with the articles, nothing therein indicates an intention to permit a distribution in kind to some of the common stockholders while compelling others to turn in their stock for its present cash value, and the subsequent statute respecting distribution of securities or assets in kind does not authorize such procedure. Civ.Code, §§ 401a, 401c.

6. Corporations 🔑629

The exception provided in statute respecting distribution of securities or assets in kind to shareholders upon dissolution of a corporation does not apply to common stockholders but provides, even where assets other than money have been distributed to all shareholders alike, for a liquidation preference. Civ.Code, § 401c.

7. Corporations 🔑629

A plan of distribution, upon the voluntary dissolution of a public utility corporation, whereby corporation's minority common stockholders would be paid the value of their stock and remaining assets of corporation as a going business would be distributed to its majority common stockholder, could not be carried out through proceedings under statute respecting superior court's supervision over the voluntary winding up of corporations. Civ.Code, § 403.

8. Corporations 🔑610(1)

While the statute respecting superior court's supervision over the voluntary winding up of corporations confers upon the court broad powers in passing upon and adjudging controversies in connection with winding up the affairs of a corporation the statute is procedural in nature and adds nothing to substantive rights which stockholders already have through other statutes. Civ.Code, § 403.

9. Corporations 🔑610(1), 617(1), 629

A corporation in the process of voluntary dissolution does not have the right to adopt and carry out a plan of distribution whereby its plants and business properties are distributed to a majority stockholder and its minority common stockholders are compelled to take their share of value of distributable assets, such value to be ascertained in a proceeding under statute respecting superior court's supervision over the voluntary winding up of corporations. Civ. Code, § 403.

10. Corporations 🔑610(1)

Where a public utility corporation engaged in process of voluntary dissolution had complied with provisions of statutes relating to dissolution, and proceedings for dissolution had commenced, and corporation filed a petition in superior court under statute respecting such court's supervision over the voluntary winding up of corporations for a determination of rights of minority common stockholders with respect to corporation's assets, it was error to sustain demurrers to petition and dismiss the proceeding without hearing or determining matters authorized to be raised in such proceeding. Civ.Code, §§ 369, 400 et seq., 400a, 401, 401a, 401c, 403.

11. Corporations 🔑610(1)

Where a petition was filed in superior court as authorized by statute by a public utility corporation engaged in process of voluntary dissolution for a determination of rights of minority common stockholders with respect to corporation's assets, the court then had power to order and adjudge as to any matters in and for the winding up of affairs of corporation, including a determination of rights of shareholders to corporation's assets. Civ.Code, § 403.

12. Corporations 🔑610(1)

Under statute respecting superior court's supervision over the voluntary winding up of corporations, an absolute right to petition for supervision and direction with respect to rights of shareholders in corporation's assets is impliedly given, and the court not only has power to order and adjudge as to all matters thus presented but is bound to do so. Civ.Code, § 403.

13. Corporations 🔑610(1)

The right to invoke the supervision and settlement of disputed matters which is contemplated by provisions of statute respecting superior court's supervision over the voluntary winding up of corporations depends upon the conditions set forth in statute for the filing of a petition, and not upon whether such a petitioner is correct in all his contentions with respect to questions and issues which are to be presented for determination. Civ.Code, § 403.

14. Corporations 🔑610(1)

The mere fact that part of the plan proposed for distribution of a public utility corporation's assets upon voluntary dissolution was unauthorized did not mean that corporation could not dissolve or that its legally commenced dissolution must be abandoned. Civ.Code, §§ 369, 400 et seq., 400a, 401, 401a, 401c, 403.

15. Corporations 🔑610(1)

The purpose of a proceeding under statute respecting superior court's supervision over the voluntary winding up of corporations is to settle disputes, correct errors, and obtain such orders as may be necessary to carry out and accomplish the end in view, and not merely to arbitrarily pass upon what has already been done, and the proceeding provided for by the statute is in some respects not unlike the one for declaratory relief, authorized by the Code of Civil Procedure. Civ.Code, § 403; Code Civ.Proc. § 1060.

16. Action 🔑6

The statute authorizing proceedings for declaratory relief should be liberally construed to the end that intent of the statute may be carried out. Code Civ.Proc. § 1060.

17. Action 🔑6

Where a pleading discloses facts required by statute authorizing proceedings for declaratory relief, such as an interest in a particular matter and the existence of an actual controversy relating thereto, it is unnecessary to allege matters which will justify the precise relief which may ultimately be given by the court. Code Civ.Proc. § 1060.

18. Action 🔑6

Where the basic facts required by statute authorizing proceedings for declaratory relief are alleged, demurrers should not be sustained, and the court should proceed to hear and determine the matters relating to which a controversy exists. Code Civ.Proc. § 1060.

19. Corporations 🔑610(1)

In proceedings under statute respecting superior court's supervision over the voluntary winding up of corporations by a public utility corporation for a determination of rights of its minority common stockholders with respect to corporation's assets, a petition, alleging facts showing that corporation had adopted a plan of distribution whereby its minority common stockholders would be paid the value of their stock and remaining assets of corporation as a going business would be distributed to its majority common stockholder, was sufficient to require a hearing. Civ.Code, §§ 369, 400 et seq., 400a, 401, 401a, 401c, 403.

20. Corporations ⚷610(1)

A public utility corporation and its majority stockholder had a right to proceed by way of voluntary dissolution of corporation rather than by way of merger or consolidation, and, while they were bound by statutory requirements therefor, they were also entitled to invoke provisions of statute respecting superior court's supervision over the voluntary winding up of corporations, to secure both a determination of a controversy which had arisen respecting rights of corporation's minority common stockholders and an adjudication of matters necessary to complete the winding up of corporation's affairs. Civ.Code, §§ 369, 400 et seq., 400a, 401, 401a, 401c, 403.

21. Appeal and error ⚷1008(1)

The application of rule respecting powers of equity to protect the rights of third parties in proceedings for a determination of rights of a corporation's minority common stockholders upon voluntary dissolution of corporation was for trial court's consideration, after the full facts had been developed, and was not a matter to be determined on appeal from a judgment of dismissal. Civ. Code, § 403.

22. Judgment ⚷231

In proceedings by a public utility corporation for a determination of rights of its minority common stockholders with respect to corporation's assets upon voluntary dissolution, a provision, in a judgment of dismissal purporting to decree that attempted distribution of corporation's assets to its common stockholders by a distribution to corporation's majority stockholder of all of its assets other than cash was void as to minority stockholders, was "surplusage". Civ.Code, §§ 369, 400 et seq., 400a, 401, 401a, 401c, 403.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

23. Corporations ⚷610(1)

A superior court may construe an order of the railroad commission authorizing a transfer of assets by a corporation in voluntary dissolution and may hold that such order has not been complied with.

24. Corporations ⚷610(1)

That a plan of distribution upon the voluntary dissolution of a public utility corporation was unauthorized did not warrant conclusion that corporation was without a remedy, since it might go back to the point of divergence and then follow procedure leading to a final dissolution as outlined in statutes or obtain some form of equitable relief. Civ.Code, §§ 369, 400 et seq., 400a, 401, 401a, 401c, 403.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Proceedings in the matter of San Joaquin Light & Power Corporation, on voluntary dissolution, wherein San Joaquin Light & Power Corporation filed a petition to obtain a determination of the rights of its minority common stockholders with respect to the corporation's assets. From an adverse judgment, San Joaquin Light & Power Corporation and Pacific Gas & Electric Company, a corporation, appeal, opposed by Ambrose Gherini and others.

Reversed with directions.

Chickering & Gregory, Robert H. Gerdes, Wm. B. Bosley, and Thos. J. Straub, all of San Francisco, for appellants.

Ambrose Gherini in pro. per., Arthur B. Dunne, Dunne & Dunne, Bradford M. Melvin, and Gregory, Hunt & Melvin, all of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment entered in a proceeding brought under section 403 of the Civil Code.

We will refer to the San Joaquin Light and Power Corporation as San Joaquin and to Pacific Gas and Electric Company as Pacific. For many years prior to the time in question San Joaquin was a public utility supplying electricity, gas and water to consumers in Fresno and other counties. In August, 1938, it began proceedings to voluntarily dissolve and wind up its affairs as provided for in sections 400 et seq. of the Civil Code. About 89 per cent of its outstanding stock was then owned and held by Pacific.

On August 10, 1938, Pacific executed a written consent to the voluntary dissolution and winding up of the affairs of San Joaquin. On August 11, 1938, San Joaquin's board of directors adopted a resolution electing to proceed to wind up its affairs and effect its voluntary dissolution, and authorizing the taking of steps to that end. A certificate was filed with the secretary of state and recorded in Fresno County in accordance with section 400 of the Civil Code, and a notice to creditors and stockholders was mailed as provided for in section 400a of that code.

On August 11, 1938, San Joaquin and Pacific executed a contract reciting that San Joaquin has elected to wind up its affairs and voluntarily dissolve; that San Joaquin has outstanding 129,569 shares of common stock and 206,718 shares of preferred stock, all of which except 702 shares of common stock and 34,849 shares of preferred stock are owned by Pacific; that San Joaquin is indebted to Pacific for money advanced in a sum exceeding $32,700,000 and has outstanding mortgage bonds in the sum of $9,181,500; and that it is the desire of both parties to expedite the winding up and liquidation of San Joaquin and the distribution of its assets. This contract then provided, in brief, as follows: 1. Pacific will, subject to the approval of the Railroad Commission, submit to the holders of San Joaquin's preferred stock (other than Pacific) a fair offer to exchange its own preferred stock for their San Joaquin stock. 2. Pacific will loan to San Joaquin all money necessary to enable it to comply with this agreement. 3. San Joaquin will pay in full the par value and accrued dividends to minority preferred stockholders who do not accept Pacific's offer for an exchange of preferred stocks. 5. San Joaquin will purchase "at their fair value and retire" all shares of its common stock held by its stockholders (other than Pacific) or "will cause the fair value of such minority common stockholders' proportional share of its net distributable assets to be ascertained in accordance with the provisions of the general corporation law" of this state and will pay to such minority common stockholders "the full amount of money to which they shall be entitled." The next four paragraphs provide that San Joaquin, after paying its current debts and the other payments required by the contract, will pay and assign to Pacific on account of its debt to the latter all remaining money, all securities and all current assets, and Pacific will release San Joaquin's remaining indebtedness to it and will assume and agree to pay the funded debt and all other debts and liabilities of San Joaquin. Paragraph 10 then provides that San Joaquin "will distribute to Pacific Company, as its sole remaining stockholder, after payment of all amounts payable to its minority preferred stockholders and minority common stockholders, all of its plants, properties and other assets." The remaining paragraphs of the contract provide that both corporations shall apply to the Railroad Commission and to the Federal Power Commission for the necessary orders authorizing San Joaquin "to distribute and transfer to Pacific Company its plants, properties and other assets, in conformity with the provisions of this agreement."

On October 13, 1938, the Railroad Commission entered and filed an opinion setting forth a summary of the contract of August 11, 1938, including the provision that San Joaquin's plants, properties and other assets were to be distributed to Pacific "as its sole remaining stockholder," followed by an order permitting San Joaquin to distribute and transfer to Pacific its plants, properties and other assets "in conformity with the provisions of the agreement between said companies dated August 11, 1938." By December 27, 1938, Pacific had acquired all of San Joaquin's outstanding preferred stock except 799 shares, and San Joaquin had retired these 799 shares by paying the holders the par value thereof with accrued dividends. Also, San Joaquin had offered to purchase for retirement and cancellation all shares of its common stock at $120 per share and had thus purchased and retired 349 shares of such stock.

On December 27, 1938, San Joaquin adopted a plan for the disposition of its current assets and for the distribution among its stockholders of its plants, properties and other assets. So far as material here, this plan provided that San Joaquin would: 1. Set aside $250,000 for the purpose of paying its common stockholders (other than Pacific) "the fair value of their proportional shares" of its net distributable assets; 2. Assign all current assets, pay all other money and distribute all other assets to Pacific; and 3, institute a proceeding in the Superior Court of Fresno County for the purpose of obtaining a determination of the rights of all common stockholders (other than Pacific) in and to San Joaquin's assets in conformity with the provisions of section 403 of the Civil Code, prosecute such proceeding to its conclusion, and pay these minority stockholders the amount which should be awarded to them or, as an alternative, pay said minority common stockholders $120 a share for the stock held by them.

On December 31, 1938, San Joaquin deposited $250,000 in a special account, assigned and paid to Pacific all its current assets, securities and other money, and "distributed" and conveyed to Pacific all of its plants, properties and other assets, although the transfer of certain licenses and permits was not fully completed until a later date when the approval of the Federal Power Commission had been obtained.

This proceeding followed, the order to show cause being issued on January 10, 1939. The second amended and supplemental petition sets forth the above facts and further alleges that the contract of August 11, 1938, is equitable, just and reasonable; that the plan of distribution adopted on December 27, 1938, is in substantial conformity with that contract and is equitable, just and reasonable; that San Joaquin has offered and now offers to purchase any and all stock held by its minority stockholders at $120 per share; that the four named respondents have rejected San Joaquin's offer to purchase and retire their stock; and that these four persons have at all times since December 27, 1938, controverted the validity, equity and fairness of the plan of distribution adopted, the right of the San Joaquin to dispose of and distribute its assets according to this plan, and its right to wind up its affairs and voluntarily dissolve without their consent. The prayer is that the court will appoint a referee to take evidence and ascertain and report the facts found with respect to any issues of fact which may arise in the proceeding, that the court will pass upon and determine the right of the minority stockholders to the assets of San Joaquin, will pass upon and determine any and all other matters concerning the dissolution and winding up of the affairs of San Joaquin, and will make and enter such judgment as shall be in accordance with law and equity.

Pacific filed an approval and ratification of all matters recited in the petition, with the request that the court determine all matters in controversy between San Joaquin and its stockholders and thereupon make and enter such judgment as should be just and equitable. The individual respondents filed demurrers raising the points that the petition stated no cause of action or facts warranting any relief, and stated no justiciable controversy; that the court was without jurisdiction under Civil Code section 403, or otherwise, to grant any relief here sought; that there was a want of a necessary party (Pacific); that there were no facts sufficient to show the existence of any controversy; that neither San Joaquin nor Pacific had the capacity to sue or bring this proceeding; that several causes of action were improperly joined; and that this proceeding constitutes an attempt to condemn and take private property for private use in violation of the state and federal constitutions. The court sustained the demurrers, with twenty days in which to amend. No such amendment being filed, the court entered a judgment decreeing that this petition does not state facts sufficient to constitute a cause of action or ground for any relief against any of the respondents; that Pacific is a trustee for the minority stockholders of San Joaquin and neither it nor San Joaquin on any attempted dissolution of San Joaquin is entitled to distribute assets of San Joaquin in kind to Pacific as a common stockholder of San Joaquin and to require the other common stockholders to take cash in satisfaction of their rights, or to make any distribution in kind except ratably to all of the common stockholders of San Joaquin; that the plan adopted by San Joaquin for the distribution of its assets to its common stockholders is null and void as to the individual respondents; that the attempted distribution by San Joaquin to Pacific of all of its assets other than certain cash is null and void as to the individual respondents; that the contract of August 11, 1938, is null and void as to the individual respondents; that upon the facts alleged Pacific has no right to any preferential treatment and the individual respondents are each entitled to his proportionate share of any distributable assets, and to participate proportionately in the distribution of its assets in like manner as is Pacific; that neither San Joaquin nor Pacific take anything by reason of the petition filed; and that the respondents recover their costs. From this judgment both San Joaquin and Pacific have appealed, and the appeals have been presented together. After the entry of judgment respondents Simonson and Harper sold their stock to San Joaquin and have disclaimed any further interest in the proceeding. It now appears that all of San Joaquin's outstanding stock, other than that owned by Pacific, has been retired or disposed of with the exception of 253 shares of common stock, 250 shares of which are owned by respondents Gherini and Nicolai.

[1] Appellants' main contention is that a corporation in the process of voluntarily dissolving and winding up its affairs under sections 400 et seq. of the Civil Code may adopt and execute a plan of distribution under which its plants and business properties shall be distributed to a majority stockholder and the remaining shareholders shall be paid in cash their proportion of the fair value of the net assets, and that such fair value, if not agreed upon by the parties, may be judicially determined in a proceeding under section 403 of that code. It may be here observed that the Articles of Incorporation of San Joaquin provide that in the event of any dissolution the preferred stockholders are to be paid in full and that "the remaining assets and funds shall be divided and paid to the holders of the common stock according to their respective shares." Simply stated, the question here is whether upon a voluntary dissolution of this corporation this provision of the Articles may be disregarded and the main assets constituting the going business may be distributed in kind to the majority common stockholder while compelling the minority common stockholders to take the cash value of their proportionate share of the total assets. The weight of authority appears to be that this may not be done in the absence of statutes permitting such a form of distribution. Ervin v. Oregon Ry. & Nav. Co., C.C., 20 F. 577; Id., C.C., 27 F. 625, 23 Blatchf. 517; Forrester v. Boston & M., etc., Co., 21 Mont. 544, 55 P. 229, 353; Theis v. Spokane Falls Gas Light Co., 34 Wash. 23, 74 P. 1004; Jones v. Missouri-Edison Elec. Co., 8 Cir., 144 F. 765, 75 C.C.A. 631; William B. Riker & Son Co. v. United Drug Co., 79 N.J.Eq. 580, 82 A. 930, Ann.Cas.1913A, 1190; Paine v. Saulsbury, 200 Mich. 58, 166 N.W. 1036; In re Doe Run Lead Co., 283 Mo. 646, 223 S.W. 600. In Ervin v. Oregon Ry. & Nav. Co., supra [27 F. 629, 23 Blatchf. 517], the court said:

> "They never contemplated winding up the business of the old company, and distributing the assets among its stockholders, otherwise than as a formal mode of doing what they could not do by legal sanction. What they intended to do, and what they practically did, was to effect a consolidation of the old company with the new, using as the means for the end the statutory power which authorized a majority of stockholders to dissolve the corporation, settle its business, and dispose of its property. * * *
>
> "The defendants have adjusted their own interests on the basis of a consolidation of the two corporations and a continuance of their business as a joint venture; but they now insist that the interests of the minority stockholders, who have not been permitted to participate with them, shall be adjusted on the basis of a dissolution and a cessation of the business which they originally associated together to conduct."

In Re Doe Run Lead Co., supra [283 Mo. 646, 223 S.W. 611], the court said: "It cannot be that the Legislature intended that a statute which was designed merely to facilitate a bona fide dissolution should be used as an easy method of effecting a consolidation, particularly when one of the avowed purposes of this proceeding is to enable the interested corporations to evade certain revenue laws of the state. 'Dissolution' means a going out of business, a cessation of business activity—business death, in short. Sections 2996 to 3000, supra, were designed to furnish means of accomplishing that end. Consolidation implies continued life and increased activity. 'Over all things certain, this is sure indeed,' that business death is the thing farthest from the intention of the St. Joseph Company and the will of the St. Joseph Company is the will that controls this proceeding, though it is brought in the name of the Doe Run Company. 'The voice is Jacob's voice, but the hands are the hands of Esau.' To use a somewhat gruesome metaphor, what is here being attempted is not corporate suicide, but corporate homicide. It is equally plain that the statute by which the St. Joseph Company seeks to attain that end was never intended to be used to permit one corporation to take the life of another."

[2] Nor do we think the form of distribution upon dissolution which is here contended for is authorized or permitted under our statutes. Section 343a of the Civil Code formerly provided for the giving of "compensation" to dissenting stockholders in certain cases and under certain conditions. But that section was repealed in 1933. The code provisions relating to

the consolidation or merger of corporations now provide a method (Section 369 of the Civil Code) whereby dissenting stockholders may be paid the value of their shares instead of receiving an interest in the new or surviving corporation, but only in case they themselves elect to do so and take the proper steps therefor.

The statutes governing the voluntary dissolution of a corporation, so far as material here, are sections 400 to 403 of the Civil Code. Section 401, among other things, gives to the directors of such a corporation the power to sell, exchange or otherwise dispose of all or any part of the assets. Section 401a provides that after taking care of the debts and liabilities the directors "shall distribute all the remaining corporate assets among the shareholders and owners of shares according to their respective rights and preferences" and that "distribution may be made either in money or in property or securities, if this can be done fairly and ratably and in conformity with the provisions of the articles and the rights of the shareholders." It further provides that a distribution among shareholders of shares in or securities of another corporation shall be deemed to be a fair and ratable distribution if made in accordance with the plan provided for in section 401c. That section provides that a plan for distributing the shares or securities of another corporation or "assets other than money" among the owners of common and preferred stock in a corporation which is being wound up may be adopted if such distribution is approved by the directors and by two-thirds of the stockholders, and that such plan shall then be binding upon all shareholders "except as hereinafter provided." The exception then provided is that dissenting shareholders "having a liquidation preference" may within thirty days demand payment of "the amount of such liquidation preference in cash," and that if such a demand is made the directors may then abandon such plan of distribution in which event "all shareholders shall then be entitled to distribution according to their rights and liquidation preferences."

Section 403 of the Civil Code provides that where a corporation is in the process of voluntary winding up and upon the petition of the corporation the superior court shall have power "to order and adjudge as to any or all matters in and for the winding up of the affairs of the corporation," including "(3) The determination of the rights of shareholders and of all classes of shareholders in and to the assets of the corporation."

[3] It seems clear that under the provisions of sections 401 and 401a the directors of a corporation may sell and convert into money all of its properties and assets, and after paying its debts distribute the remainder among the stockholders according to their respective rights. It seems equally clear that a corporation's properties and assets, other than money, may also be distributed among its stockholders if this can be done fairly and ratably and in conformity with the provisions of the articles and the rights of the shareholders. The appellants further contend, however, that section 401c, taken in connection with sections 401 and 401a, should be interpreted as permitting the adoption of a plan whereby minority stockholders may be paid the value of their stock and the rest of the properties and assets of the corporation may be distributed to the majority stockholder; that in the absence of agreement between the parties such value may be determined in a proceeding brought under the provisions of section 403 of the Civil Code; that there was no lack of equity, fairness or reasonableness in the plan here adopted; and that through this plan the minority common stockholders would receive the cash value of their shares which is exactly what they would have received had the directors sold all of the assets for money and distributed the proceeds. In connection with this last contention it may be here observed that had all of the assets been sold and the proceeds distributed all of the stockholders would have been treated alike whereas under the plan here attempted the majority stockholder obtains and may continue a going business, whereas the minority stockholders are compelled to take the present value of their respective shares.

[4-6] While we think the court erred in other respects we think it was correct in its conclusion that the plan here proposed was not authorized by our statutes and, clearly, it was not in accordance with San Joaquin's Article provisions. While section 401 permits the sale or exchange of all assets of a corporation section 401a provides for the distribution of all remaining assets among the stockholders according to their respective rights. Not only was there no sale or exchange of the corporate assets here, but the language used in section 401a clearly implies that all common stockholders are to be

treated alike and in proportion to their holdings of stock. While section 401a also permits the distribution of assets other than money where this can be done fairly and ratably and in conformity with the articles, nothing therein in any way indicates an intention to permit a distribution in kind to some of the common stockholders while compelling others to turn in their stock for its present cash value. Nor do we think section 401c authorizes such a course of procedure. That section provides for a plan of distribution of shares or securities of another corporation or of "assets other than money." It contains no provision for a plan of distribution calling for the distribution of assets other than money to certain stockholders and all money to other stockholders, and much less does it provide for compelling certain stockholders to take money while others receive assets other than money. The exception provided therein does not apply to common stockholders but provides, even where assets other than money have been distributed to all shareholders alike, for a liquidation preference, in other words shareholders holding preferred stock may at their option demand payment of their full preference instead of accepting a share in a distribution in kind.

[7-9] Under such circumstances, the particular plan of distribution here in question cannot be legalized or carried out under and through the proceeding provided for in section 403. While that section confers upon the court broad powers in passing upon and adjudging controversies in connection with winding up the affairs of a corporation it is procedural in nature and adds nothing to the substantive rights which stockholders already have through the statutes, or otherwise. With respect to the first point raised, we therefore hold that a corporation in the process of voluntary dissolution has not the right to adopt and carry out a plan of distribution whereby its plants and business properties are distributed to a majority stockholder and its minority common stockholders are compelled to take their share of the value of the distributable assets, such value to be ascertained in a proceeding under section 403.

[10-12] We think, however, the trial court was in error in dismissing this proceeding and in denying the petitioner any relief without hearing or determining the matters authorized and permitted to be raised in such a proceeding. San Joaquin had complied with all of the provisions of the statutes relating to the dissolution of a corporation, at least up to the point of arranging for the disposal and distribution of its assets. Proceedings for a dissolution had commenced (§ 400a, Civ.Code) and the corporation was in the process of a voluntary winding up. A petition was filed as authorized by section 403 of the Civil Code and the superior court then had "power to order and adjudge as to any or all matters in and for the winding up of the affairs of the corporation," including "(3) the determination of the rights of shareholders * * * in and to the assets of the corporation." An absolute right to petition for such supervision and direction is impliedly given and we think it follows that the court not only has the power to order and adjudge as to all matters thus presented, but that the duty of so doing is imposed upon the court.

[13-15] The right to invoke the supervision and settlement of disputed matters which is contemplated by the provisions of section 403 depends upon the conditions therein set forth for the filing of a petition and not upon whether or not such a petitioner is correct in all of his contentions with respect to the questions and issues which are to be presented for determination. The mere fact that a part of the plan here proposed for the distribution of its assets was improper and unauthorized did not mean that this corporation could not dissolve or that its legally commenced dissolution must be abandoned. Presumably, errors could be corrected and proper steps could be ordered and taken to dispose of the assets, to make a legal distribution and to wind up the corporation's affairs in accordance with our statutes and under the direction and guidance of the court. In any event, a hearing on the merits was called for and the matter could not be disposed of by sustaining demurrers and denying all relief to the petitioner. The purpose of the proceeding is to settle disputes, correct errors and obtain such orders as may be necessary to carry out and accomplish the end in view, and not merely to arbitrarily pass upon what has already been done.

[16-18] The proceeding thus provided for by section 403 is in some respects not unlike the one for declaratory relief, authorized by section 1060 of the Code of Civil Procedure. It has been held that that statute should be liberally construed, Tolle v. Struve, 124 Cal.App. 263, 12 P.2d 61, to the end that the intent of the statute may be carried out. Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782. Where a pleading dis-

closes the facts required by that statute, such as an interest in a particular matter and the existence of an actual controversy relating thereto, it is unnecessary to allege matters which will justify the precise relief which may ultimately be given by the court. California C. P. Growers v. Corcoran, 14 Cal.App.2d 264, 57 P.2d 1360. Where the basic facts required by that statute are alleged, it has frequently been held that demurrers should not be sustained and that the court should proceed to hear and determine the matters relating to which a controversy existed.

[19, 20] We think that a similar situation prevails here and that the facts alleged in the petition were sufficient to call for and require a hearing with such adjudications and orders as might prove necessary under the facts as they developed at the hearing. The appellants had a right to proceed by way of dissolution if they were willing to accept the consequences of proceeding in that manner rather than by way of merger or consolidation. And while they are bound by the statutory requirements therefor, they are also entitled to invoke the provisions of section 403 in order to secure both a determination of the controversy which has arisen and an adjudication of the matters necessary to complete the winding up of the affairs of this corporation. It follows that the demurrers to the petition should have been overruled and that the court should have permitted further proceedings to the end that it could hear the matters presented, determine the respective rights of the shareholders and hear and determine the other matters relating to the winding up of this corporation.

[21] The appellants suggest that it may be difficult to undo what has been done and to segregate San Joaquin's properties which have been knit into and have become a part of Pacific's system, and that the rights of the public should be protected. It is, therefore, argued that respondents should be limited to a determination in the trial court of the fair value of their proper share of San Joaquin's distributable assets and to the payment of the amounts so found. Jones v. Missouri-Edison Elec. Co., 8 Cir., 144 F. 765, 75 C.C.A. 631, is cited as showing the powers of a court of equity in such a situation. In that case it was pointed out that the rights of many third parties might have intervened and it was stated that these might be considered by the court below and that the rules of equity were broad enough to permit relief other than that specifically asked for, if it became necessary, in order to substantially protect the interests of some without unduly prejudicing the interests of others. Any possible application of the rule suggested in that case is a matter for consideration in the trial court, after the full facts have been developed, and is not a matter to be determined on this appeal from a judgment of dismissal.

[22] The appellants further contend that it was beyond the jurisdiction of the trial court to declare null and void the transfer of San Joaquin's assets to Pacific since that transfer was made pursuant to an order of the Railroad Commission and such orders are reviewable only by the Supreme Court. In its judgment of dismissal, the court included a provision purporting to adjudge and decree that the attempted distribution of San Joaquin's assets to its common stockholders by a distribution to Pacific of all of its assets other than cash is, and was, null and void as to the respondents. This provision is surplusage in what is, in practical effect, nothing more than a judgment of dismissal.

[23] It does not appear, however, that the court was attempting to set aside an order of the Railroad Commission or to invade the jurisdiction of the Supreme Court. In declaring this transfer null and void as to the respondents it was merely construing the order of the Railroad Commission and holding that such order had not been complied with. This may be done by a superior court. Coast Truck Line v. Asbury Truck Co., 218 Cal. 337, 23 P.2d 513. The Railroad Commission referred in its opinion to the contract of August 11, 1938, between San Joaquin and Pacific and pointed out that therein San Joaquin agreed to first retire all its minority common stock or to pay the amounts due its minority common stockholders, and thereafter to distribute to Pacific "as its sole remaining stockholder" its plants, properties and other assets. The order of the commission specifically authorized the transfer to the Pacific "in conformity with the provisions" of the contract of August 11, 1938, and further stated that in granting the application no determination had been made of the value of San Joaquin's properties. It would appear that the order of the commission has never been complied with, as Pacific is not yet the "sole remaining stockholder" of San Joaquin. The particular point raised by the appellants is without merit, although the provision in

question had no proper place in the judgment for the reasons above suggested.

[24] While we regard the method of distribution of its assets adopted by San Joaquin as not authorized by our law it does not necessarily follow that that corporation is without a remedy. It might go back to the point of divergence and then follow the procedure leading to a final dissolution as outlined in our statutes. Another possibility is some form of equitable relief under the broad powers suggested in Jones v. Missouri-Edison Elec. Co., supra, if the facts developed at a hearing justifies such a course and the court considers it necessary and proper. Incidentally, some generous purchaser might be found to take over the common stock of the two dissenting stockholders, thus making possible an adjustment without injury to anyone. In any event, the right of the appellants to invoke the benefits offered by section 403 and to obtain the relief and assistance therein provided for should not be foreclosed on demurrer to their petition.

The judgment is reversed with directions to overrule the demurrers, to allow the respondents to answer, and thereafter to proceed, allowing such amendments as may be necessary or proper, with a hearing and determination of the issues and matters which may be presented.

MARKS and GRIFFIN, JJ., concurred.

WEST KEY NUMBER SYSTEM

In re HAMPTON'S ESTATE.

Civ. 2846.

District Court of Appeal, Fourth District, California.

June 25, 1942.

Rehearing Granted July 25, 1942.

1. Wills 🔑386

Whether will contestants had capacity to maintain the contest was a matter purely for determination of jury and of trial judge on motion for new trial, and their determination that contestants had sufficient capacity would not be disturbed on appeal, where substantial evidence was offered both by contestants and proponents, which if believed by jury, would have been sufficient to show capacity or lack of capacity.

2. Wills 🔑324(1)

Whether testatrix' illegitimate daughter, who had been the subject of abandonment and adoption proceedings in Kansas, was "interested person" within statute authorizing interested person to contest will, was a "question of law". Probate Code, § 370.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested Person" and "Question of Law".

3. Wills 🔑288(1)

A will contestant had burden of proving that she was interested person authorized by statute to contest will. Probate Code, § 370.

4. Adoption 🔑1
Descent and distribution 🔑1
Statutes 🔑225

Legislative control over adoption and succession is absolute, and statutes of adoption must be read into the succession laws.

5. Adoption 🔑14

The laws of Kansas and California are not at variance in regard to sanctity of adoption decrees against collateral attack and as to presumptions which must be indulged in to support them.

6. Judgment 🔑818(5), 820

A judgment of sister state is binding on California courts, if valid, by virtue of "full faith and credit" clause of federal constitution, but jurisdiction of court of sister state in which judgment is rendered can be questioned collaterally in another state notwithstanding full faith and credit clause and jurisdictional recitals in judgment, if extrinsic fraud exists with respect to jurisdiction, and judgment can be ignored if want of jurisdiction appears on face of record or is shown as to the subject matter or the person. U.S.C.A.Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Full Faith and Credit".

7. Judgment 🔑818(4)

The presumption in favor of recitals of due service in judgment of sister state will not be indulged in California or Kansas where it affirmatively appears in the record that the proceedings were not regular. U.S.C.A.Const. art. 4, § 1.

8. Judgment 🔑818(4)

In Kansas, the presumption that necessary jurisdictional facts existed in support of judgment of sister state is not indulged in where the record shows what was done in the attempt to make service, and those facts are insufficient to constitute legal service. U.S.C.A.Const. art. 4, § 1.

9. Judgment 🔑818(5)

In collateral attack on Kansas order placing child in custody of children's home as a neglected, abandoned and dependent child, recitals in order that notice was issued to mother of child and that notice was returned by sheriff with report that sheriff was unable to find the mother within the county, were not conclusive that Kansas probate court had jurisdiction over child's mother and over the custody of the child. Gen. St.Kan.1901, § 4215.

10. Parent and child 🔑2(4)

A proceeding by which the parent, entitled to the custody of his or her minor child, is deprived of such custody, is a proceeding "adverse" to the child.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Proceeding".

11. Adoption 🔑10

To give adoption decree validity, court entering decree must have acquired jurisdiction over parties seeking to adopt child and over the child and over child's parents, and decree is not binding on a person who has not had his "day in court", which means that such person has been duly cited to appear and has been afforded an opportunity to be heard.

See Words and Phrases, Permanent Edition, for all other definitions of "Day in Court".

12. Adoption 🔑12

The mere fact that parent has neglected or abandoned child does not dispense with parent's right to actual or constructive notice of abandonment proceedings which are instituted for purpose of awarding child to custody of children's home for ultimate purpose of allowing home, rather than the parent, to consent to adoption of child.

13. Constitutional law 🔑309(1)

Notice to a party whose rights are to be affected by a judicial proceeding is an essential element of "due process of law". U.S.C.A.Const. Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

14. Judgment 🔑818(2)

An order and decree of Kansas probate court in proceedings relating to abandonment and adoption of testatrix' illegitimate daughter could be collaterally attacked in will contest by daughter not having right to inherit from testatrix if such proceedings were valid, notwithstanding jurisdictional recitals in such order and decree, and full faith and credit clause of federal Constitution, where proceedings were void on their face as violating "due process of law", in view of failure to give adequate notice thereof to testatrix. Gen.St.Kan.1901, § 4215; Probate Code, §§ 257, 370; U.S.C.A.Const. art. 4, § 1, Amend. 14, § 1.

15. Evidence 🔑581

Whether a witness has departed from the jurisdiction of the court, so as to allow admission of his testimony taken at former trial, is "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

16. Appeal and error 🔑1170(7)

In will contest, admission of evidence given at former trial by witness, if erroneous for failure to exercise due diligence to find witness, was not prejudicial, where evidence was only cumulative. Const. art. 6, § 4½.

17. Appeal and error 🔑1046(5)

In will contest, trial court's remarks that counsel was inclined to impede progress in the path of justice was not prejudicially erroneous, notwithstanding that the remark would have been better unsaid or made in absence of jury.

18. Evidence 🔑90

The term "burden of proof" is used in different senses, sometimes being used to signify the burden of making or meeting a prima facie case and sometimes the burden of producing a preponderance of the evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Burden of Proof".

19. Appeal and error 🔑882(12)

A party cannot complain of instructions given at his request, or of error in the instructions of his adversary, where other instructions requested by party or given at his request are affected with the same vice.

20. Appeal and error ⚷882(12)

In will contest, erroneous instructions on question of burden of proof and shifting of burden of proof were not prejudicial error, where instructions offered by appellant may possibly have lead the trial court into the error, and appellant did not offer or request further instructions to be given. Const. art. 6, § 4½.

21. Appeal and error ⚷1170(9)

A judgment can be reversed for giving of erroneous instructions only when rights of complaining party have been prejudiced, and such action will not generally be taken by appellate court for error in modifying or in giving instructions if verdict is manifestly right upon the evidence. Const. art. 6, § 4½.

22. Trial ⚷296(1)

In will contest, reading of portion of decision of appellate court rendered on the last appeal bearing on the law of the case was not error, where the trial court fully instructed the jury at appellants' request on the limited purpose of trial court in reading the decision.

Appeals from Superior Court, San Diego County; Edward J. Kelly, Judge.

Proceeding in the matter of the estate of Katherine Hampton, deceased, wherein Bertha Houghtaling offered for probate a will which was opposed by W. A. Bolton, who offered for probate another will which was opposed by Bertha Houghtaling. Thereafter Hazel L. Sliff filed opposition to the probate of both wills. From orders denying the probate of both wills, W. A. Bolton and Bertha Houghtaling appeal.

Order affirmed.

Herbert C. Kelly, of San Diego, for appellant Bolton.

John W. Holler and Sloane & Steiner, all of San Diego, for appellant Houghtaling.

Stickney & Stickney, of San Diego, Clarence B. Smith, of El Centro, and William H. Wylie, of San Diego, for respondent.

GRIFFIN, Justice.

Proponent Bertha Houghtaling offered for probate a will of the deceased dated April 6, 1938. Proponent W. A. Bolton offered for probate a will dated March 31, 1938. On April 20, 1938, Bolton filed a contest to the Houghtaling will. May 4, 1938, Houghtaling filed a contest to the probate of the Bolton will. Subsequently, respondent Hazel L. Sliff filed opposition to the probate of both wills. On the first trial of her contest, the trial judge then presiding, ruled that the validity of the Houghtaling will should be tried first and at the conclusion of the evidence it erroneously granted a nonsuit as to the contest of that particular will (In re Estate of Hampton, 39 Cal.App.2d 488, 103 P.2d 611, hearing in the Supreme Court denied), admitted the Houghtaling will to probate and consequently no further proceedings were had in respect to the Bolton will. On the second trial, from which this appeal originates, over the objections of both proponents, the trial court ruled that all issues involving both wills should be tried together and before the same jury. The jury returned verdicts against both proponents and in favor of Hazel L. Sliff as to both wills. Probate as to these wills was thereafter, by order of the court, denied. From this order, after denial of a motion for a new trial, both proponents appeal.

Appellants' main grievance now is that the court improperly recognized Hazel L. Sliff and W. A. Bolton as contestants. At the outset of the hearing, the court overruled appellants' objection to the capacity of Hazel L. Sliff to maintain a contest and to the capacity of Bolton to appear further as a contestant. It was claimed that both rulings were erroneous and that neither of these persons was entitled to be heard in challenge of the proffered will or wills. The evidence produced at the second trial was, for all practical purposes, so similar to that set forth in the decision on the former appeal that we will not again repeat it here. There was, however, some additional testimony offered by appellants which, in effect, only create a conflict with that offered by respondent.

[1] The evidence offered by the respective parties, which from the record appears to be substantial, if believed by the jury, would have been sufficient to support either contention. This was a matter purely for the determination of the jury and the good judgment of the trial judge on the motion for a new trial. Their determination being adverse to appellants, it

will not now be disturbed on appeal. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301; Raymond v. Glover, 144 Cal. 548, 78 P. 3. Appellants claim that since the perfection of the last appeal they discovered that respondent Hazel L. Sliff had been legally adopted in the State of Kansas in October, 1901, by Jesse and Mary Ann Parker; that under section 257 of the Probate Code she was not entitled to maintain the contest and had lost her right to inherit by reason of that fact. In support of this defense appellants offered in evidence an authenticated copy of the record of proceedings in reference to the abandonment and adoption proceedings had in the State of Kansas. The trial court sustained an objection of respondent to the offer on the ground that "lack of jurisdictional findings being apparent on the face of the record, I am compelled to hold that the adoption in the State of Kansas is a nullity."

Appellants contend that the authenticated copy of the proceedings had in the Probate Court of Sedgwick County, Kansas, is conclusive and is not subject to collateral attack on the ground of lack of jurisdiction.

It is conceded by respondent that if the proceedings above mentioned are valid section 257 of the Probate Code would compel a reversal of this judgment insofar as any judgment rendered in her favor is concerned. That section provides that "An adopted child succeeds to the estate of one who has adopted him, the same as a natural child * * *. An adopted child does not succeed to the estate of a natural parent when the relationship between them has been severed by the adoption * * *." In re Darling's Estate, 173 Cal. 221, 228, 159 P. 606.

[2, 3] Section 370 of the Probate Code provides that any person "interested" may contest a will. Under the uncontradicted evidence in this action the question whether respondent is a person "interested" is a question of law. In re Estate of Nelson, 191 Cal. 280, 283, 216 P. 368. The burden was upon the contestant Hazel L. Sliff to show her interest. In re Estate of Land, 166 Cal. 538, 137 P. 246; In re Estate of Butzow, 21 Cal.App.2d 96, 99, 68 P.2d 374. Although appellant Houghtaling's original answer denied that respondent Sliff was the daughter of the deceased, on the first trial of the action counsel for this appellant stipulated in open court in reference to the capacity of respondent to maintain the contest, as follows: "Mr. Sloane: * * * I think we may be able to save time here. I will say I have read these depositions, and it is all the information any of us are going to have on subject of relationship of this Mrs. Sliff to Mrs. Hampton, and I am satisfied that they make a prima facie showing of the fact that Mrs. Hampton did bear an illegitimate child and that that child was given to the Parker family to be brought up and that she has the capacity to maintain that contest." Then, in answer to the court's question, "* * * she is the daughter?" Mr. Sloane answered: "That she is the daughter by blood of the decedent and that would make it unnecessary to read all of this evidence. We concede that she is entitled to maintain a contest as a daughter." In the trial of the second action appellants made no such stipulation but relied upon the denial of such relationship in their answer.

In reference to the facts leading up to the offer of the proffered abandonment and adoption proceedings, the following evidence was produced: That respondent was the illegitimate daughter of Katherine Hampton, deceased; that she was born in Arkansas City, Kansas, March 19, 1897, at which time her mother "Kitty Higgins" was about 16 years of age; that some six weeks later the mother took the child to Wichita, Kansas, and placed her in the home of Jesse and Mary Parker, now deceased; that the mother visited the Parkers two or three times during 1898 and 1899; that at that time the Parkers wanted to adopt the child but, as stated by the Parkers' own son, "* * * my mother wanted to adopt the child, and I believe she went so far at one time as to promise to let her adopt her, and then when the time came right down to the point, she said that she could not give her away"; that on May 12, 1900, the mother wrote to Mrs. Parker from Little Rock, Arkansas, seeking a picture of her child, stating: "Hazel is on my mind all the time and I pine to see her. Enclosed find a $2 bill. * * * I will send you some more when my hubby comes back"; that she stated that she was going to California; and that the Parkers heard nothing further from the mother.

In October, 1901, proceedings were taken to declare Hazel Higgins (now Sliff) a neglected child. Adoption proceedings followed. The nature of these proceedings must be set forth to properly analyze their validity. The forms prescribed in section 4215, section 34, chapter 67, article 2, page 890 of the 1901 General Statutes of Kansas were followed.

One F. B. Stanley signed and verified "an information and complaint" addressed to the Probate Judge of Sedgwick County, Kansas, alleging that Hazel Higgins is "a neglected child, who is dependent on the public for support, having no home or proper guardianship; in circumstances exposing the child to an idle and dissolute life, being deserted by its parents, in violation of the statutes of the state of Kansas. * * *" The probate court then issued an order to show cause directed to the Parkers, and to "Kitty Higgins, parents and custodians of Hazel Higgins," requiring them to appear before it on a day fixed to show cause why the judge of that court should not order the delivery of the named child to the Kansas Children's Home Society. On this order was an endorsement by the sheriff to the effect that he received the writ and "served same by delivering a certified copy of this writ personally to Mary Ann Parker and Jesse Parker on the 9th day of Oct., 1901, *and I could not find the within named Kitty Higgins in my County,* (Sedgwick County)." (Italics ours.) A decree followed reciting that on October 14, 1901, "Hazel Higgins, a neglected child, having been brought before me by F. B. Stanley * * * to determine if the said Hazel Higgins is a neglected child within the meaning of the statutes of Kansas * * * and whereas, due notice of said investigation has been served according to law on Jesse Parker and Mary Ann Parker, custodians and persons having the actual possession of said child, *and notice was issued to the mother of said child Kitty Higgins, and said notice was returned by the sheriff of Sedgwick County, Kansas, with the report that said sheriff was unable to find said Kitty Higgins within the county* and the said Jesse Parker and Mary Ann Parker now appearing in open court: Upon examining the notice and hearing the evidence offered * * * and having investigated the facts, I do find that the proper notices have been served, and that the proceedings are regular, and that the said Hazel Higgins is a neglected child within the meaning of the statutes." (Italics ours.) "* * * that the said Hazel Higgins is a neglected child who is dependent on the public for her support having no home and having been deserted by her mother and only parent and having had almost no support from her said mother or other relatives; and it being found in circumstances exposing it to an idle and dissolute life; I do hereby order * * * that * * * Hazel Higgins be delivered in the care, custody and control of the Wichita Children's Home * * * pursuant to said findings and the provisions of the act of the legislature of the state of Kansas, in the year 1901."

The following day a relinquishment was signed by the president of the home, an offer to adopt was signed by the Parkers, and after these documents were filed a decree was signed in that same court reciting that "on the application of Mary E. Larkin, president of the board of directors of the Wichita Children's Home, for the adoption of Hazel Higgins * * * and the said Jesse Parker and Mary Ann Parker file their consent in writing to adopt the said Hazel Higgins as their child and heir at law, and the said Jesse Parker and Mary Ann Parker all being before the court for hearing at this time, the court after hearing the evidence and being fully advised in the premises, finds: * * * That Mary E. Larkin * * * has the right to relinquish children for adoption admitted to such home. That Hazel Higgins was relinquished to the care and custody of said home on or about the 14th day of October, 1901, and such child was admitted to such home at that time. That said home has had the care, custody and control of said child since that time, and now has the legal control of the same. The court further finds that said relinquishment and acceptance are each free and voluntary and made in good faith * * * that the said Jesse Parker and Mary Ann Parker desire to adopt said child by the name of Hazel Parker as their child and heir at law of them. * * *"

A decree of adoption was then entered according to these findings. This decree and the record of the abandonment proceedings above mentioned were the duly authenticated copies offered in evidence but refused by the trial court for the following stated reason: "Perhaps I would have to give full faith and credit to it (Kansas abandonment and adoption proceedings) if the showing was made that the parents were served or that their whereabouts were unknown, or that publication of the so-called writ was made, but certainly no court can take jurisdiction over a mother which divests a person of something more sacred than property upon a mere statement of the sheriff that the party is not in his county. The court had no jurisdiction over Katherine Higgins, the natural mother of the child. The court had no jurisdiction of the case."

The Kansas statutes cited by appellants as applicable at the time are General Statutes of Kansas (1901 edition), pages 882 to 888, chapter 67, articles 1 and 2, sections 4182 to 4209 inclusive; and cited by respondent as applicable in reference to service of notice to the parent, are General Statutes of Kansas, 1897 (vol. 2, chap. 95, p. 106, § 63; vol. 2, p. 242, § 558; vol. 2, p. 105, § 59, and § 72, p. 109).

[4-6] Legislative control over adoption and succession is absolute and our statutes of adoption must be read into our succession laws. In re Estate of Jobson, 164 Cal. 312, 128 P. 938, 43 L.R.A.,N.S., 1062; In re Darling's Estate, supra; In re Estate of Mercer, 205 Cal. 506, 512, 271 P. 1067; In re Estate of Jones, 3 Cal.App.2d 395, 400, 39 P.2d 847; In re Estate of Stewart, 30 Cal.App.2d 594, 595, 86 P.2d 1071; In re Estate of Grazzini, infra. The laws of Kansas and California are not at variance in regard to the sanctity of adoption decrees against collateral attack and as to the presumptions which must be indulged in to support them. Dowdell v. Sunflower Grand Lodge, K. P. of Kansas, 91 Kan. 128, 136 P. 920; Denton v. Miller, 110 Kan. 292, 203 P. 693; Chamberlin v. Thorne, 145 Kan. 663, 66 P.2d 571; In re Estate of Grazzini, 31 Cal.App.2d 168, 171, 87 P.2d 713; In re Adoption of Kelly, 47 Cal.App.2d 577, 118 P.2d 479; In re Bartholomew's Adoption, 29 Cal.App.2d 343, 347, 84 P.2d 199; Kaufmann v. California Mining, etc., Syn., 16 Cal.2d 90, 104 P.2d 1038; McHatton v. Rhodes, 143 Cal. 275, 277, 76 P. 1036, 101 Am.St.Rep. 125; In re Estate of Wiechers, 199 Cal. 523, 527, 250 P. 397; In re Estate of Estrem, 16 Cal.2d 563, 570, 107 P.2d 36; In re Silva, 213 Cal. 446, 448, 2 P.2d 341; Almquist v. Garner, 53 Cal.App. 305, 308, 200 P. 76. However, with equal force, it has been held in this state that a judgment of a sister state is binding upon the courts of this state, if valid, by virtue of the full faith and credit clause of the United States Constitution (Art. IV, § 1) but the jurisdiction of the court of a sister state in which a judgment is rendered, may be questioned collaterally in another state notwithstanding the full faith and credit clause and notwithstanding the jurisdictional recitals in the judgment, if extrinsic fraud exists with respect to the jurisdiction, and the judgment may be ignored if want of jurisdiction appears on the face of the record or is shown as to the subject matter or the person. Hammell v. Britton, 19 Cal. 2d 72, 119 P.2d 333; Ryder v. Ryder, 2 Cal.App.2d 426, 431, 37 P.2d 1069; DuQuesnay v. Henderson, 24 Cal.App.2d 11, 74 P.2d 294.

In Re Estate of Pusey, 177 Cal. 367, 170 P. 846, where the copies of an affidavit and order for publication were introduced as evidence to impeach the judgment, it was held that they may be considered in contesting the invalidity of a foreign judgment and that this may be shown collaterally by evidence which is not incorporated into the part of the record constituting the technical judgment roll. In People v. Harlow, 9 Cal. App.2d 643, 646, 50 P.2d 1052, 1053, which involved a Mexican decree of divorce, it was held that by section 1917 of the Code of Civil Procedure the jurisdiction of Mexican courts must be "over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment." See, also, In re Estate of Estrem, 16 Cal. 2d 563, 570, 107 P.2d 36.

[7, 8] The presumptions in favor of the recitals of due service in a judgment of a sister state are subject to certain exceptions. If a judgment recital is such as to affirmatively show that it is based upon an attempted service which is in fact a nullity, or if such recital is consistent with the idea that the other portions of the record show all that was done a different situation is presented. In re Eichhoff's Estate, 101 Cal. 600, 603, 36 P. 11. Where it affirmatively appears in the record that the proceedings were not regular, the presumption will not be indulged in. In re Application of Tassey, 81 Cal.App. 287, 290, 253 P. 948; Crouch v. H. L. Miller & Co., 169 Cal. 341, 146 P. 880. A similar rule prevails in Kansas. In Chamberlin v. Thorne, Kan., supra, it was held that the presumption is that the necessary jurisdictional facts existed. Such presumption cannot be indulged in where the record shows what was done in the attempt to make service and those facts are insufficient to constitute legal service.

[9] Counsel for appellants contend that the recitals appearing in the order of Oc-

tober 14, 1901, that "said notice was issued to the mother of said child, Kitty Higgins" and that "said notice was returned by the sheriff of Sedgwick County, Kansas, with the report that said sheriff was unable to find said Kitty Higgins within the county," together with the other recitals, are conclusive that the probate court had jurisdiction over Kitty Higgins, the child's mother, and over the subject matter, the custody of her child, and that the decree of adoption is not subject to collateral attack since it contains recitals of due service. We are satisfied that these recitals are not conclusive.

We must therefore determine whether, from the proffered record before us, under the law and under the due process provision of our Constitution (Fourteenth Amendment to Constitution of United States, section 1), sufficient notice was given whereby that court acquired jurisdiction of the cause and *parties*.

The sections of the statutes of Kansas in reference to the notice described may be thus summarized: In reference to adoption proceedings generally, section 4187, section 6 of the Statutes of 1901 above mentioned then provided that any person may offer to adopt any minor child provided "such minor and his or her parents, if living and in the state, or guardian, if any, appear before such court and consent to such adoption." Section 4200, section 19 of the 1901 Statutes of Kansas then provided that any child apprehended under section 4199, section 18, Statutes 1901, shall be brought before the proper court for examination within three days after such apprehension and "it shall thereupon be the duty of the court to investigate and ascertain whether such child is dependent and neglected * * * its age, and the name and residence of its parents." The section further provided: "*The parents (if their whereabouts is known) or persons having the actual custody of such child* shall be duly notified of such examination not less than three days before the day set for such examination * * * and if on such examination the court finds that any child is dependent or neglected * * * he shall enter such findings by proper order to that effect, and shall order delivery of such child to such children's aid society or institution as in his judgment is best suited to deal with said child." Section 4195, section 14, of the 1901 Statutes of Kansas, in reference to children's homes, provided that in such incorporated children's homes, they shall have legal custody of all children committed to them by the legal or natural guardians or by any "magistrate of any county * * * with * * * all the rights appertaining to the natural or legal guardians"; and "the president of the board of directors of any such corporation may appear in the probate court of any county where such home * * * is located, without the consent of either parent or guardian, and consent to the adoption of such children * * *." Section 4202, section 21, 1901 Statutes of Kansas (in reference to the "Title to Child") then provided that the institution shall be the legal guardian of any child so committed "and all the powers and rights of the parents in respect of that child shall vest in the said society or institution; and it shall be the duty of said children's aid society or institution to use special diligence in providing suitable homes for such children as may in this way be committed to their care; and such society or institution is hereby authorized to secure for such children legal adoption * * *." Section 4206, section 25, Statutes of Kansas (1901), then provided: "If it appears to any * * * probate court, on motion made before him, under oath, by any person who in the opinion of the court is bona fide acting in the interest of any child, that there is reasonable cause to suspect that such child * * * has been or is being ill-treated or neglected in any place within the jurisdiction of such court, * * * such * * * probate judge may issue a warrant authorizing any proper person named therein to search for the child, and if it is found to have been * * * neglected * * * to * * * detain it in a place of safety until it can be brought before the proper court; and the court before whom the child is brought may cause it to be dealt with in a manner provided for by sections 4 and 5 of this act."

Respondent now argues that under the statutes there are only two means whereby proceedings might be had, wherever a child is neglected or abused by its parents, when the court may deliver the child to an institution for the care of children, by means of which the institution is vested with the power and authority to consent to its adoption: (1) the apprehension of the child by a peace officer without warrant, and the bringing of such child before any court of summary jurisdiction under section 4199, section 18, Statutes of Kansas, 1901; and (2) upon motion made before any court of summary jurisdiction, under oath, by any person who in the opinion of the court is bona fide acting in the interest of any child where there is probable cause to suspect that such child has been ill-treated or neglected under section 4206, section 25, Statutes of Kansas, 1901; that the authenticated copy of the record of the proceedings had in the Kansas Court discloses that neither of the foregoing methods of acquiring jurisdiction over the alleged neglected child was followed in that F. B. Stanley, the informant, was neither a constable nor peace officer; that he had no warrant issued by the probate court; that he was not only unauthorized to apprehend Hazel Higgins but he never did, in fact, apprehend her nor bring her before any court of summary jurisdiction as required by the statute; that the authenticated copy of the record contains neither finding nor recital that she was before the probate court of that county on October 9, 1901, before or after the information and complaint were filed or when the probate judge granted the order to show cause on that date; that she not having been brought before the probate court that day, no proceeding against her was then pending and the order to show cause granted by the probate court under such circumstances is void for lack of jurisdiction over the subject matter; that the judge, upon the filing of the information and complaint did not issue any warrant authorizing Stanley, or any proper person, "to take such child and detain it in a place of safety until it can be brought before the proper court"; that the authenticated copy contains neither finding nor recital that the examination of Hazel Higgins was had within the time provided by the statute nor the facts required to be ascertained by the court during such examination; that the order to show cause is directed to Mr. and Mrs. Parker and Kitty Higgins, parents and custodians of Hazel Higgins; that the record, on its face, shows that a copy of said notice and order to show cause was not served upon Kitty Higgins personally or by publication; that the facts under which the court found the minor child to have been a neglected child are not sufficiently set out in the proceedings; that there is no finding as to the name and residence of the mother of the child and that according to the record the information and complaint does not set forth facts sufficient to give the court any jurisdiction to make any valid order as to the care, custody or control of Hazel Higgins; that the decree of adoption does not recite that Hazel Higgins was present at the hearing of that proceeding; that the record is conclusive that the mother did not consent to the adoption and that the children's home was not legally appointed to do so in her place; that the relinquishment filed on behalf of the home was therefore a nullity; and that the home never had the possession nor control of Hazel Higgins.

The force of respondent's argument is mainly directed to the question of the validity of the service of the notice directed to be given *"to the minor's parents (if their whereabouts is known) or persons having the actual custody of such child."*

The complaint appears to be based mainly upon the contention that no jurisdiction was acquired by the court because, it is argued, under section 558, Stats. 1897, vol. 2, p. 242, and § 63, Gen.Stats. of Kansas, 1897, vol. 2, p. 106, it is specifically provided that the service of the notice shall be made as required by law for the service of a summons and that since the notice above italicized was not so made, the proceedings are void. In support of this contention she cites Chambers v. King, etc., Manufactory, 16 Kan. 270; and Bradley, Wheeler & Co. v. Harwi, 2 Kan.App. 272, 42 P. 411, which are civil actions and in effect hold that jurisdiction over the person of the defendant must and can only be acquired either by the issuance of or service of process in one of the ways pointed out in the statute, i. e., actual service or substituted service or by a voluntary appearance in court. Thisler v. Little, 86 Kan. 787, 121 P. 1123, is also cited, which case involved the question of the service of a notice of appeal. It was there held that when the appellee and his attorney reside in the State of Kansas the service of such notice must be made in the same manner as service of summons unless service be waived or acknowledged. See also Garfield Tp. v. Theis, 9 Kan.App. 770, 59 P. 42.

If respondent's contention is correct and the provisions of these sections of the statutes required notice to the mother either by personal service or by publication, any judgment based thereon would be void for the reason that there was no service upon her of any description. However, we do not believe it necessary to determine the construction of those particular sections of the statutes for the reasons hereinafter expressed.

Under the Kansas statute, as it then existed, where a child was adopted under an ordinary proceeding (§ 4187, § 6, supra), after first having the child declared to be an abandoned child, notice was required to be given to such of the minor's parents as were then living in the state, or the guardian, if any. The section was subsequently amended (Gen.Stats. 1915, § 6362, § 6, p. 1264) to read that notice to appear should be given to such minor's parents as were then living in the state *and* the guardian (if any). And if the parents resided out of the state, written consent to the adoption was necessary.

Proceedings may be instituted in the State of California to declare a person free from the custody and control of his parents. § 775 et seq., Welfare & Institutions Code, St. 1937, p. 1041. Provision, however, is here especially made for service by publication of notice to parents residing outside of the state or whose residence is not known to the petitioner. We find no similar provision in the section or sections pertaining to abandonment proceedings requiring service of notice by publication under the laws of Kansas as they then existed. Provision was made by our Legislature for notice to the parents by publication if not personally served in adoption proceedings commenced under section 224 of our Civil Code.

Without attempting to adopt Hazel L. Sliff under section 4187, § 6, supra, by giving the notice there required, petitioners attempted to avoid that requirement, in reference to notice, by seeking the aid of the abandonment proceeding which, as appellants contend, does not require notice of the examination or proceedings to be given to the parent if it is shown that the only parent authorized to give consent has neglected and abandoned the child, unless her whereabouts is known.

[10] A proceeding by which the parent, entitled to the custody of his or her minor child, is deprived of such custody is a proceeding adverse to him or her. In re Guardianship of Van Loan, 142 Cal. 423, 426, 76 P. 37.

[11] Jurisdiction to proceed in adoption proceedings has been thus declared:

"To give a decree of the county court adopting a child any validity, such court must have acquired jurisdiction (1) over the parties seeking to adopt such child, (2) over the child to be adopted, and (3) over the parents of such child"; and

"No person shall be personally bound by a decree until he has his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. A judgment without such citation and opportunity wants all the attributes of a judicial determination." Furgeson v. Jones, 17 Or. 204, 20 P. 842, 3 L.R.A. 620, 11 Am.St.Rep. 808 (from syllabus).

The question then arises, in this proceeding, did the court acquire jurisdiction of the parties? If not, the judgment awarding the custody of the minor child to the Wichita Children's Home for the ultimate purpose of allowing it to consent to the adoption of the child, rather than the parent, was void, and the adoption proceedings based on such a void judgment is likewise void.

[12] Our attention has been called to many cases which hold that after service of notice (either personal or substituted) of such abandonment proceedings on the parent or parents, no written consent of such parent or parents is necessary if the trial court determines, on the hearing, upon proper and sufficient evidence, that the minor child has been abandoned by them. In re Estate of McKeag, 141 Cal. 403, 74 P. 1039, 99 Am.St.Rep. 80; Matter of Cozza, 163 Cal. 514, 521, 126 P. 161, Ann.Cas. 1914A, 214; Almquist v. Garner, 53 Cal. App. 305, 200 P. 76. This is, however, not determinative of the issue here presented. The mere fact, if alleged in the petition and found by the court, that the parent neglected or abandoned the minor child, will not and does not dispense with the right of such parent to notice, either actual or constructive, of such proceeding, in order that he or she may appear and contest the question to be there determined, i. e., whether or not, in fact, he or she has actually neglected or intentionally abandoned the child so that the court may then be authorized to so declare it abandoned for the purpose of allowing the children's home to give consent to a subsequent adoption of the child in the place and stead of its natural parent by reason of her or his

claimed misconduct. Our search has not revealed a case where this question has been definitely decided in this state. It was presented in the Matter of Guardianship of Michels, 170 Cal. 339, 149 P. 587, 588. There one Verna Shaw, who had possession of petitioners' minor child, upon learning that petitioners, the natural mother and father of the minor child, desired to secure possession of it, proceeded to have the child declared, by the juvenile court, to be an abandoned child. On the day of the hearing the parents appeared. The trial court determined the minor to be an abandoned child. Petitioners appealed and claimed that they were entitled to notice of the proceeding and therefore the proceedings were void as being in violation of the Fourteenth Amendment to the Constitution. The Supreme Court said, speaking through Mr. Justice Henshaw:

"Upon the general proposition, suffice it to say this: That it is unquestionably a part of the power as well as a part of the duty of the state to guide and guard its helpless young. In the exercise of that duty, it is quite proper for the state to make provision for the custody, care, and maintenance of abandoned children, and in so doing to provide process of law and a forum for the determination of the question whether or not a child is an abandoned child. Upon a determination of abandonment, it is equally within the power and the duty of the state to provide for the care and nurture of the child in the future, and proceedings in guardianship and proceedings in adoption may be and by our law are based upon decrees of abandonment. And finally it is within the power of the state to declare what sins and acts of omission or commission shall constitute abandonment by the parent or parents. *Unquestionably due process of law demands some sufficient notice to the parents of the proceedings about to be taken, with an opportunity to the parents to be heard upon the issue.* But, so far as concerns this case, it appears by the petition that the parents not only received this notice, but responded to it * * *." (Italics ours.)

This same question was raised in Matter of Cozza, supra, but not decided for the same reason that the party entitled to notice appeared at the hearing. In Bell v. Krauss, 169 Cal. 387, 146 P. 874, a question of notice to the father of the contemplated adoption of his child by a third party was discussed. It was there held that he had been deprived of his child without due process of law. Many cases are there cited supporting the right of notice of such a proceeding. In Matter of Hart, 21 Cal. App. 30, 130 P. 704, it was held that the mother, divorced from her husband for her adultery, was entitled to notice, the right to be heard, and to resist any attempt to relinquish parental control of her child to the Children's Home Society for the purpose of giving consent to adoption even though her husband had given his written consent, and, also, where it was claimed by petitioners that the child was an abandoned child and the parents had thereby relinquished all their right to it. Ex parte Becknell, 119 Cal. 496, 51 P. 692, 693, is cited therein, wherein it is said: Parents are the natural guardians and "cannot be deprived of their right to his care, custody, society, and services except by a proceeding to which they are made parties, and in which it is shown that they are unfit or unwilling or unable to perform their parental duties."

1 Cal.Jur. p. 429, sec. 12, after setting forth the provisions of section 224 of the Civil Code in reference to notice of abandonment proceedings, reads:

"Such notice is required before there can be an adjudication by the juvenile court of an abandonment such as will afford a basis of adoption without the consent of the parent or parents guilty of the abandonment described in the section referred to. While the code does not in express terms otherwise provide for notice of adoption proceedings, it is clear that the code requirements as to appearance and consent imply that notice be given of such proceedings." See also page 440, sec. 21, where it is said:

"Unquestionably, due process of law demands some sufficient notice to the parents of the proceedings about to be taken, with an opportunity to the parents to be heard upon the issue."

Our attention has not been directed to any case in Kansas construing their statute in this respect. However, this question is discussed and many cases are cited in 1 American Jurisprudence, page 642, sec. 40, and page 644, sec. 44. It cites the rule stated in Furgeson v. Jones, supra, and discusses generally the necessity for notice of hearing on forfeiture of rights of parents. It is there said:

"The existence of the facts rendering consent unnecessary, though alleged in the petition, must be judicially determined, and notice is therefore an essential prerequisite to a valid decree and a cutting off of the parent's rights, for even where the parents, by their wrongful neglect or criminal conduct, have forfeited their right to give or withhold consent, it does not necessarily follow that they are not entitled to notice * * * although no notice may be specified by statute in cases where the rights of the parents have been forfeited by abandonment or other misconduct, notice will ordinarily be required in order to bind the parent on the question of such abandonment or misconduct. The object of notice is not merely to bind those who have not consented and without whose consent the adoption cannot be made. It is more than this—it is to bind those who are entitled to be heard upon the question whether they have forfeited their rights in regard to consent, and to prevent them, if notified, from again raising this question. Although notice is not always specifically required, the judicial proceedings by which adoption is effected are prescribed as a duty of courts of record, wherefore it is presumed that the legislature intended that such proceedings should be in accordance with the usual practice of such courts, requiring notice as an element of due process. * * * Nonresidence of the parent does not excuse failure to give notice to him, although constructive notice may be given where the residence of the parent is unknown. The only exception to the general rule that the rights of the parent, however much he may be at fault, cannot be cut off without notice to him and an opportunity to be heard in his own behalf exists in the presence of statutes providing for the divesting of the parent's natural rights in an adversary proceeding for that purpose, or of which it is an incident. Thus, it will be observed that the exception is apparent rather than real, inasmuch as the parent has, previous to the adoption proceeding, had his day in court and a full determination of his parental rights, so that there is no longer need of their protection at the time of the adoption. Where the custody of a child has been taken from the parents for delinquency, by adversary proceedings [upon due notice], notice of adoption proceedings is unnecessary, since the parents have already been divested of the custody and control of the child."

See, also, State v. District Court, 75 Mont. 147, 242 P. 959, citing 1 Cal.Jur. p. 429, sec. 12, wherein it was held that an order of adoption, entered without any notice to the child's mother, who was alleged to have abandoned the child, and who had not consented to the adoption, was without jurisdiction and void, and that notice of the adoption proceedings to the mother of the child was an indispensable element of due process, and that while their state adoption statute did not provide for notice in express terms, by implication it required that notice be given to parents of the child to be adopted, even though they were nonresidents of the state.

[13, 14] It therefore must follow that since it is an elemental and fundamental principle of law that notice to a party whose rights are to be affected by a judicial proceeding is an essential element of due process, the failure to give adequate notice to the mother of Hazel L. Sliff of the abandonment proceeding as an enabling step to securing the adoption of her child without her consent, was void as being in violation of the due process clause of our Constitution. The order of the trial court refusing the introduction of such record into evidence must be sustained. In view of this determination, it becomes unnecessary to analyze respondent's other claimed reasons why the proceedings were void. These proceedings being thus void upon their face, we think it follows that the respondent, who was the central figure therein and the person whose interests were mainly affected thereby, has the right to attack the decree entered which purports to thus interfere with her right of inheriting from her natural mother.

[15] The next point presented by appellants involves the admission of certain evidence given at the former trial by the witness Scott. That witness was there called and testified for the contestant. At the time of the second trial she could not be located. One of the counsel for contestant testified in this action that two weeks before the second trial he began and made a very diligent search for the witness Scott and this search continued up to the time of trial; that he was unable to locate her to serve a subpoena upon her which he then had in his possession; that the only information he had as to her whereabouts was that one or two of the several persons he contacted who knew her "understood she was going to San Francisco." The other persons said they did not know where she went. The trial court then admitted the testimony of that witness taken at the former trial, over objection. Error is claimed in so doing, citing Butcher v. Vaca Valley Railroad Co., 56 Cal. 598, and Meyer v. Roth, 51 Cal. 582. The question whether a witness has departed "from the jurisdiction of the court" is generally a question of fact. Cameron v. Ah Quong, 175 Cal. 377, 165 P. 961. Assuming, under the cases cited by appellants, that the court committed error in admitting the evidence of the witness under the showing made, those cases were both decided before the adoption of section 4½ of article VI of our Constitution.

[16] In People v. Weston, 169 Cal. 393, 146 P. 871, the effect of failure to comply strictly with section 686 of the Penal Code in reference to due diligence in endeavoring to locate a witness was considered in connection with the constitutional amendment. Irrespective of the question of due diligence it was there held, as we must hold here, that the evidence admitted was only cumulative, and the other evidence properly received was sufficiently convincing of the undue influence on the part of the proponents that we cannot say the error, if any, resulted in a miscarriage of justice or that the verdict rendered probably would have been different had the deposition not been admitted.

[17] The trial court made certain remarks during the trial which appellants claim were prejudicial. Several remarks were made which would have been better unsaid or made in the absence of the jury. These comments included such as a suggestion to counsel for one of the appellants that he was inclined to "impede progress in the path of justice" etc. We have examined the record in this respect and we cannot hold the remarks prejudicially erroneous. Lewis v. Crenshaw, 47 Cal.App. 781, 191 P. 72.

Appellants complain of certain instructions given by the court bearing on the question of the burden of proof being on the proponents to show that no undue influence was practiced upon the deceased, if the jury concluded they were occupying a fiduciary relationship toward her. Several instructions were offered and given on this subject. Some of these instructions lack all of the necessary elements in stating the correct rule. One instruction, after telling the jury that the burden of proof was at all times upon the contestant to prove his or her case by a preponderance of the evidence, but "that burden may shift to the proponent to show by a *preponderance of the evidence that he is right.*" Similar instructions in reference to the shifting of the burden of proof and placing the burden on the proponent to show "by a preponderance of the evidence" that the presumption has been overcome, have been condemned and also held to be erroneous.

[18] In Re Estate of Erickson, 140 Cal.App. 520, 35 P.2d 628, it was held that when the circumstances raise the presumption that a will was procured by undue influence, the proponents have the burden of meeting that prima facie case, but it is sufficient if they produce just enough evidence to counterbalance the prima facie case, and it is not necessary for them to prove the absence of undue influence by a *preponderance of the evidence.* See, also In re Estate of Eakle, 33 Cal.App.2d 379, 91 P.2d 954. The term "burden of proof" is used in different senses. Sometimes it is used to signify the burden of making or meeting a prima facie case, and sometimes the burden of producing a preponderance of the evidence. Scott v. Wood, 81 Cal. 398, 22 P. 871; Bonneau v. North Shore Railroad Co., 152 Cal. 406, 93 P. 106, 125 Am.St.Rep. 68; 10 Cal.Jur. p. 782, sec. 88, et seq.

Proponent and appellant Houghtaling offered and the trial court gave (with some modification), an instruction on this subject which possibly led the trial court into the error complained of. It read in part: "In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. * * * This means that if no evidence were given on either side of such issue your finding as to it would have to be against that party. When the evidence is contrary, the decision must be made *according to the preponderance of evidence* * * *."

[19] A party may not complain of instructions given at his request, or of error in the instructions of his adversary where others requested by him or given at his request are affected with the same vice. Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 186 P. 772. The trial court did, in the instant case, either directly or indirectly throughout the instructions tell the jury that the presumption of

undue influence, where a confidential relationship existed, "may be overcome" or "may be dispelled"; or that "in the absence of rebuttal the presumption is conclusive"; or that "presumptions must stand if not rebutted" or that "it devolves upon the proponent to explain the disposition expressed to be made of the estate by producing evidence to show that in fact the contestant was not, and that he himself was, an object of the decedent's bounty"; or that "it is up to you to say whether or not the long continued exception sufficiently rebuts the presumption that arises from the failure to recognize the moral claim of her daughter"; or "each of said presumptions is disputable and may be controverted by other evidence."

[20] Appellants offered no other instruction setting forth the correct rule as to the burden of meeting the prima facie case where the presumption of undue influence had been established. If appellants desired a further instruction to be given on the issue they should have requested it. Daniel v. Asbill, 97 Cal.App. 731, 739, 276 P. 149; Richmond v. Moore, 103 Cal.App. 173, 181, 284 P. 681.

In view of the evidence in this case and under the circumstances here presented, we are not possessed to hold the particular instruction complained of, prejudicially erroneous. Lonnergan v. Stansbury, 164 Cal. 488, 129 P. 770; People v. Tomlinson, 66 Cal. 344, 5 P. 509; In re Estate of Graves, 202 Cal. 258, 259 P. 935. The trial court also fully considered this question on a motion for new trial and came to the same conclusion.

[21] A judgment may be reversed for the giving of erroneous instructions only when the rights of the complaining party have been prejudiced and it is the general rule that such action will not be taken by an appellate court for error in modifying or in giving instructions if the verdict is manifestly right upon the evidence. Art. VI, § 4½ Constitution.

[22] During the course of the trial the trial court read a portion of the decision of this court rendered on the last appeal bearing on the law of the case. The trial court fully instructed the jury, at appellants' request, on its limited purpose. No error resulted. In re Estate of Spencer, 96 Cal. 448, 31 P. 453.

We have examined the record in respect to the other claimed errors. They do not merit further consideration.

The judgment and orders are affirmed. Respondent to recover costs on appeal.

BARNARD, P. J., and MARKS, J., concurred.

52 Cal.App.2d 840

McCABE et al. v. SANTA MONICA SCHOOL DIST. OF LOS ANGELES COUNTY et al.

Civ. 13763.

District Court of Appeal, Second District, Division 2, California.

June 24, 1942.

Appeal and error 🔑801(1)

Where motion to dismiss appeal was supported by certificate of the clerk of Superior Court setting forth the facts and all grounds stated in motion for dismissal were supported by such certificate and by the authorities cited, appeal would be dismissed on motion. Rules of Supreme and District Courts of Appeal, rule 6.

Appeal from Superior Court, Los Angeles County.

Action by A. E. McCabe and others against Santa Monica School District of Los Angeles County and others. From an order of the Superior Court denying a new trial, plaintiffs appeal and defendants move to dismiss the appeal.

Appeal dismissed on motion.

Thomas Reynolds and Grant G. Calhoun, both of Los Angeles, for appellants.

Tripp, Penney & Callaway, of Los Angeles, for respondents.

PER CURIAM.

The respondents having served and filed their motion to dismiss the appeal in the above entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited.

It is ordered that this appeal be, and the same hereby is, dismissed.

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52 Cal.App.2d 760

BROWN MATERIALS CO., Ltd., v. PACIFIC AUTOMOBILE INS. CO.

Civ. 13478.

District Court of Appeal, Second District, Division 1, California.

June 19, 1942.

Hearing Denied Aug. 17, 1942.

1. Appeal and error 🔑927(7)

On review of question whether there was sufficient evidence in favor of plaintiff to justify submission of case to the jury instead of directing a verdict for defendant, all conflicts in evidence must be resolved and every legitimate inference indulged in favor of plaintiff, and if any evidence is found of sufficient substantiality to support a verdict for plaintiff, judgment entered on directed verdict must be reversed.

2. Insurance 🔑665(7)

In insured's action on automobile liability policy requiring insured to give written notice of accident to insurer as soon as practicable, evidence, including showing that insured did not notify insurer of accident until five months after it occurred, showed as a matter of law that insured failed to give notice required by policy because of failure of insured's responsible officers to exercise reasonable diligence in ascertaining the facts.

3. Insurance 🔑561

Under automobile liability policy requiring insured to give notice of accident to insurer as soon as practicable, provision for deduction of $25 from property damage claims after completion of investigation by insurer was not intended to alter conditions regarding the giving of notice of accident.

Appeal from Superior Court, Los Angeles County; J. T. B. Warne, Judge.

Action by Brown Materials Company, Ltd., against the Pacific Automobile Insurance Company on an automobile liability policy. From a judgment entered on a directed verdict for defendant, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissents.

Joseph E. Madden, of Long Beach, for appellant.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for respondent.

DORAN, Justice.

[1] This is an appeal from a judgment upon a directed verdict in favor of defendant, in an action upon an automobile insurance policy. The policy in question was issued by respondent to cover the fleet of cars and trucks used by appellant in its business. Appellant, in an action for damages against it, had suffered a judgment for $5,325.56 for personal injuries which were the result of an accident involving a truck operated by appellant and covered by the insurance policy above mentioned; and upon respondent's refusal to pay said judgment on behalf of appellant, appellant brought the instant action to recover indemnity under the terms of the policy. Respondent defended upon the ground that appellant had not performed all the conditions of said policy in that appellant did not notify respondent of the accident out of which the claim arose until after appellant had been served with the summons and complaint in the action for personal injuries, which was several months after the accident occurred. Upon conclusion of the evidence and after both parties had rested, the trial court granted respondent's motion for a directed verdict. The sole question here presented is whether there was sufficient evidence in favor of appellant to justify submission of the case to the jury. Under the well settled rule, upon review of such a question all conflicts in the evidence must be resolved, and every legitimate inference indulged in favor of appellant; and if under such circumstances any evidence is found of sufficient substantiality to support a verdict in favor of appellant, the judgment entered upon the directed verdict must be reversed.

[2] The insurance policy upon which appellant's claim is based covered all of

the vehicles of which appellant was the registered owner. Attached to the policy was an agreement or rider, providing that: "In case of accident involving damage to the property of others the assured named in said policy agrees that if the Insurance Company, after completing its investigation, determines that the assured named in said policy is legally liable therefor, to pay at its own cost each and every such claim not exceeding Twenty-five dollars * * *"; and that the assured would pay the first $25 of any claim for property damage in excess of such sum.

The material portions of the provisions of the policy relating to the duty of the assured to notify the respondent of the occurrence of accidents read as follows:

"(F) Accident and Suit Notice and Cooperation:

"The assured upon the occurrence of an accident involving bodily injuries or death, or damage to property of others, coming within the provisions of Clauses A and/or B of the Insuring and Indemnifying Agreements, shall give written notice thereof, as soon as practicable, with the fullest information obtainable, including names and addresses of witnesses, to the Company at its Home Office, Los Angeles, California, or its duly authorized Agent. He shall give immediate notice, with full particulars, of any claim made on account of such accident. If, thereafter, any suit is brought against the Assured he shall immediately forward to the Company every summons or other process served upon him."

"(G) Notice and Proof of Loss:

* * * * *

"Each and every duty imposed upon the assured by Clauses F and/or G of the Insuring and Indemnifying Conditions of this Policy is a condition subsequent, it being understood that failure to give any notice required to be given by this Policy, within the time specified therein, shall not invalidate any claim made by the Assured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible."

Clauses A and B of the policy embodied the provisions relating to indemnification for bodily injuries or death, and property damage.

The accident out of which the suit for injuries arose occurred while appellant's equipment and driver were hauling a large dragline power shovel for the Belyea Company, a contractor. The equipment consisted of a large truck and semi-trailer which was especially constructed for moving shovels of that kind. As it was proceeding along the highway a portion of the shovel extending over the top of the truck struck a wire that was suspended across the road and on which was attached a street lamp. At the same time the operator of the shovel, who was working for the Belyea Company, either jumped or was brushed from the top of the cab to the ground, as a result of which he suffered injuries, for which he brought the suit above mentioned and recovered the judgment aforesaid.

The driver of appellant's truck did not report the incident to the employee whose duty it was to report accidents to the insurance company, but, instead, the driver reported the accident to appellant's sales manager, stating to the sales manager that the shovel operator had either jumped or was brushed off of the equipment and had turned or sprained his ankle, but that the operator did not appear to be hurt. About a month after the occurrence of the accident, in what appears to have been a casual conversation, the truck driver reported the incident to appellant's president and general manager but failed to mention that the shovel operator was in any way involved. Subsequently, the power company owning the street lamp presented its claim for $55.46 damages and was referred by appellant's president to respondent, the insurance carrier; but appellant did not report the occurrence of the accident to respondent. Respondent later wrote to appellant, acknowledging presentation of claims by the power company and requesting information concerning them. Approximately five months after the occurrence of the accident appellant was served with a summons and complaint in the personal injury action instituted by the shovel operator; and these papers were then transmitted to respondent, together with information concerning the operator's claim. Respondent then wrote to appellant advising that respondent would refuse to perform its obligations under the policy except under an agreement reserving respondent's rights in the matter. Under such an agreement respondent furnished appellant counsel for the defense of the personal injury suit.

Appellant takes the position that its evidence in the instant action established that, according to appellant's information, only trivial and inconsequential damages had been done, which appellant justifiably believed would not result in a claim for damages; and that an assured is not required to give notice of accidents in which the injuries are so trivial as not to suggest a possible claim for damages. Respondent contends that appellant's delay of five months in the reporting of the accident constituted such a material prejudicial breach of the contract as to absolve the respondent from liability.

The cases cited by appellant in support of its position are all those in which the assured's knowledge of the accident was not such as to indicate the possibility of a subsequent action for damages. The distinction between such cases and the case at bar is that here it was not so much the knowledge which appellant possessed as it was its lack of knowledge. Appellant states that "the test of whether notice is required is not per se the nature of the accident, but it is the knowledge of the assured, acquired in the exercise of reasonable diligence, of the nature and extent of the damages caused by the occurrence." It is at once apparent from the evidence presented that appellant did not exercise reasonable diligence in seeking to ascertain the true facts regarding the accident. In fact, appellant does not appear to have made any effort at all to ascertain the true circumstances. The facts in connection with the accident as observed by the driver were such as would put a reasonably prudent man on notice that an action for injuries would be likely to ensue; and the statement of the facts as made by the driver to appellant's sales manager was also such as should give a reasonably prudent man notice of the likelihood of a suit for damages, despite the stated opinion of the driver that he didn't think the shovel operator was hurt. Moreover, appellant's president could easily have ascertained the facts by questioning the truck driver in appellant's employ. From all that appears in the record, during the entire five months' period from the time of the accident to the time when notice thereof was finally given, appellant was possessed of the means of obtaining sufficient knowledge of the accident to give it notice of the possibility of a claim for damages, even if it be assumed that such knowledge had not actually been received. The only conclusion to be drawn from the evidence is that the failure of appellant to give the notice of the accident required by the terms of the policy was due not to its knowledge of the facts but to the failure of appellant's responsible officers to exercise reasonable diligence in ascertaining the facts. The evidence affirmatively reveals that it was reasonably possible for appellant to have given respondent notice of the accident prior to the time the action for damages was instituted, and that notice was not given as soon as was reasonably possible. There was no need for respondent to have carried the burden of proof further in this regard.

[3] The supplemental agreement providing for the deduction of $25 from property damage claims does not aid appellant. This provision clearly was not intended to alter the conditions regarding the giving of notice of accidents. It should be noted that the deductible provision was only effective after completion of the investigation by the insurer. Thus it was not up to the assured to determine whether the extent of damages was greater or less than $25. That was a matter for determination by the insurer upon investigation; and the matter of notice was not by the terms of the policy made dependent upon the apparent extent of the damage.

In the circumstances here presented, it is obvious that the delay in giving notice of the accident for several months and not until a suit thereon was actually commenced, was necessarily prejudicial to the insurance carrier, since the insurer was thereby placed in the position of making its preliminary investigation and defending the action in the face of evident disadvantages that the notice provided for in the policy manifestly was intended to prevent.

There being no evidence of sufficient substantiality to support a verdict for appellant the trial court properly granted respondent's motion for a directed verdict at the close of the case. For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

PUCKETT v. PUCKETT.

Civ. 13027.

District Court of Appeal, Second District, Division 1, California.

June 18, 1942.

Hearing Granted Aug. 13, 1942.

1. Divorce 🔑236, 297

Where court found wife entitled to divorce, it had jurisdiction to provide in its judgment for the proper support of the wife and minor child of the parties regardless of the terms of property settlement agreement.

2. Divorce 🔑309, 311

Trial court had jurisdiction to enforce and to modify the provisions contained in divorce decree relative to the support of minor child of the parties, notwithstanding parties had stipulated to such provisions of decree in accordance with property settlement agreement.

3. Divorce 🔑269(2), 311

Where divorce decree approved property settlement agreement and in addition specifically provided that pursuant to such agreement husband was ordered to pay wife $250 monthly for her support and that of minor child, order became an operative part of a "mandatory judgment" enforceable by contempt proceedings, and thereafter provision for support was not merely a contractual obligation enforceable only by contract remedies.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Judgment".

4. Divorce 🔑245(1), 309

Where divorce decree in addition to approving property settlement agreement specifically directed the performance of the provisions of such agreement relative to support of wife and minor child, court had jurisdiction to modify such provisions of decree, notwithstanding the contract between the parties upon which they were based.

5. Divorce 🔑222

Court has no jurisdiction to award counsel fees for services already performed for the wife in connection with divorce action, since such allowance for past services is clearly not necessary to enable the wife to prosecute the action.

6. Divorce 🔑222

Upon application filed pending divorced husband's motion for modification of divorce decree, trial court had jurisdiction to award to former wife reasonable attorney's fees for services being performed subsequent to the filing of motion for modification of the decree in resisting such motion.

7. Divorce 🔑222

Trial court had no jurisdiction to award to former wife attorney's fees for services performed in connection with wife's motion for modification of divorce decree, where application for allowance of such fees was not filed until after ruling on the motion and after the services in connection therewith had already been performed.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Divorce action by Ynex H. Puckett against T. Lyell Puckett, wherein a divorce was granted plaintiff and provisions made with respect to custody of the minor child of the parties and for monthly payments to be made by defendant for the support and maintenance of plaintiff and minor child in accordance with property settlement agreement between the parties. From an order denying defendant's motion for modification of provisions of interlocutory and final judgments relating to stipulated monthly payments for maintenance and support and granting plaintiff's motion for allowance to her of attorney's fees and costs in connection with resisting such motion and in connection with her motion for modification of the judgments so as to permit removal of child to Arizona, defendant appeals.

Order reversed and cause remanded with directions.

Parker & Irwin and Don S. Irwin, all of Los Angeles, for appellant.

Leonard Comegys, of Los Angeles, for respondent.

WHITE, Justice.

Based upon the ground of extreme cruelty, respondent obtained an interlocutory decree of divorce from appellant in the Superior Court of Los Angeles County on March 23, 1933, and a final decree of divorce was entered in the action on March 26, 1934. On March 16, 1933, which was prior to the entry of the interlocutory decree, appellant and respondent entered into an agreement by which they settled and determined their respective property interests and rights in a manner which is not here in controversy or under attack. However, there were included in said agreement certain covenants which required of appellant the payment of specific sums of money for the support and maintenance of respondent and the minor child of the parties. In connection with this last-mentioned provision, the agreement provided as follows:

"For the support and maintenance of the wife, and for the support and maintenance of the minor child of the parties, the husband agrees to pay to the wife the sum of $250 per month, the first payment thereunder to be made April 1st, 1933, and a like payment to be made on the 1st day of each succeeding month thereafter.

"From and out of the said $250 per month reserved to be paid as aforesaid, the wife promises and agrees that she will, without further demand upon the husband, support, educate, and maintain the said minor child during her minority.

"It is understood and agreed that the said sum of $250 hereinbefore reserved to be paid shall continue to be paid for such time as the wife shall be married to the husband, and/or for such time as the wife shall not be married to any other person save and except the husband herein. In the event, however, that at some future time the wife shall procure a decree of divorce from the husband, and thereafter shall marry some person other than T. Lyell Puckett, then and in that event all obligation or liability of the husband for the support and maintenance of the wife shall cease and determine and all payments herein reserved to be made for the support and maintenance of the wife shall abate, provided, however, that should the wife at some future time marry a person other than the husband herein, then and in that event the husband shall pay to the wife such sum for the support and maintenance of the minor child as shall be mutually agreed upon between the parties hereto or if the said parties cannot agree upon the sum for such support and maintenance of said minor child, then the husband shall pay to the wife for the support and maintenance of such minor child such sum of money per month as shall be determined by a court of competent jurisdiction after notice to the husband."

After arranging for the custody of the minor child, it was provided in the agreement that "It is further agreed that the husband shall have the right to approve of any school or schools attended by the said minor child and shall have the right to supervise the education of the said minor child"; and further, that "* * * neither party shall remove the said minor child from the State of California nor permanently from Los Angeles County without the written consent of the other party first had and obtained or upon an order made by a court of competent jurisdiction upon notice to the other party."

The interlocutory decree of divorce also contained the following:

"It further appearing to the Court that the plaintiff and the defendant, T. Lyell Puckett, entered into an agreement in writing which has been offered and received in evidence as Plaintiff's Exhibit 'A,' and which agreement bears date March 16, 1933, and which agreement is for the purpose of settling the property rights between the parties;

"Now, therefore, it is ordered, adjudged and decreed that said agreement of March 16th, 1933, be and the same is hereby approved as to form and contents.

"It is further ordered, adjudged and decreed that in view of said agreement of March 16th, 1933, that the defendant, T. Lyell Puckett, shall pay to the plaintiff as and for the support and maintenance of the plaintiff and the minor child of said parties, Barbara Lyell Puckett, the sum of two hundred and fifty ($250) dollars per month. * * *"

On August 1, 1940, respondent served and filed in the superior court a "notice of motion to modify interlocutory and final judgments of divorce and related matters," by which she sought permission to remove the minor child of the parties from the State of California so that such child might receive collegiate education at the University of Arizona. This motion was supported by respondent's affidavit, and in opposition thereto appellant filed his affidavit. After hearing upon said motion, the court made its order granting the same and modifying the interlocutory and final decrees as prayed.

On August 21, 1940, appellant served upon respondent and filed in the superior court a written notice of motion to modify the provisions of the decree awarding the sum of $250 per month to respondent for the support and maintenance of herself and the minor child. When this motion came on for hearing and appellant had called his first witness, respondent objected to the introduction of any evidence whatsoever in support of appellant's motion upon the ground that the court was without power or justification to modify the decrees in the manner requested for the reason that the award of $250 per month to respondent, having been made pursuant to a property settlement agreement, was not subject to modification except as provided by the terms and conditions of the property settlement agreement itself.

Concurrently with the hearing of the last-mentioned motion there was presented to the court a motion of respondent, filed September 12, 1940, petitioning "for costs and attorney's fees in reference to the application of the plaintiff" (respondent) "for modification of the interlocutory and final judgments of divorce relative to the place of schooling of the minor child of the parties, and relative to the pending application on the part of the defendant for a modification of said judgments to reduce the monthly payments required of the defendant to be made to the plaintiff." Upon submission of the matters last above mentioned, the court, on September 26, 1940, entered its order sustaining the objection to the introduction of any evidence in support of appellant's motion to modify the decrees relative to the payment of $250 per month to respondent and denying said motion. In the same order the court granted respondent's motion for the allowance to her of attorney's fees and costs and directed appellant to pay to plaintiff the sum of $100 therefor. It is from such order that this appeal is prosecuted.

Two questions are presented to us by this appeal: (1) Was the court without jurisdiction to modify the award for the maintenance and support of respondent and the minor child of the parties? (2) Was the court without jurisdiction to make the order for payment of attorney's fees and costs?

[1-3] In connection with the first query, respondent urges that the payment of $250 monthly from appellant to respondent was being made solely by and through the provisions of a property settlement agreement, and is therefore subject to modification only as provided for by the terms of the contract. With this claim we are not in accord. The contract in question was entered into either prior to or during the pendency of the divorce action, but at all events prior to the entry of the decree. That such contract was executed by both parties thereto in contemplation of a divorce proceeding is evidenced by the fact that it was therein provided that should respondent thereafter marry a person other than the appellant, so much of such monthly payment as was utilized for the support of the wife should abate, and only such monthly sum should be paid thereunder as would be adequate for the support of the minor child, which amount would be agreed upon between the parties, or in the event of their inability to agree, the sum to be paid should be determined by a court of competent jurisdiction following notice to the husband of such judicial proceeding. Without question, the trial court in the divorce proceeding was authorized to deal with the matters covered by the agreement and render judgment thereon, to the extent, at least, of properly providing for the support and maintenance of the wife and minor child, should the court find, as it did, that the husband was guilty of the charges preferred against him in the divorce action. The mere fact that the parties chose to stipulate to a decree as to property matters and support of the wife and child did not deprive the court of jurisdiction to deal with such matters in its decrees. Furthermore, it cannot be and is not questioned upon this appeal but that the court was clothed with jurisdiction not only to enforce but to modify the provisions contained in the decrees relative to the support of the minor child during her minority. True, in the instant case the court approved the agreement between the parties, but it did more than that. It specifically provided in the decrees that pursuant to the intention of the parties appellant husband was ordered and directed to pay to the wife the sum of $250 monthly for her support and that of the minor child. Thus this order became a mandatory judgment, for a violation of which the husband could have been punished as a contemnor. The order for the payment of such sum monthly, in other words, became an operative part of the divorce decree and did not thereafter remain merely a part of a contractual obligation between the parties enforceable only by ordinary contract remedies.

In an exhaustive and exceptionally well considered and reasoned opinion prepared by Mr. Justice Carter, the Supreme Court in the case of Plummer v. Superior Court, 20 Cal.2d ——, 124 P.2d 5, at page 9, said:

> "In those cases where it is the intention of the parties and the court to have certain provisions of such an agreement constitute a part of the decree or judgment and made enforceable as such, the court may set forth such provisions in the decree and provide therein that the same be performed. This is the usual practice and when it is followed all doubt as to the effect of such provisions is removed."

[4] In the case at bar we therefore hold that the court, having in its decrees specifically and definitely ordered the performance of the provisions of the property settlement agreement relative to support and maintenance of the wife and minor child, it was clothed with jurisdiction to enforce such provisions, and consequently to modify the same. Petry v. Superior Court, 46 Cal.App.2d 756, 116 P.2d 954.

[5-7] We come now to a consideration of the second and final question raised on this appeal, as to the jurisdiction of the court to order payment of counsel fees. The law is well settled that the court is without power to award counsel fees for professional services already performed, his holding being based upon the reason that such an allowance for past services is "clearly not necessary to enable the wife * * * to prosecute * * * the action." Smith v. Superior Court, 89 Cal.App. 177, 186, 264 P. 573, 577. But we are not here concerned with the prosecution of a divorce action instituted by the wife. On the contrary, a final decree of divorce had been entered for some six years when on August 1, 1940, respondent wife filed a notice of motion to modify the interlocutory and final decrees in regard to the removal of the minor child from the State of California to Arizona for completion of her college education. This motion was opposed by appellant, and came on for hearing on August 15, 1940, at which time the court granted the same. On the last-named date appellant filed his motion to modify the decrees by reducing the monthly payments thereunder. On September 4, 1940, respondent wife filed her motion for allowance of attorney's fees "in reference to the application of the plaintiff for modification of the interlocutory and final judgments of divorce relative to the place of schooling of the minor child of the parties and relative to the pending application on the part of the defendant for a modification of said judgments to reduce the monthly payments required of the defendant to be made to the plaintiff." This motion was noticed for hearing on September 5, 1940, but the ruling thereon was withheld by the court until September 26, when the order was made denying appellant's motion to modify the decrees so far as the monthly payments were concerned, and at this time the court made its award of attorney's fees to respondent wife. Admittedly, therefore, at the time respondent moved the court for an allowance of fees, the professional services rendered in connection with her motion for modification of the decrees in connection with the education of the child had been fully performed; but such motion for an award of attorney's fees to defend against the husband's attempt to modify the decrees in regard to the monthly payments for support was timely because it was not made to assist her in the "prosecution" of any phase of the case, but on the contrary, was to enable her to defend against the motion for modification initiated by the husband. The court was therefore empowered to make such an award in an amount deemed reasonable for the services being performed subsequent to the filing of the husband's motion to modify the decrees; but not for services already performed in prosecuting the wife's motion for modification.

The order appealed from is reversed, and the cause remanded, with directions to the court below to proceed with a hearing and determination upon the merits of defendant's motion of August 15, 1940, to modify the decrees with reference to the monthly payments ordered by such decrees, and also to make such award of attorney's fees, if any, which the court may determine to be reasonable to enable the plaintiff to defend against such last-named motion.

YORK, P. J., and DORAN, J., concurred.

53 Cal.App.2d 14

WILLIAMS v. KAWANAMI.

RICHFIELD OIL CO. v. SAME.

Civ. 2819, 2820.

District Court of Appeal, Fourth District, California.

June 25, 1942.

Rehearing Denied July 20, 1942.

See 127 P.2d 996.

1. Automobiles 🔑244(12)

Where automobile struck rear of truck, which had been driven to center of highway preparatory to making left turn at intersection, evidence that truck driver failed to give a warning of intention to turn, that he started to turn a considerable distance before he reached intersection, and that he stopped on two occasions in the center of the highway with his truck angling across highway, sustained finding that truck driver was negligent.

2. Appeal and error 🔑1008(1)

Where automobile struck rear of truck, which had been driven to center of highway preparatory to making left turn at intersection, whether driver of automobile was guilty of contributory negligence on ground that he was traveling too close to another automobile which preceded him, and which was following the truck, was a question of fact for the trial court.

3. Appeal and error 🔑1008(1)

Where automobile struck rear of truck, which had been driven to center of highway preparatory to making left turn at intersection, whether there was causal connection between automobile driver's negligence, if any, in traveling too close to an automobile which was preceding him, and which was following the truck, and the collision, was a fact question for the trial court.

4. Appeal and error 🔑1008(1)

Where automobile struck rear of truck, which had been driven to center of highway preparatory to making left turn at intersection, whether automobile driver was guilty of contributory negligence on ground that he was driving too fast near intersection and on ground that he attempted to pass to the left of the truck within 100 feet of an intersection, in violation of the vehicle code, was a fact question for the trial court. Vehicle Code § 530(b), St.1939, p. 2198.

5. Appeal and error 🔑1008(1)

Where automobile struck rear of truck, which had been driven to center of highway preparatory to making left turn at intersection, whether automobile driver was guilty of contributory negligence in attempting to pass the truck on the right when to do so might have required automobile driver to drive on the shoulder of the highway was a fact question for the trial court. Vehicle Code, § 529(b), St.1939, p. 2198.

Appeals from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Actions by Woodruff Irvine Williams and by the Richfield Oil Company against G. K. Kawanami, to recover for injuries sustained by Woodruff Irvine Williams and for damage to an automobile owned by the Richfield Oil Company when the automobile collided with a truck owned and operated by the defendant. The actions were consolidated for trial. From judgments in favor of the plaintiffs, the defendant appeals.

Judgments affirmed.

Harry W. Horton and Reginald L. Knox, Jr., both of El Centro, for appellant.

Clarence B. Smith, of El Centro, for respondents.

BARNARD, Presiding Justice.

These two cases arose out of a collision between an automobile owned by Richfield Oil Company and driven by its employee, Williams, and a small truck owned and operated by the defendant. One action involved personal injuries suffered by Williams and the other damages to the car owned by the oil company. The two cases were consolidated for trial. The court, sitting without a jury, found in all respects in favor of the respective plaintiffs and separate judgments were entered from each of which the defendant has appealed. The two appeals have been presented upon one set of briefs and, for convenience, we will refer to Williams, the driver of the car, as the respondent.

The accident happened on December 14, 1939, on U. S. Highway No. 99, about three miles north of Calexico and a short distance south of the intersection of that highway with Jasper Road. At the place in question Highway 99 runs north and south and consists of a pavement 22 feet wide with a white line down the middle and with 5-foot oiled shoulders on each side. Jasper Road is a graveled county road which intersects this highway at right angles.

Shortly after noon on this occasion a number of employees of the oil company left Calexico on their way to El Centro in two cars, one driven by the respondent and the other by one Cairns. The respondent was following the car driven by Cairns and they proceeded north on Highway 99 at a speed of between 35 and 40 miles per hour. As they neared the intersection with Jasper Road Cairns was following appellant's truck, which was also proceeding north. Cairns started to pass the truck on the left but observing that appellant was moving over into the center of the road Cairns swerved and passed the truck on the right. When Cairns started to pass the appellant the respondent was about 75 feet behind Cairns. The respondent did not see the truck until Cairns was passing it, and when Cairns had succeeded in passing the truck the respondent was within 50 feet of it. The appellant, who had been moving slowly, stopped his truck at an angle across the highway with his left front wheel at the white line or just past the white line. Seeing him stopped there, the respondent started to pass the truck on the left but just then the appellant drove ahead about three feet and again stopped with his truck at an angle of 45 degrees across the highway. When the respondent saw the appellant start up after having first stopped he swerved and attempted to pass on the right of the truck, and also tried to stop, but the left front of his car came into contact with the right rear corner of the truck, causing the damages in question. The respondent, who had been travelling at from 35 to 40 miles an hour, slowed to from 25 to 28 miles an hour when he saw the truck. When he saw the appellant again move forward, and about the time he swerved to the right, he put on his brakes but was unable to stop.

The evidence is, of course, sharply conflicting. The appellant testified that he was moving over to the center of the highway in order to turn west at this intersection, that he started to pull over about 10 feet south of the south edge of the intersection, and that his truck was well within the intersection when the collision occurred. According to other evidence in the record the collision occurred somewhere from 75 to 100 feet south of the south line of the intersection. There is ample evidence that the appellant gave no arm signal indicating his intention to turn left at this intersection.

[1] Appellant's first contention, that there is no evidence of negligence on his part, requires little consideration in view of the evidence that he failed to give a warning of his intention to turn, that he started to make the turn a considerable distance before he reached the intersection, and that he stopped on two occasions in the center of this highway with his truck angling across the road. Upon sufficient evidence the court found he was guilty of negligence in these and other respects.

Appellant's main contention is that the respondent was guilty of contributory negligence as a matter of law. It is asserted that the respondent was guilty of negligence in that he had been driving too close to Cairn's car, which preceded him; that he was going too fast; that he violated section 530(b) of the Vehicle Code, St.1939, p. 2198, in attempting to pass the truck within 100 feet of the intersection; that he violated section 529(b) of the Vehicle Code, St.1939, p. 2198, in attempting to pass the truck upon the right when to do so would make it necessary for him to drive upon the shoulder of the highway; that he did not sound his horn; and that being himself negligent in these various respects he could not rely upon or invoke the sudden peril rule.

[2-5] It may first be observed that the evidence is conflicting with respect to whether the respondent sounded his horn. Whether or not the respondent had been traveling too close to Cairn's car was a question of fact, as was also the question as to the causal connection of such negligence, if any, with the happening of the accident. The argument that the respondent was going too fast is based upon the contention that the collision occurred within 100 feet of the intersection and that this was an obstructed corner wherein a speed limit of 15 miles an hour would apply. A great deal of argument is presented as to whether or not this was an obstructed corner and whether the court properly found that it was not. We do not regard those matters as material here. The evidence was conflicting as to whether or not it was an obstructed corner and, assuming that it was, the collision occurred before the respondent reached the intersection, there is nothing to conclusively show that he could not have slowed to 15 miles an hour by the time he reached the intersection, and nothing in this connection can support a finding of contributory negligence

as a matter of law. Whether the respondent was guilty of negligence in attempting to pass on the left within 100 feet of an intersection and in attempting to pass on the right where it might have been necessary to swing out on the shoulder, are also questions of fact. The matter of proximate cause presented a further question of fact. If the evidence on behalf of the respondent, which the trial court accepted, is taken as true, the respondent was suddenly confronted with a perilous situation caused by the acts of the appellant in starting to make this turn too soon and without warning, in stopping and starting up and again stopping with his truck across the highway at a time when the other cars were approaching. Conceding that a close question of fact was presented with respect to contributory negligence on the part of the respondent, and further assuming that the finding thereon could well have been the other way, it can not be held, as a matter of law, that there was such contributory negligence. The question was one of fact for the trial court and the evidence sustains the material findings as made.

The judgments are affirmed.

MARKS and GRIFFIN, JJ., concurred.

In re RUSSELL'S GUARDIANSHIP.

CLARK v. BOSWORTH.

Civ. 11859.

District Court of Appeal, First District, Division 2, California.

June 23, 1942.

Rehearing Denied July 23, 1942.

Hearing Granted Aug. 20, 1942.

1. Insane persons 🔑38

On petition to remove guardian of incompetent, evidence was insufficient to support charges that guardian was guilty of fraud, deceit, and misrepresentation, in procuring order of appointment.

2. Insane persons 🔑38

On petition to remove guardian of an incompetent on grounds stated in statute specifying the grounds for removal of a guardian, the trial should have been conducted on the issues framed in the pleadings, and not on ground that order of appointment of guardian should be vacated because of irregularities in the order of appointment, since such attack must be made in a motion to set aside the order of appointment. Probate Code, § 1580(1–3, 5).

3. Insane persons 🔑38

On petition to remove guardian of an incompetent, on ground that guardian had an interest adverse to the faithful performance of his duties, within meaning of statute specifying grounds for removal of a guardian, the guardian's interest or unsuitability was required to be determined as of the time of the order of appointment, and it was not sufficient that guardian might have had an adverse interest or was unsuitable after his appointment. Probate Code, § 1580(3, 5).

4. Insane persons 🔑38

The fact that a trustee of a fund to be applied to a minor's support is expressly preferred by statute for appointment as guardian of a minor is persuasive as indicating that the Legislature did not intend that, because the guardian of an incompetent was a trustee for the incompetent, the guardian should be removed under the statute specifying the grounds for removal of a guardian of an incompetent or a minor. Probate Code, §§ 1407, 1580(1–3, 5).

5. Insane persons 🔑38

A trustee who was given the power to manage incompetent's estate and to pay the entire net income to the incompetent during her life time, with entire reversion to go to her estate at her death, did not have an "adverse interest" which would require his removal as guardian of incompetent under statute specifying the grounds for removal of a guardian. Probate Code, § 1580(5).

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Interest".

6. Insane persons 🔑38

The fact that attorneys, who represented guardian ad litem of incompetent in proceedings to have trust deed conveying incompetent's estate to incompetent's guardian prior to his appointment as guardian set aside, after guardian's appointment as guardian was being attacked because guardian was also incompetent's trustee, expected to be paid from incompetent's estate, did not establish that guardian was guilty of "waste" or "mismanagement" within meaning of statute specifying the grounds for removal of a guardian, since there could be no waste unless probate court improperly approved such expenditure. Probate Code, § 1580(1).

See Words and Phrases, Permanent Edition, for all other definitions of "Mismanagement" and "Waste".

7. Insane persons ⚷38

Where incompetent's realty had been rented for $750 a month, and when it became vacant incompetent's guardian offered to rent it for $500 a month, but real estate agents were not able to procure a tenant, guardian was not guilty of "waste", "mismanagement", "failure to perform his duties", or "incapacity to perform his duties suitably" within meaning of statute specifying grounds for removal of guardian. Probate Code, § 1580(1–3).

See Words and Phrases, Permanent Edition, for all other definitions of "Failure to Perform His Duties" and "Incapacity to Perform His Duties Suitably".

8. Insane persons ⚷38

The fact that guardian of incompetent failed to include in his inventory certain jewelry, silverware, books, and similar articles, did not constitute "fraud" requiring guardian's removal, where articles were of inconsiderable value, and guardian thought he had told his attorneys about the articles when they prepared the inventory.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

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Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the guardianship of the person and estate of Lillian F. Russell, an incompetent person, wherein George M. Clark was appointed guardian of the person and estate of Lillian F. Russell. Katherine Russell Bosworth filed a petition for removal of the guardian. From a judgment removing the guardian, the guardian appeals.

Judgment reversed.

Morrison, Hohfeld, Foerster, Shuman & Clark, of San Francisco, for appellant.

Linforth, Cannon & Miller, of San Francisco, William C. Stein, of Los Angeles, and Long & Levit, of San Francisco, for respondent.

NOURSE, Presiding Judge.

The business affairs of Mrs. Lillian F. Russell, an elderly woman who owned property worth approximately $350,000, were for many years managed by an agent named Williams. On April 8, 1937, Mr. Williams advised Mrs. George M. Clark, a first cousin and one of Mrs. Russell's two surviving next of kin, that it was difficult for him to continue with this responsibility because Miss Montgomery, the nurse and companion of Mrs. Russell, would not permit him to discuss business matters with her. Subsequently Mrs. Clark's husband, George M. Clark, visited Mrs. Russell and Miss Montgomery at the former's Carmel home, and they agreed that he should replace Mr. Williams as the business representative. His then attorney prepared and Mrs. Russell executed a deed of trust dated May 5, 1937, in which she conveyed all her property to him as trustee. This deed gave him power of management and control, together with the right to sell the property and invest the proceeds. The entire net income was to be paid to Mrs. Russell during her lifetime, and, of course, the entire reversion would go to her estate. Williams was notified of the execution and recordation of this deed, but he refused to comply with Clark's request for all documents relating to Mrs. Russell's business affairs and possession of her property unless Clark would supply him with a physician's certificate to the effect that Mrs. Russell was competent at the time of the execution of the deed. On August 19, 1937, Miss Montgomery filed a petition to have Mrs. Russell declared incompetent, asking that Mr. Clark be appointed guardian of her estate as well as of her person. This petition was granted. At the hearing the court was not advised of the trust deed. On April 14, 1938 the present petition for the removal of the guardian was filed. Subsequently Clark filed a purported revocation of the trust deed, signed in his capacity as guardian and again as trustee. During the court's vacation, which interrupted the hearing on this petition, Mrs. Clark's sister, Mrs. Juliet B. Lane, filed a petition for the appointment of a guardian ad litem. The guardian so appointed brought suit against Clark to have the trust terminated, and a judgment was entered vacating and setting aside the deed of trust. Counsel for Mrs. Lane testified that the petition for the appointment of a guardian ad litem was prepared by Clark's counsel.

In granting the petition for removal of the guardian the trial court found that Mrs. Russell was incompetent at the time the trust deed was executed, and that Mr. Clark was aware of that fact; that Clark accepted his appointment as guardian knowing that the court was not advised of the trust; that Clark took no steps to terminate the trust or withdraw from it after his appointment as guardian until the petition for removal was filed; that the purpose of the suit by the guardian ad litem was to remove the adverse position which petitioner claimed Clark was occupying; that Clark verified his first inventory, though he knew it did not include certain personal property in his possession belonging to the estate; that Clark failed to use reasonable diligence to lease certain real property in Stockton belonging to the estate; that in his first account Clark obtained credit for certain disbursements made prior to his appointment as guardian, and failed to inform the court of such inclusions; that Clark was not a proper person to be guardian of the person of Mrs. Russell because her mental and physical condition required personal attention of a delicate and disinterested nature. As conclusions of law, the court found that Clark occupied a position adverse to the interests of Mrs. Russell and had violated Probate Code, section 1580, subdivisions (1), (3), (5) and the last portion of subdivision (2).

The litigation was begun in April, 1938, by a sister-in-law of Mrs. Russell who had been paid a monthly stipend by the incompetent which was discontinued by the guardian soon after his appointment. The petition was based upon section 1580 of the Probate Code. An answer having been filed the cause went to trial on May 10, 1938 and testimony was offered by petitioner on these three issues—the competency of Mrs. Russell when the deed of trust was executed, the adverse interest of the guardian, and whether he had used due diligence in leasing certain real property of the estate. The appellant stipulated that Mrs. Russell was incompetent when the deed of trust was executed, but objected to all evidence relating to that issue and to his knowledge of her mental condition upon the ground that it was not relevant to the causes for removal specified in the code section. The cause was continued for hearing to June 23, 1938, and at the opening of the session counsel for appellant renewed his motion to strike out this testimony on the grounds stated. During the course of the argument counsel for the respondent stated "Counsel objected to all the testimony," and the trial court agreed that such was the case. After argument the court again failed to rule on the motion and stated that a ruling would be deferred until the testimony was in. But testimony was then taken tending to show that both before and at the time of the execution of the deed of trust Mrs. Russell was incompetent, and this testimony was received for the purpose, as stated by the trial court, of showing that the petitioner knew, or should have known, the condition of Mrs. Russell when he assumed to act under the deed. At the close of the testimony of the third witness called for this purpose the motion to strike was renewed, the counsel for petitioner thereupon stipulated that all the testimony of the three witnesses called to prove the state of mind of Mrs. Russell and appellant's knowledge of her condition should be stricken from the record and the issue eliminated. Other testimony was taken at this hearing upon other issues and, upon June 30, 1938, the cause was submitted for argument. New counsel were then substituted for the petitioner and, upon their motion and over the objection of appellant, petitioner was relieved of the stipulations theretofore made and the whole cause was reopened for trial. A great part of the testimony taken at the second trial related to the issue upon which respondent puts her main reliance—the "fraud" of appellant in concealing from the probate court the existence of the deed of trust at the time of his appointment as guardian.

It is appellant's contention on this appeal that this evidence relating to his conduct in procuring the letters of guardianship and his failure to disclose the trust relation at the time of his appointment is a false issue in a proceeding for removal under section 1580 of the Probate Code and that its injection into the trial was prejudicial. The respondent contends that it was both proper and non-prejudicial. Respondent states her position in this way: "The grounds or causes of removal relied upon, and found by the court to exist, divide themselves into two classes, (1) whether the court was deceived and imposed upon in appointing Clark guardian; (2) whether, after his appointment, the 'causes' specified in Subdivisions 1, part of 2, 3 and 5 of section

1580 of the Probate Code, or any of them existed."

[1, 2] We should first direct attention to the propriety of the attack upon the appointment of the guardian as an issue in the proceeding for his removal. But at this time it should be said that, though respondent's briefs teem with charges of "fraud," "deceit" and "misrepresentation" there is no evidence to support the charges, and no findings were made supporting the assertions. The trial should have been conducted upon the issues framed in the pleadings—that appellant should be removed for grounds stated in section 1580 of the Probate Code—not that the order of appointment should be vacated because of fraud or other irregularities in the order.

The code section specifies as grounds for removal of a guardian:

"(1) For waste or mismanagement of the estate, or abuse of his trust;

"(2) * * * for continued failure to perform his duties;

"(3) For incapacity to perform his duties suitably; * * *

"(5) For having an interest adverse to the faithful performance of his duties."

It is apparent from a reading of the section that irregularities in the proceedings leading to the appointment of a guardian are not included as a ground for removal. It is appellant's contention that such form of attack must be made in a motion or suit to set aside and vacate the order of appointment. In this contention appellant is sustained by the great weight of authority. In Re Wall's Estate, 48 Cal. App.2d 8, 119 P.2d 165, this court held that a motion to vacate an order appointing a guardian made long after the expiration of the period prescribed by section 473 of the Code of Civil Procedure was governed by all the rules applicable to collateral attack. To the same effect is In re Marmaduke's Estate, 130 Cal.App. 449, 453, 20 P. 2d 69, 965. In the early case of Guardianship of Raynor, 74 Cal. 421, 16 P. 229, an order removing a guardian was reversed because based upon a ground not specified in the code section; and in Re Estate of Atkins, 121 Cal.App. 251, 255, 8 P.2d 1052, it was held that when a guardian has once been appointed the letters cannot be revoked for other than the reasons specified in the code. However, the Supreme Court, in Re Guardianship of Howard, 218 Cal. 607, 610, 24 P.2d 486, expressly declined to hold that the code section furnishes the exclusive grounds for removal, and has thus left the question in some doubt. But since that decision In re Guardianship of Sturges, 30 Cal.App.2d 477, 501, 86 P.2d 905 and In re Guardianship of Sherman, 42 Cal. App.2d 251, 108 P.2d 717 adhered to the rule that the code section was controlling.

The respondent seeks to escape this uncertainty by the contention that the matters occurring prior to the appointment are admissible here to show appellant's "incapacity to perform his duties suitably" and for "having an interest adverse to the faithful performance of his duties." The discussion of these points is weakened by the unwarranted repetitions of counsel's charges of fraud. There is no fraud in the case except in respondent's briefs. If respondent's case rested upon fraud we should expect to find some evidence and a finding concerning it. The evidence plainly shows that the appellant accepted the deed of trust for the purpose of managing the estate for the benefit of the incompetent and that it was in the nature of a general power of attorney substituting appellant for Williams, who theretofore had acted as agent for the incompetent having charge and control of her property. This deed purported to convey to the trustee all property owned by the trustor for the sole purpose "to manage and control said trust estate and invest and reinvest the same and to pay the whole of the net income from said property to Lillian F. Russell, party of the first part herein, during her lifetime," and provided that the trustee should "hold, manage and control the said property during the existence of the trust estate." Thus the trust terminated upon the death of the trustor and the entire reversion would become a part of her estate, without any beneficial interest going to the trustee. It is also disclosed that the appellant did not at any time act under the deed, did not take possession of any of the property of the incompetent, and received no benefits from the transaction. It appears that the deed of trust was executed on May 5, 1937; that appellant was appointed guardian August 26, 1937; that on March 4, 1938 respondent commenced this proceeding for his removal as guardian; that on October 5, 1938 a final judgment was entered terminating the trust. The trial of the proceedings for removal of the guardian was commenced May 10, 1938; after several partial hearings and continuances, and amendments to the petition, including allegations relating to the judgment terminating the trust, it was finally submitted and findings and judgment were entered January 4, 1940. It is thus apparent that when the cause was heard and determined the deed of trust was dead and did not at that time create an adverse interest in the guardian.

[3] This presents the first question argued by appellant—whether the findings upon this issue support the conclusion of law that the guardian had "an interest adverse to the faithful performance of his duties," or that because of it he was incapable "to perform his duties suitably." Preliminarily it must be noted that this "interest" or unsuitability, must be determined as of the time of the judgment. It is not sufficient that the guardian might have had an adverse interest ten years before his appointment, or ten days before, or ten days after. The question is whether, when the cause is heard and determined, he has "an interest adverse to the faithful performance of his duties." The rule is well stated in Drake v. Green, 10 Allen, 124, 92 Mass. 124, where the court upheld an order refusing to remove an administrator because he had endeavored to take an advantage of the estate prior to his appointment. The court said: "In so deciding, we do not mean to adopt to its full extent the ground taken by the respondent, that the cause of removal must be in every case an evident unsuitableness arising since the appointment. *It must be an existing unsuitableness at the time when the petition for removal is heard.* For it is not enough to show that the administrator was unsuitable at the time he was appointed, without showing further that the disqualification has continued, or has been revived. *The appointment has been regularly made, and, if not appealed from, is valid and conclusive.* All parties in interest were notified according to law, and their remedy, if they were dissatisfied with the appointment, was by appeal. The person appointed, whether suitable to discharge the trust or not, has become the administrator, perhaps because no one took the trouble to prove his unsuitableness. *On a petition to remove him, the court does not reconsider the question whether his original appointment was proper. That has been adjudicated.* His qualifications when he was appointed may incidentally be introduced in evidence, in order to show what his present qualifications are. But if since his appointment he has not become a suitable administrator, he has become an unsuitable one, and may be removed for that cause upon petition, although the present unfitness may have existed before his appointment to an equal degree, and would have been a good cause for refusing to appoint him in the first instance." (Emphasis ours.) To the same effect is Odlin, Guardian, v. Nichols, 81 Vt. 219, 222, 69 A. 644, 645, where the court, in refusing removal of an executor, said: "When his competency is challenged on the score of interest, the question is to be considered with reference to the situation of the estate at the time. If his interest will not conflict with the duties still to be performed, there is no occasion for removal. The matter in which it was claimed that the rights of the petitioner would be jeopardized has been disposed of." And, in Murray v. Angell, 16 R.I. 692, 693, 19 A. 246, it was said: "* * * the purpose of a removal is not punishment for omitting to exercise a discretionary right, which he might properly, and as a general rule ought to, exercise, but the security and benefit of the estate. *For this reason, the alleged cause of unsuitableness must exist at the time of the removal. The court does not reconsider the question whether his original appointment was proper.*" (Italics ours.) For these reasons we must hold that all evidence relating to the execution of the deed of trust must be confined to the single issue whether, *at the time of the hearing,* appellant was unsuitable to perform his duties as guardian.

[4] But it should be said here that it is a matter of doubt whether the existence of the trust relation would have been a ground of attack upon the order of appointment. Certainly there was no evidence, and no finding, that if this relation had been disclosed to the probate court it would have caused that court to refuse to appoint the appellant as guardian. And it is not clear that, because of the peculiar nature of the trust, the relation would have been a good ground alone for denying the application, if that relation had been disclosed at that time. Where there is no other beneficiary of a trust, but where the trustor and the sole beneficiary are one, the position of the trustee is precisely the same as that of a "trustee of a fund to be applied to the child's support," who, in section 1407 of the Probate Code, is expressly preferred for appointment as guardian of a minor. This statutory preference given such a trustee for appointment in the case

of a minor is persuasive as indicating that the Legislature did not intend the relation to be a cause for removal under section 1580, because the latter section applies to guardians of both incompetents and minors.

[5] But, aside from this, we are unable to hold that the interest of the appellant under the deed of trust was an "adverse" interest in contemplation of the code section. As trustee under the deed he was protecting her rights alone. As guardian of the estate he was doing the same thing. Persuasive evidence that there was no adverse interest is the conceded fact that for more than two years nothing was done or attempted under the deed of trust, and no claim of right was asserted under its terms.

For these reasons the conclusion of law upon which the judgment is based—that from the time of his appointment up to September 29, 1938, appellant occupied a position adverse to the interest of the ward—is not supported by the findings and is contrary to the only relevant evidence.

The trial court also drew the conclusions of law, based upon these same findings of fact, that the appellant was incapable of performing his trust suitably, and was guilty of an abuse of his trust as guardian. These conclusions, all based upon the evidence of the deed of trust, the circumstances under which it was executed, and the failure to disclose it when the letters of guardianship were granted, must fail for the reasons heretofore stated.

[6] Findings were made disclosing the proceedings leading to the appointment of a guardian ad litem and the proceedings instituted by him to cancel the deed of trust. And it was found that the attorneys who represented the guardian ad litem expected to be paid for their services from the estate. From these findings the conclusion of law was drawn that appellant was guilty of waste or mismanagement of the estate, or of incapacity to perform his duties as guardian. The simple answer is that there could be no waste unless the probate court improperly approved the expenditure, and that the mere conjecture of error in this respect cannot support the conclusion of law.

[7] The only finding of fact which is attacked by the appellant as not sustained by the evidence is that relating to his failure to rent the real property situated in Stockton to the advantage of the estate. This finding is relied on to support the conclusion that the guardian was guilty of a "continued failure to perform his duties." The evidence on this issue proved nothing more than that various real estate agents, unsuccessful in procuring from appellant an exclusive contract to handle the property, ventured the opinion that he had been negligent in its management. The property referred to had been rented for $750 a month. When it became vacant the appellant offered to rent it for $500, but none of the witnesses was able to procure a tenant. Some testified that the estate should expend $25,000 in renovation of the building. All testified that they had no tenant ready to take the property. The trial court asked counsel for respondent what he thought the appellant should have done other than what the evidence showed he did do, but counsel made no answer. The evidence is wholly insufficient to show "waste or mismanagement," "failure," or "incapacity to perform his duties suitably."

[8] The trial court found that the appellant had failed to include in his inventory certain jewelry, silverware, books and similar articles, but that he thought he had told his attorneys about these articles when they prepared the inventory, and that they were of such inconsiderable value that it was not necessary to include them. The jewelry and silverware were safely deposited with a bank in Pacific Grove, had been carefully inventoried by the manager of the bank in appellant's presence, and both retained duplicate copies of the list of articles. The contents of the safe deposit box as shown by this list were intact at the time of the hearing. The books were moved to appellant's home and were of little if any value. The trial court accepted the explanations of appellant and did not find that the failure to include these articles in the inventory was wilful, intentional, or a fraudulent concealment. Respondent's argument that a fraud was committed by appellant is not supported by the findings made and is not supported by any competent evidence.

Other grounds urged are either so unsubstantial or are covered by what is said herein that it is unnecessary to prolong the opinion by giving them special consideration. The views herein expressed as to the application of section 1580 of the Probate Code require a reversal of the order removing appellant as guardian of the person of the incompetent as well as the portion removing him as guardian of the estate. In re Guardianship of Sherman, 42 Cal.App.2d 251, 253, 108 P.2d 717.

The judgment is reversed with costs to appellant chargeable to the estate.

STURTEVANT and SPENCE, JJ., concurred.

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52 Cal.App.2d 379

BESSINGER v. GROTZ.

Civ. 13282.

District Court of Appeal, Second District, Division 3, California.

June 26, 1942.

Appeal and error 🔑**80(3)**

Where court rendering judgment granting plaintiff leave to redeem property sold to defendant under judgment foreclosing mortgage found that defendant, during redemption period, contracted to sell property to others and decreed that payments made under contract were for use and occupation of property but where findings did not state amount of money received by defendant under the contract and did not find that defendant had not received other moneys for use and occupation of land, there were judicial matters to be determined by referee as against contention that judgment was appealable because no judicial action remained to be taken.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 126 P.2d 355.

James R. Jaffray, of Los Angeles, for appellant.

Robert N. Baker, of Santa Monica, for respondent.

PER CURIAM.

By petition for rehearing appellant points out that the findings state the exact price, the amounts and times of monthly payments and the rate of interest specified in the contract of sale made by defendant, and the judgment decrees that payments under that contract are for the use and occupation of the property in question, from which appellant seeks to draw the conclusion that no judicial action remains to be done by the referee or the court. But the findings do not state the amount of money received by the defendant under this contract, nor do they find that the defendant has received no other sums for use and occupation of the land. Hence there are matters yet to be determined by the referee, and since the judgment provides for a settlement of the accounting taken by the referee, it obviously contemplates further judicial action by the court in making such settlement.

The petition of appellant for rehearing is denied.

SCHAUER, P. J., WOOD, J., and SHAW, J. pro tem., concur.

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52 Cal.App.2d 804

KORT et al. v. CITY OF LOS ANGELES et al.

Civ. 13284.

District Court of Appeal, Second District, Division 3, California.

June 23, 1942.

Hearing Denied Aug. 20, 1942.

1. Municipal corporations 🔑**601**

A city has power to enact a general zoning ordinance covering entire city and following a comprehensive, fairly conceived, and carefully studied plan.

2. Municipal corporations 🔑**611**

The conduct of the business of a public accountant was not subject to regulation by a city in exercise of "police power".

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

3. Municipal corporations 🔑**120**

A general zoning ordinance could not be dissected and considered as a multitude of ordinances having no relation to general scheme of zoning.

4. Municipal corporations 🔑601, 602

That plaintiff's business as a public accountant was lawful, inoffensive, and dignified was not ground for invalidating a general zoning ordinance in so far as it prohibited plaintiff from maintaining a sign advertising the business in front of plaintiff's dwelling house and from carrying on the business at that place.

5. Municipal corporations 🔑626

The discrimination under a general zoning ordinance which permitted the businesses of operating hotels and private clubs and rooming and boarding houses with signs advertising such places, but which prohibited plaintiff from maintaining a sign advertising plaintiff's business as a public accountant in front of plaintiff's dwelling house and from carrying on such business at that place, was not unreasonable and did not invalidate ordinance, where district in which house was located was zoned for residential income uses.

6. Municipal corporations 🔑626

Residential income use is a proper classification in a zoning ordinance, as distinguished from private residential, business, and manufacturing uses, and it is permissible to exclude, from a residential income district, businesses unidentified with residential uses, while permitting therein hotel, apartment house, rooming, and boarding house businesses.

7. Municipal corporations 🔑625

There is nothing unreasonable in the mere zoning of one side of a street for business and the other side for residential uses or in the allowance of small business communities where surrounding property remains zoned for residential uses, provided such zoning is a part of a comprehensive and reasonable scheme.

8. Municipal corporations 🔑122(4)

In suit to enjoin a city from enforcing provisions of a general zoning ordinance, evidence failed to sustain allegations of complaint alleging that plaintiff's property, while originally residential, had become essentially business in character.

9. Appeal and error 🔑1056(1)
Municipal corporations 🔑122(3)

In suit to enjoin a city from enforcing provisions of a general zoning ordinance on ground that changed conditions had transformed plaintiff's property from residential to a business character, evidence offered by plaintiff to show that businesses were operated on nearby streets could properly have been considered by trial court, but exclusion of such evidence was not prejudicial where evidence, if received, would not have changed plaintiff's case.

10. Municipal corporations 🔑601

Where it is claimed that the character of a locality has been changed through gradual growth or development of a street or district, it is proper to allow a wide latitude of proof in order that the court may be as fully informed as possible as to extent and significance of such changed conditions.

11. Appeal and error 🔑1009(2)

In suit to enjoin a city from enforcing provisions of a general zoning ordinance on ground that changed conditions had transformed plaintiff's property from residential to a business character, a finding of the trial court, based upon sufficient evidence, as to suitability of property for residential uses, was conclusive as to that fact.

12. Municipal corporations 🔑63(1)

Where it is fairly debatable whether the determination by city authorities with respect to an application for a zone variance was an unreasonable, arbitrary, or unequal exercise of power, the court will not substitute its judgment for that of the legislative body.

13. Municipal corporations 🔑601, 625

The limitations imposed upon the use of plaintiff's dwelling house property by a general zoning ordinance which prohibited use of such property for carrying on plaintiff's business as a public accountant were not unreasonable or oppressive.

14. Injunction 🔑127

In suit to enjoin a city from enforcing provisions of a general zoning ordinance in so far as it prohibited plaintiff from carrying on his business as a public accountant at a dwelling house, evidence offered by plaintiff to show that one of the "accessories" of a hotel, apartment house, or private club was services of a public accountant, and that therefore plaintiff's business was countenanced by ordinance, was properly excluded, in view of definition of quoted word in ordinance.

15. Trial 🔑397(5)

Where facts as to which the trial court failed to make findings were not addressed to material issues, there was no necessity for findings thereon.

16. Injunction ⚿130

In suit to enjoin a city from enforcing provisions of a general zoning ordinance, a finding that character of plaintiff's property was and for many years had been residential was a sufficient determination of plaintiff's claim that property, while originally residential had become essentially business in character, and no more specific finding was necessary.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by Louis G. Kort and others against the City of Los Angeles, a municipal corporation, and others, to enjoin defendants from enforcing provisions of a general zoning ordinance in so far as it restrains plaintiff Louis G. Kort from maintaining a certain sign and from carrying on the business of a public accountant at such plaintiff's dwelling house. From an adverse judgment, plaintiffs appeal.

Affirmed.

Andrew J. Copp, Jr., of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and William Christensen and Bourke Jones, Deputy City Attys., all of Los Angeles, for respondents.

SHINN, Justice.

Plaintiffs appeal from an adverse judgment in an action brought against the city of Los Angeles and others to enjoin them from enforcing the provisions of a general zoning ordinance of the city insofar as it restrains plaintiff Louis G. Kort (hereinafter referred to as plaintiff) from maintaining a sign three feet by three feet having the notation "Public Accountant, Income Tax Service, Notary Public" in front of his dwelling house on a fifty-foot lot at 2437 Crenshaw Boulevard in said city, and from carrying on at said location the business so advertised. Plaintiff maintains an office as an accountant at another location in the city; he lives at the above described address, brings home work in the evening, which he attends to in a room containing ordinary household furniture, a desk, typewriter, and adding machine. He alleges that during the busiest time of the year, between January 1st and March 15th, no more than sixty of his clients come to his residence and that then they come singly and not in groups; he has no assistants or other personnel in his employ at the house. We do not understand from the pleadings or the briefs that the city questions plaintiff's right to do his accounting work at his home, but it is insisted by the city that the ordinance is violated in terms by plaintiff's carrying on the business of accountant upon the premises and by maintaining the sign advertising his business, as an incident thereto, contrary to a provision of section 12.07 of the Zoning Ordinance, which reads: "* * * and no lot or premises shall be used for any purpose, except as hereinafter specifically provided and allowed in this section," there being nothing in the action specifically allowing the business of accounting to be carried on at the location in question.

Crenshaw Boulevard is a main north and south traffic artery in the westerly part of Los Angeles. Plaintiff's property is located in a long block between Washington Boulevard and Adams Street, some 772 feet northerly from Adams and considerably more than twice that distance southerly from Washington; at those intersections there are business centers upon the corner lots and upon the intersecting streets, the one at Adams being the more extensive. The original ordinances zoning the city were adopted in 1921 and 1922 and were revised and placed in the Municipal Code in 1936, at a time subsequent to the expiration of building restrictions which had limited the use of property in the block, excepting the corner lots, to residential purposes.

Plaintiff's property is in zone R-4, in which, under the ordinance, property may be improved and used for single-family dwellings, private garages, hotels, apartments, rooming and boarding houses, private clubs, public dining rooms and restaurants in hotel buildings, with certain limitations, together with the usual "accessories" in connection with hotels and private clubs, including necessary garage accommodations for both private and other residential properties; also permitted are fraternity and sorority houses, churches, public and quasi public education institutions, with their usual "accessories" and garage accommodations. It is lawful to have in zone R-4 the office of a minister of religion, physician, dentist or healer, provided the room used as an office constitutes an integral part of the dwelling or apartment used as such person's home and contains complete housekeeping facilities; provided also that such office is not used for the conduct of the general practice of medicine, surgery, dentistry or healing other than as a religious vocation, although it may be used for emergency treatment with no assistants employed. The offices which are permitted may lawfully be advertised by a sign or placard having a surface area of not more than one and one-half square feet. It is lawful to use premises in said zone for farming, the keeping of domestic livestock, and the raising of poultry, rabbits, bees, pigeons, "or other similar enterprises which in the opinion of the Board [of Planning Commissioners] as evidenced by a resolution of record are no more objectionable to the particular community than the enterprises above enumerated, provided the same is not in violation of any ordinance, law or any section of this Code." (Mun.Code 12.04.) Dairies, stockyards, cattle feeding yards, horse corrals or stables except for private use, hog or goat ranches, hog or goat raising establishments or dog or cat breeding establishments are forbidden.

It is contended that the ordinance deprives plaintiff of property without due process of law and is therefore void. The several zones into which the city has been divided may be roughly described as providing for the following uses: (1) Single-family dwellings; (2) the uses permitted in zone 1 and also multiple dwellings, including duplexes and apartment houses; (3) the uses permitted in zone 2 and also fraternity houses, sorority houses, rooming and boarding houses; (4) the uses permitted in zone 3 and also hotels and private clubs with private dining rooms and restaurants in hotels having more than twenty guest rooms and with certain other restrictions; (5) in addition to the uses provided in zone 4, stores, shops and businesses, professional and business offices; (6) in addition to the uses allowed in zone 5, motion picture theaters, hospitals, sanitariums and similar uses; (7) in addition to the uses allowed in zone 6, automobile repair shops, dancing academies, night clubs, laundries, plumbing, etc.; (8) all other uses, with certain specified exceptions, usually classified as nuisances or quasi nuisances; and (9) all uses not prohibited by law or ordinance.

[1] It is not questioned that the zoning of the entire city followed a comprehensive, fairly conceived and carefully studied plan or that it is generally a valid enactment. The power of municipalities to enact such ordinances is too well understood to require repetition of general principles.

The argument against the validity of the ordinance proceeds upon several grounds, (1) that the uses which plaintiff is making of his property for the conduct of his business of accountancy and the advertising thereof by means of a sign in no way interferes with, and that their prohibition by the ordinance does not tend in any way to promote, the public health, morals, safety or general welfare; (2) that the ordinance unfairly discriminates against the business of public accountancy, which is prohibited while other businesses are permitted in the district; (3) that if the restrictions upon the use of plaintiff's property for business purposes were valid in the beginning they have become invalid because of changed conditions which have transformed the property in the district from residential to business property.

[2-4] It may be conceded that plaintiff's business is not one the conduct of which is subject to regulation by the city in the exercise of the police power, and that the ordinance would be invalid if its only purpose was to prohibit the practice of public accountancy in certain districts of the city, while permitting it in others. But the ordinance cannot be dissected and considered as a multitude of ordinances having no relation to the general scheme of zoning. The authority which the city exercises in adopting a general zoning ordinance is not the same one that it exercises in placing restrictions upon certain types of business because they are actual or potential nuisances, the latter power being one which was commonly used, before city planning became an established practice, in confining to certain districts businesses which were in themselves detrimental to the public safety, morals, health or general welfare. It is not a ground of invalidity of the ordinance that plaintiff's business is, as the court found, "lawful, innocent, inoffensive and dignified," for if restrictions on business uses of property could be invalidated upon that ground there could be no such thing as comprehensive city planning. Rehfeld v. City and County of San Francisco, 1933, 218 Cal. 83, 85, 21 P.2d 419; Jones

v. City of Los Angeles, 1930, 211 Cal. 304, 309, 295 P. 14; Zahn v. Board of Public Works, 1925, 195 Cal. 497, 234 P. 388; Id., 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074; see also 37 Harv.L.Rev. 834, 850.

[5, 6] Plaintiff points out that the businesses of operating hotels and private clubs with restaurants and dining rooms therein under certain conditions, apartment houses, rooming and boarding houses, with signs advertising the same, are permitted, and contends that this constitutes an unlawful discrimination against his business. There is a discrimination, of course, but it is one that is not unreasonable and it does not invalidate the ordinance. The district is zoned for residential income uses and all of the businesses enumerated are identified with residential uses of the property. We can conceive of no valid reason why it is not just as reasonable to exclude nonresidential business uses of property from a residential income district as it would be to exclude hotels, apartment houses, rooming and boarding houses from a single-family residential district. Residential income use is commonly recognized as a proper classification, as distinguished from private residential, business and manufacturing uses. It is therefore permissible to exclude from a residential income district businesses unidentified with residential uses, while permitting therein hotel, apartment house, rooming and boarding house businesses. Zahn v. Board of Public Works, supra; Feraut v. City of Sacramento, 1928, 204 Cal. 687, 269 P. 537; Acker v. Baldwin, 1941, 18 Cal.2d 341, 115 P.2d 455; Reynolds v. Barrett, 1938, 12 Cal.2d 244, 83 P.2d 29.

The ordinance in its present form might be construed as allowing poultry, rabbits, pigeons, etc., to be kept and raised as a business but it does not appear that there are any such businesses in the district or that they have not been prohibited by other ordinances of the city. Under the circumstances there is no need to discuss these provisions of the ordinance as might have been necessary if it had been shown that those businesses had grown up in the neighborhood.

[7, 8] Plaintiff's next contention is that by means of changed conditions the property in the block between Washington and Adams has become unfit for residential uses and is suitable only for business uses. The court found against this contention, the finding being "that the character of plaintiff's said real property is now and for many years last past has been residential." There was an abundance of evidence that the property in the block is valuable as residential income property, that there are some thirteen apartment houses in the block, many rooming and boarding houses, and that the same are well tenanted. As already stated, there is a somewhat extensive business district at Crenshaw and Adams and a less extensive one at Washington and Crenshaw. These alone do not destroy the residential character of the remainder of the property in this long block. There is nothing unreasonable or unsound in the mere zoning of one side of a street for business and the other side for residential uses or in the allowance of small business communities where the surrounding property remains zoned for residential uses, provided such zoning is a part of a comprehensive and reasonable scheme. (See cases cited above.) We think plaintiff's evidence wholly failed to sustain the allegations of the complaint that plaintiff's property, while originally residential in character, has become essentially business in character.

[9-11] Certain evidence offered by plaintiff to prove that changed conditions have transformed his and surrounding property into business property was excluded, and the rulings are assigned as error. Plaintiff offered to prove that on Crenshaw between Wilshire Boulevard on the north and Jefferson Boulevard on the south, outside of the block between Washington and Adams, for a distance of several miles there are located some 120 separate businesses. Photographs of a great many business buildings and centers in the same area were offered in evidence. The offered evidence was excluded, and the rulings are assigned as error. In the original zoning there were only four intersections zoned for business. At each of three intersections, Pico Boulevard, Washington Boulevard, and Adams Street, the four corner lots were zoned for commercial uses. Later a key lot south of Washington on Crenshaw was rezoned for business. All of the other business uses to the north of Washington and south of Adams came into being through amendments of the ordinance or through special zone variances. There would have been no impropriety in the court's considering the offered evidence. Where it is claimed that the character of

a given locality has been changed through the gradual growth or development of a street or district it would seem proper to allow a wide latitude of proof in order that the court be as fully informed as possible as to the extent and significance of such changed conditions. But we think the offered evidence was without evidentiary value in the present case, that the rulings were justifiable upon that ground and were not harmful to plaintiff's case. Conditions as they exist in the block between Washington and Adams were fully proved and, as we have seen, the court found that the property in that block still remains suitable and valuable for residential uses. If this is true despite the business centers at the intersections of Washington and Adams, it it difficult to see how the existence of other businesses and business centers more remotely located have had or could have had any different or greater effect upon plaintiff's property. The most that can be said in favor of plaintiff's argument in connection with the offered evidence is that there is a prospective or threatened conversion of his property and that which surrounds it, from residential to business property. This of course may take place or upon the other hand, the expansion of business uses may reach the saturation point and lie dormant for a long period of time. As a matter of fact, property north of Washington and south of Adams may be more suitable for business than for residential income uses, and plaintiff's property yet maintain the latter character, and we think the court's finding as to the suitability of plaintiff's property for residential uses, based upon sufficient evidence, is conclusive as to that fact. As we have pointed out, there would be no unlawful discrimination under those circumstances in the refusal to rezone plaintiff's property for business uses. Had the excluded evidence been received plaintiff's case would not have been changed in any material respect.

[12, 13] There is another feature of the case which may well have influenced the decision of the trial court and which should be mentioned, although it has no bearing upon the conclusions which we have stated. In 1938, while plaintiff was a tenant of the premises in question, he caused the owner thereof to apply to the city authorities for a zone variance which would have made possible the practice of his profession upon the premises. After a hearing in due course before the Board of City Planning Commissioners the application was denied and an appeal was taken to the City Council, where the action of the board was affirmed. Thereafter plaintiff purchased the property and subsequent to his purchase filed another application for zone variance, which met the same fate as the first one. All of this was established at the trial, with the result that the trial court was called upon to decide questions of the alleged unfair and discriminatory operation of the ordinance insofar as it affects plaintiff's property under present conditions, which had but recently been fully considered by the city authorities. It is a settled rule, as stated in the Zahn case, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. at page 1076, that under such circumstances, where it is fairly debatable whether the determination by city authorities was an unreasonable, arbitrary or unequal exercise of power, the court will not substitute its judgment for that of the legislative body. See also Vincent Pet. Corp. v. Culver City, 1941, 43 Cal.App.2d 511, 516, 517, 111 P.2d 433; Sunny Slope Water Co. v. City of Pasadena, 1934, 1 Cal.2d 87, 93, 94, 33 P.2d 672, and cases cited therein. Upon the facts, as found by the trial court, which are controlling as to the present character of plaintiff's property, the limitations upon the use of the property are not unreasonable or oppressive.

[14] Plaintiff sought to prove that one of the "accessories" of a hotel, apartment house or private club is the services of a public accountant, together with the maintenance of a sign advertising the availability of such services, and that his business is therfore countenanced by the ordinance. This evidence was excluded upon objection and the ruling is assigned as error. We think the evidence was properly excluded. While the usual accessories in connection with hotels, apartments and other buildings are specifically permitted, the ordinance defines "accessories" as "any one story building or structure, or a portion of any main building, the use and maintenance of which is incidental to the use and maintenance of the main building and which is located on the same lot" and in other sections of the ordinance "accessory buildings" are limited to one story in height and to certain areas. The accessories which are allowed are clearly those structures which are defined as such in the or-

dinance, and plaintiff's business of accountancy would not fall within that classification. Furthermore, we do not understand the ordinance to mean that even if the conduct of plaintiff's business in connection with the hotel business is not prohibited it would nevertheless be allowed as a business activity apart from the conduct of the hotel business; and there is no contention that plaintiff's business is in any respect allied with the business of any hotel, apartment or club building or business.

[15] The court failed to make findings with respect to any of the facts sought to be proved by the evidence which was excluded and which we have already discussed. For the reasons which we have stated as lending support to the rulings complained of it follows that the facts as to which the court failed to find were not addressed to material issues and that there was no necessity for findings thereon.

[16] The finding that the character of plaintiff's property is now and for many years last past has been residential was a sufficient determination of the claim of plaintiff that the property, while originally residential in character, has become essentially business in character; no more specific finding was necessary.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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52 Cal.App.2d 620

PEOPLE v. GRAY.

Cr. 3468.

District Court of Appeal, Second District, Division 1, California.

June 10, 1942.

Hearing Denied July 10, 1942.

1. Criminal law 🔑742(3)

In prosecution for subornation of perjury, for soliciting perjury and bribing a witness, the jury had right to give credence to testimony of admitted perjurors. Pen.Code §§ 127, 137, 653f.

2. Criminal law 🔑1158(1)

Testimony on which convictions for subornation of perjury, attempted subornation and soliciting perjury was based was not so inherently improbable as to be impossible of belief and therefor District Court of Appeal would not be warranted in disturbing conclusion of trial judge in passing on sufficiency of evidence to support verdicts when considering motion for new trial. Pen.Code, §§ 127, 653f.

3. Criminal law 🔑1158(1)

District Court of Appeal is warranted in disturbing conclusion of trial judge in passing on sufficiency of evidence to support verdicts when considering motion for new trial only when testimony of witnesses on which verdicts are based is so inherently improbable as to be impossible of belief.

4. Criminal law 🔑935(1)

Where there is a substantial conflict in the evidence, however much the evidence may preponderate against the verdict, the sole remedy of the aggrieved party is his application to trial judge for a new trial.

5. Criminal law 🔑935(1), 1159(3)

It is the duty of trial judge, who has heard evidence and had opportunity to judge as to amount of credit to be given to the various witnesses, to grant a new trial when he is of the opinion that verdict is clearly against weight of evidence notwithstanding there is a substantial conflict therein, but no such power exists in appellate court.

6. Perjury 🔑11(2)

Where answer to personal injury action brought by attorney in behalf of his client set up in general terms contributory negligence and according to testimony of witness attorney solicited witness to testify falsely concerning witness' observation regarding whether plaintiff had given hand signal prior to automobile collision, conviction for soliciting perjury was not objectionable on ground that the subject-matter concerning which perjury was solicited was immaterial. Pen.Code, § 653f.

7. Perjury 🔑34(1)

Corroborative evidence necessary to sustain conviction for soliciting perjury need not be strong. Pen.Code, § 653f.

8. Perjury 🔑34(4)

Corroborative evidence was sufficient to sustain conviction for soliciting perjury. Pen.Code, § 653f.

9. Perjury 🔑33(1)

Where answer in personal injury action brought by attorney in behalf of his client set up in general terms contributory negligence and according to witness' testimony attorney solicited witness to testify falsely concerning his observation as to whether the client had given hand signal when automobile made turn at time of collision, witness' testimony was not so inherently improbable as to be impossible of belief. Pen.Code, § 653f.

10. Criminal law 🔑1169(2)

In prosecution of attorney for subornation of perjury and for soliciting perjury, where transcript of testimony which had been given by witnesses during second part of state bar committee's hearing, in absence of attorney, regarding attorney's conduct was introduced to satisfy jury that the witnesses in second part of hearing admitted falsity of their statements during first part, witnesses' testimony to same effect directly to jury and in presence of attorney cured error, if any. Pen.Code, §§ 127, 653f.

11. Criminal law 🔑673(5)

In prosecution of attorney for subornation of perjury and for soliciting perjury, admission of testimony of witnesses regarding acts not named in the indictment was not error in view of court's instruction whereby the testimony was limited to purpose of proving a general plan or scheme and to prove consciousness of guilt. Pen. Code, §§ 127, 653f.

12. Criminal law 🔑370, 371(1), 372(1)

Evidence of offenses similar to that on which prosecution is based is admissible to show guilty knowledge and intent of defendant and to establish a definite prior design or system and it is not essential that such similar transactions shall have resulted in commission of a crime but it is sufficient if they tend to prove a scheme of defendant which included the acts charged.

13. Witnesses 🔑387

Where witness had been called before grand jury and there made statement under oath directly contrary to those made under oath to jury which tried prosecution for subornation of perjury, the court committed no error in allowing searching cross-examination of such witness of defendant. Pen. Code, § 127.

14. Criminal law 🔑810

In prosecution for subornation of perjury and for soliciting perjury, instruction given at defendant's request regarding evidence introduced by the prosecution that defendant's reputation was bad did not conflict with instruction given by prosecution regarding evidence introduced by defendant that his reputation was good. Pen.Code, §§ 127, 653f.

15. Criminal law 🔑858(4)

In prosecution for subornation of perjury and for soliciting perjury where jurors retiring to jury room were given all written instructions which court had previously read to them including instruction from which part of language had been struck out, the fact that jury thus beheld that the court struck out language which would have been merely repetitious was not error. Pen.Code, §§ 127, 653f.

16. Criminal law 🔑783(1), 858(4)

In prosecution for subornation of perjury and for soliciting perjury, action of court in failing to give in full requested instructions regarding evidence of alleged offenses committed by defendant other than those pleaded in indictment and in permitting instruction with line drawn through part of the instruction to be taken by jurors to jury room on their retirement was not error. Pen.Code, §§ 127, 653f.

17. Criminal law 🔑805(3)

In prosecution for subornation of perjury and for soliciting perjury where formula instructions were given on each of the counts upon which defendant was convicted and each instruction began with the phrase, if you believe from the evidence beyond reasonable doubt that the following facts are true, the fact that the word facts was used by mistake for statements was not misleading. Pen.Code, §§ 127, 653f.

18. Perjury 🔑37(1)

In prosecution for soliciting perjury, instruction containing statement that the solicited testimony was material to the issues involved in certain civil action was not objectionable on theory that to constitute perjury it is essential that the testimony be material at the time it is given. Pen.Code, § 653f.

19. Perjury 🔑13

To constitute offense of soliciting perjury it is not necessary that the person solicited shall actually commit perjury. Pen. Code, § 653f.

20. Perjury 🔑11(9)

Perjury can be assigned upon testimony that goes to the credit of a material witness in a case. Pen.Code, § 127.

21. Perjury 🔑11(2)

The test of "perjury" is not whether the false testimony actually does influence the tribunal or jury but whether it can influence it. Pen.Code, § 127.

See Words and Phrases, Permanent Edition for all other definitions of "Perjury".

22. Attorney and client 🔑31

Where state bar committee was authorized to investigate, among other things, evils incident to the prosecution and settlement of personal injury claims and litigation, the investigation of the solicitation of one to commit perjury in connection with settlement of personal injury action was authorized as against contention in prosecution for soliciting perjury that the committee had no power to inquire into incident regarding whether defendant had solicited witness to testify falsely upon taking of her deposition for use in personal injury action. Pen.Code, § 653f.

23. Perjury 🔑29(2)

An indictment for subornation of perjury may embrace two or more assignments of perjury and if the evidence sustains one or more of the assignments it is not necessary for the prosecution to prove all of the charges. Pen.Code, § 127.

24. Criminal law 🔑829(1)

In prosecution for subornation of perjury, for soliciting perjury and for bribing a witness, refusing instruction that the fact that the court had advised jury to return verdict of acquittal on two of the counts in indictment was not to be taken by jury as an indication that jury should convict defendant on any of the counts was not error where court adequately instructed jury on reasonable doubt and presumption of innocence. Pen.Code, §§ 127, 137, 653f.

25. Perjury 🔑37(1)

Where first count of indictment charged soliciting perjury and second count charged subornation of perjury but court instructed that as to count two evidence failed to prove subornation and that jury had right to find defendant guilty of attempted subornation of perjury, the attempt became complete when witness gave her false testimony and not until then so that the counts were not based on identical acts and defendant was not aggrieved by court's refusal to instruct that jury could not convict defendant of the offenses charged in both counts. Pen.Code, §§ 124, 127, 653f.

26. Criminal law 🔑778(4)

In prosecution for subornation of perjury, for soliciting perjury and for bribing a witness where evidence of other similar offenses was admitted for purpose of showing general scheme, requested instruction that defendant was presumed not only to be innocent of the offenses charged but of any other offense and that jury should presume defendant was innocent in all of his other acts and transactions revealed by the evidence unless jury was convinced to the contrary by evidence beyond reasonable doubt was properly refused. Pen.Code, § 127, 137, 653f.

27. Criminal law 🔑561(1)

In criminal prosecution where evidence of other offenses is admitted to show general scheme, it is not necessary that the other offenses be proved beyond a reasonable doubt.

28. Criminal law 🔑829(13)

In prosecution for subornation of perjury, for soliciting perjury and for bribing a witness where evidence of other similar offenses was introduced to show general scheme, refusal to give requested instruction regarding evidence of other similar offenses was not error in view of instructions given. Pen.Code, §§ 127, 137, 653f.

29. Criminal law 🔑1037(1), 1055

Charges of misconduct on part of deputy district attorney who prosecuted criminal case could not be reviewed where there was no objection made nor exception taken.

30. Criminal law 🔑1186(4)

In prosecution for subornation of perjury, for soliciting perjury and for bribing a witness, error if any, in trial of case did not require reversal where no miscarriage of justice had resulted. Pen.Code, §§ 127, 137, 653f; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Bingham Gray was convicted of subornation of perjury and attempted subornation, and he appeals.

Affirmed.

Hearing denied; Carter, J., dissenting.

Joseph Scott and Byron C. Hanna, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., Eugene M. Elson, Deputy Atty. Gen., and John F. Dockweiler, Dist. Atty., and Jere J. Sullivan and Fred Henderson, Deputy Dist. Attys., all of Los Angeles, for respondent.

DESMOND, Justice pro tem.

The appellant was accused, in a grand jury indictment, of soliciting a Mrs. Trew to commit perjury on three different occasions, February 2, 1939, March 1, 1940, and March 20, 1940. He was tried by a jury and found guilty of the first two of these charges under counts I and V of the indictment and not guilty of the third charge, set up in count VII. He was accused in the same indictment of soliciting George Trew to commit perjury on two occasions, March 1, 1940, and March 20, 1940 (counts VI and IX). As to these charges he was found guilty of the first; not guilty of the second. The jury found appellant guilty of additional offenses as follows: Under count II, attempted subornation of perjury committed on February 16, 1939, in his dealings with Mrs. Trew; under count VIII, subornation of perjury committed on March 20, 1940, in relation to Mrs. Trew; under count X, the same character of offense committed on March 20, 1940, in connection with Mr. Trew; under count XII, soliciting George Gallina on May 22, 1940, to commit perjury. He was acquitted under count XI and count XIII of bribing Gallina as that offense is defined in section 137, Penal Code.

He appeals from all judgments of conviction and from the order of the trial court denying his motion for a new trial upon each and all of the counts upon which the jury found him guilty. As grounds for his appeal he claims insufficiency of the evidence to sustain conviction upon any of such counts, errors of the court in sustaining and in overruling certain specified objections to the admission of evidence. He also claims that the district attorney was guilty of misconduct warranting the setting aside of all the judgments of conviction, specifying many instances of alleged misconduct and he charges that the court committed serious error in giving and refusing certain instructions; also, in modifying instructions and permitting the jury to have the instructions with such modifications appearing thereon.

The reporter's transcript of the evidence has been carefully examined. It consists of approximately 2,500 pages and reveals that appellant was indicted upon eighteen counts, the last three of which were dismissed at the trial upon motion of the district attorney. As to another count the jury was directed by the court, upon the district attorney's motion, to render a verdict of not guilty, similar action being taken in regard to still another count, upon motion of appellant's counsel. On six counts, the jury rendered a verdict of not guilty. The three counts which the district attorney moved to dismiss involved alleged soliciting by appellant of one Carolyn Galbraith to commit perjury, subornation of perjury in connection with the same person, also bribing her as a witness, as defined in section 137, Penal Code. Two of the counts upon which the jury acquitted appellant charged him respectively with soliciting one Vincent Herron to commit perjury and with bribery of said Herron, under said section 137. Summarizing, it will be seen that at the conclusion of his trial appellant stood convicted of six criminal offenses arising from his dealings with Mr. and Mrs. Trew, the other remaining conviction arising from his dealings with George Gallina. The two convictions based upon his soliciting perjurious statements from Mrs. Trew, as well as two similar convictions arising from his transactions with George Trew and George Gallina were charged as violations of section 653f, Penal Code, which provides punishment for every person who solicits another to commit or join in the commission of various listed crimes including perjury. The two counts under which he was found guilty of subornation of Mr. and Mrs. Trew respectively as well as count II under which he was found guilty of an attempt were set up under section 127 of the Penal Code which reads as follows:

> "Subornation of perjury. Every person who willfully procures another person to commit perjury is guilty of subornation of perjury, and is punishable in the same manner as he would be if personally guilty of the perjury so procured."

The counts in which Mr. and Mrs. Trew were concerned all had to do, directly or indirectly, with a lawsuit filed by appellant as Mrs. Trew's attorney and with investigations by State Bar authorities as to the manner in which the case was handled. The suit arose from a traffic accident which occurred on September 19, 1938, in which Mrs. Trew claimed she was injured and for which she sought damages in the sum of $25,000. The specifications of injury and damage set up in a complaint filed by this appellant in behalf of Mrs. Trew on October 10, 1938, against the Los Angeles Railway Corporation, read as follows:

"III. That by reason of the negligence of the defendant as aforesaid, the plaintiff, Patricia Trew, was bruised and injured about her body and person, and was severely injured in her health, strength and activity, and was made sick and sore thereby; that she received a severe nervous shock; that said plaintiff has suffered thereby, and still continues to suffer, great pain and mental anguish; that by reason of the foregoing injuries the plaintiff has suffered damages in the sum of Twenty-five Thousand Dollars ($25,000.00).

"IV. That by reason of the injuries as aforesaid, the plaintiff, Patricia Trew, was compelled to receive medical care and treatment; that plaintiff is obligated to pay for said services, and upon information and belief alleges that it will be necessary to secure additional medical services in the future, and to have X-rays taken; that said plaintiff does not know at this time the amounts due and to become due for said services rendered and to be rendered; that said plaintiff will ask leave of this Court to amend this complaint to state said amounts when they are ascertained."

This action was settled approximately four months later by the corporation's paying to appellant, as Mrs. Trew's attorney, the sum of $6,000. This may cause surprise when it is noted that Mrs. Trew suffered no broken bones, sprains or even the slightest scar, whose injuries as detailed to the jury in this case, by the doctor who attended her and who was engaged upon the recommendation of this appellant, were a bump on the back of the head, some scattered bruises on the back and chest, a definite muscular spasm over the sacroiliac joint and bruises on the knees. The doctor ordered her to stay in bed for three weeks and during that period called on her ten times and ten or fifteen times during the next 3½ months. He stated that he gave her sedative pills the first time he attended her and told her to put an ice-pack on her head; that five days later he strapped her back and possibly again at a later time. He also stated that he gave Mrs. Trew one or possibly two heat treatments; that she had no fracture but complained of pain in back. "I felt she had a sacroiliac sprain," but no X-rays were taken of her back. In determining whether to give credence to this testimony by the physician itemizing Mrs. Trew's bruises, the jury, of course, had a right to consider the testimony of the motorman describing what happened at the time of the accident. He testified that his car struck Mrs. Trew's automobile; that it was quite a heavy jar which knocked the automobile a few feet; "She had stopped suddenly in front of me and just had started up"; that the impact knocked her car four or five feet but not against the curb at the southwest corner; "She pulled the car over after the impact; she pulled it around the corner. She was just starting up when the accident happened, why, she had the car in gear, and she ran over and stopped; she was making a left turn." According to this witness he went over to the auto and talked with Mrs. Trew, who got out of the auto. He also testified that a lady got off the car at the same time and went over to the auto; that Mrs. Trew talked to her and came back and got on the car, tried to get some witnesses; was around there after the accident five or six minutes; that she appeared to be perfectly conscious and seemed to know what she was talking about.

The settlement for $6,000 followed, by only a few days, the taking of the plaintiff's deposition on February 16, 1939, before H. D. Palmer, a notary public. As to this proceeding count I of the indictment charged "That on or about February 2, 1939, the said defendant Bingham Gray, then and there knowing that said deposition was to be taken on or about February 16, 1939, and then and there knowing that said plaintiff, Natalie Patricia Trew, was to be a witness before the said H. D. Palmer, notary public, as aforesaid, and then and there knowing that the said Natalie Patricia Trew, plaintiff in said civil action, was to be duly and regularly sworn to testify to the truth, the whole truth and nothing but the truth with respect to said material matters at the taking of said deposition, said defendant, Bingham Gray, did knowingly, willfully, unlawfully and corruptly solicit and instruct the said Natalie Patricia Trew to willfully, knowingly, falsely and perjuriously testify, swear and state as a witness in the giving and taking of her said deposition in substance, as follows: That she, the said Natalie Patricia Trew, was rendered unconscious by said accident; that when she regained consciousness a woman and the motorman of the street car involved in the accident came over to her, the said Natalie Patricia Trew; and that she, the said Natalie Patricia Trew remembered nothing more until she came to in her bed at her home with a doctor bending over her; and that said doctor, to wit, one Saul Moss, was her family doctor and her aunt's physician; and that she was not, by her testimony, to connect the said Moss and the said defendant, Bingham Gray, together; and that she was to and should testify that since said accident, she had been wholly incapacitated from performing any work of any sort; that she did not want to leave her house because when she did leave, such leaving made her feel bad; that she had had several fainting spells since the accident and that she was melancholy and that the world was against her and that her husband and her mother who should be close to her, had turned against her; and that she should exaggerate in other respects the extent of her injuries and the suffering and pain caused therefrom; and that she had had constant headaches and frequent dizzy spells ever since that accident; the said defendant, Bingham Gray, stating to said Natalie Patricia Trew that such false and perjurious testimony would make her case stronger and enable him to secure more money for her on account of said alleged injuries.

"That in truth and in fact, to the knowledge of the said defendant, Bingham Gray, the said testimony so solicited and directed by said defendant, Bingham Gray, was false in the following particulars: That the said Natalie Patricia Trew did have a clear and distinct recollection of all of the events following such accident occurring on the day thereof; that in truth and in fact, the said Natalie Patricia Trew had, following said accident, driven her automobile to a place where she had picked up her mother, had then taken her mother home, had then gone and gotten her husband and proceeded home with him and had continued and remained fully conscious of all events following said accident on the day thereof; that in truth and in fact, said Dr. Moss was not the family doctor of said Natalie Patricia Trew nor was he nor had he ever been her aunt's physician, but in truth and in fact, said doctor was a doctor called at the suggestion of the defendant, Bingham Gray; that in truth and in fact, said Natalie Patricia Trew remained in her home from the date of said accident, to wit, on or about September 18, 1938, until on or about January 15, 1939, except for occasional absences therefrom, at the direction and suggestion of said Bingham Gray who on several occasions instructed her to remain in her home in order to build up the claim for damages in said action;

"That in truth and in fact, said Natalie Patricia Trew did wish to leave her home and was not rendered worse nor did she feel bad after being absent therefrom; that in truth and in fact, said Natalie Patricia Trew had not had several or any fainting spells since said accident nor was she melancholy nor did she feel that the world had turned against her nor did she believe or feel that her husband or mother had turned against her nor had she had constant headaches or frequent or any dizzy spells; that in truth and in fact, she had not been wholly incapacitated from performing any work since said accident;

"That in truth and in fact, the said defendant, Bingham Gray, well knew the falsity and perjury of said statements and testimony which were so solicited and directed by him to be made by said Natalie Patricia Trew under oath at the taking of said deposition."

Count II of the indictment, accusing the appellant of subornation of perjury committed on February 16, 1939, charged that on that date said crime occurred, when Mrs. Trew's deposition was taken; that the perjurious statements and representations which had been solicited by appellant were actually sworn to as true, Mrs. Trew thereby committing willful and corrupt perjury and being procured to do so by the defendant, Bingham Gray. Under this count appellant was found guilty of attempted subornation of perjury, "a lesser offense than that charged in count 2 of the indictment but necessarily included therein."

More than a year after Mrs. Trew's lawsuit was settled, and on March 20, 1940, appellant's conduct in connection with the case was inquired into, count V of the indictment charging that in connection with that investigation appellant again and on or about March 1, 1940, solicited Mrs. Trew to commit perjury, that "there was pending before The State Bar Special Local Administrative Committee number 1, a duly and regularly appointed and acting committee of the State Bar of the State of California, an inquiry into a charge and charges of unethical and improper conduct of said defendant, Bingham Gray, who was at all times in this count mentioned, an attorney-at-law duly and regularly licensed to practice law in the State of California, and member of said State Bar * * * that in said inquiry before said Committee, it was material to know how much money had been paid to said Natalie Patricia Trew and had been received by her out of the total sum of Six Thousand and no/100 Dollars ($6,000.00) paid by said Los Angeles Railway Corporation, a corporation, in the settlement of said action, and it was also material to know in what manner one Dr. Saul Moss became the physician for said Natalie Patricia Trew and it was material to know the manner in which the accident occurred as a result of which Natalie Patricia Trew brought suit against the Los Angeles Railway Corporation, a corporation, in case numbered 432819, the nature and extent of her injuries in connection with said accident, and all matters and things surrounding the cause of action of the said Natalie Patricia Trew in said case.

"That the said defendant, Bingham Gray, well knowing the said Natalie Patricia Trew would be a witness in said proceedings before said Committee and well knowing that as such witness, said Natalie Patricia Trew would be sworn to testify to the truth, the whole truth and nothing but the truth, and well knowing that said Natalie Patricia Trew had received the sum of One Thousand One Hundred Fifty and no/100 Dollars ($1150.00) and no more out of said settlement of Six Thousand and no/100 Dollars ($6,000.00) as aforesaid, and well knowing that said Dr. Saul Moss was not nor never had been the family physician of said Natalie Patricia Trew, and was not nor never had been the physician of the aunt or any aunt of said Natalie Patricia Trew, and well knowing that the said Natalie Patricia Trew had exaggerated and committed perjury in connection with the deposition theretofore taken on or about February 16, 1939, in her case against the Los Angeles Railway Corporation, a corporation, case numbered 432819, and that said Natalie Patricia Trew had falsely in said deposition stated that she did not remember how she got home after the accident and that when she came to after arriving at home, the doctor was leaning over her and working on her and that at the time of the taking of the deposition, heretofore mentioned, the pain in her head seemed to get worse instead of better and that she had pains in her head that shoot down her neck all the time and that after the accident and at the time of the taking of the deposition, she did not want to leave her house because she felt worse when she returned, the said defendant, Bingham Gray, did knowingly, willfully, unlawfully and corruptly solicit and instruct the said Natalie Patricia Trew to willfully, knowingly, falsely and perjuriously testify, swear and state as a witness under oath before said Committee, in substance as follows:

"That she, the said Natalie Patricia Trew, had received Twenty Seven Hundred and no/100 Dollars ($2700.00) out of said settlement aforesaid, and that the said Dr. Saul Moss was the family physician and the physician of an aunt of said Natalie Patricia Trew, and that the said Natalie Patricia Trew did not know and remember how she got home after the accident and did not know that she drove her automobile home thereafter and that the said Natalie Patricia Trew did not come to until the doctor was leaning over her and working on her after arriving home after the accident and that at the time of the taking of the deposition the pain in the head of said Natalie Patricia Trew seemed to get worse instead of better and that she had pains in her head that shoot down her back all the time and that she felt worse after being out of her home and upon her return to her home.

"That in truth and in fact, the said defendant, Bingham Gray, well knew the falsity and perjury of said statements and testimony which were so solicited and directed by him to be made by said Natalie Patricia Trew under oath to the aforesaid Committee."

Count VI of the indictment charged appellant with soliciting on or about March 1, 1940, George Trew, the husband of Natalie Patricia Trew, to commit perjury in connection with the same matters mentioned in Count V in connection with Mrs. Trew's perjury.

Count VIII accused appellant of subornation of perjury in "That on or about the 20th day of March, 1940, the defendant, Bingham Gray, did willfully, knowingly and corruptly procure, induce and instigate one Natalie Patricia Trew to commit the crime of Perjury; that the said perjury of the said Natalie Patricia Trew so procured by the defendant, Bingham Gray, was committed as follows: * * *

"That in connection with and in the course of the aforesaid proceeding and inquiry by the said State Bar Special Local Administrative Committee number 1, the said Natalie Patricia Trew was duly and regularly sworn to testify to the truth, the whole truth and nothing but the truth by W. Joseph McFarland, a person then and there lawfully entitled to and having legal authority to administer said oath; that after being so sworn as aforesaid, said Natalie Patricia Trew did willfully, unlawfully and perjuriously testify and state as true material matter which she knew to be false, which matters and things so stated were in substance as follows:

"That she obtained approximately Twenty Six Hundred and no/100 Dollars ($2600.00) as a result of the settlement of her case against the Los Angeles Railway Corporation, a corporation, numbered 432819, theretofore pending in the Superior Court of the State of California, in and for the County of Los Angeles; that she did not remember the entire amount of the settlement; that she did not leave her home after the accident and until January, 1939, and that she was in bed most of the time between the date of the accident on September 18, 1938, until January, 1939, and did not discuss with the defendant, Bingham Gray, the fact that she should stay indoors or in the house during the period between September 18, 1938, and January, 1939; that the last time that she had seen the defendant, Bingham Gray, prior to March 20, 1940, was the day before yesterday, in other words, March 18, 1940, and that when she was subpoenaed to appear before the State Bar Committee, heretofore referred to, she did not know what the subpoena was for; that she had not agreed with defendant Gray to call his office or go to his office if she did receive a subpoena to appear before said State Bar Committee; that she had no understanding that she might be called to appear before said State Bar Committee; that she had no idea she was going to get a subpoena to appear before said State Bar Committee and the fact that she might get such subpoena was never mentioned by the defendant Gray and that she and her husband, George Trew, did not at any time prior to the time that she was subpoenaed, have a conversation with the defendant Gray about the fact that she might be subpoenaed to testify before the State Bar or the State Bar Committee, heretofore referred to; that the only time in the period of six months prior to the service of the subpoena upon her to testify before the said State Bar Committee in which she had seen the defendant Gray was on one occasion when she had visited said Gray to ask about a job and that she remembered no other occasion upon which she had talked to said Gray in said period of time; that when her attention was directed to the fact that she and her husband had met with the defendant Gray at the corner drug store on or about March 1, 1940, that the reason she had not told about that meeting when first asked to relate her previous meetings with the defendant Gray occurring in the period of six months prior to March 20, 1940, was because she did not think of it and that she had forgotten one or two things, but had tried to remember everything; that during the course of the conversation at the drug store between the defendant Gray, Mr. Trew and Mrs. Natalie Patricia Trew, nothing was said or brought up about the case of Patricia Trew against the Los Angeles Railway Corporation and nothing said about the case that she could remember and nothing was said in that conversation about the testimony of herself before the said Committee of the State Bar that she knew of and that she paid no attention to conversation between the defendant Gray and her husband, George Trew, at the said drug store on or about March 1, 1940.

"That the aforesaid testimony so given by said witness Natalie Patricia Trew, was false and untrue to the knowledge of said Natalie Patricia Trew at the time the same was given and that the same was false and untrue in the following particulars:

"That the said Natalie Patricia Trew did not obtain approximately Twenty Six Hundred and no/100 Dollars ($2600.00) in settlement of her case against the Los Angeles Railway Corporation, but on the contrary, received a much smaller amount which was approximately Eleven Hundred Fifty and no/100 Dollars ($1150.00); that in truth and in fact, the said Natalie Patricia Trew did remember the entire amount of the settlement of her case, heretofore referred to against the Los Angeles Railway Corporation, and that the same was approximately Six Thousand and no/100 Dollars ($6,000.00); that in truth and in fact she had left her home after September 18, 1938, the approximate date of the accident, and the month of January, 1939; that in truth and in fact, she was not in bed most of the time between the approximate date of the accident and January, 1939, but on the contrary, was up out of bed and around the house during the major portion of said time; that in truth and in fact she did discuss with the defendant, Bingham Gray, the fact that she should stay indoors between September 18, 1938, and January, 1939, and he advised her to stay in the house at all times after the accident and prior to the settlement of the case, telling her in substance that it would increase her showing of damages as a result of the accident involved and that if she were seen outside the house that someone might take pictures of her movements for the purpose of demonstrating that she was not as badly injured as she claimed to be; that the last time she saw the defendant, Bingham Gray, prior to appearing as a witness before said State Bar Committee on March 20, 1940, was not the day before yesterday, or in other words, March 18, 1940, but on the contrary was on March 20, 1940, within the period of one hour prior to the time that she gave this testimony; that she did in truth and in fact know what the subpoena was for when she was subpoenaed to appear before the said State Bar Committee and that she knew at that time that the subpoena was for the purpose of procuring her testimony as a witness at the hearing of said State Bar Committee and that said State Bar Committee was then and there conducting an investigation and inquiry into the conduct of the said Bingham Gray as a member of the State Bar and a practicing attorney in Los Angeles; that in truth and in fact she and her husband, George Trew, had agreed with the defendant Gray to call his office or go to his office if she did receive a subpoena to appear before said State Bar Committee; that in truth and in fact she did have an understanding that she might be called to appear before said State Bar Committee as a witness and that she knew this because the defendant had told her in substance that several of his clients were being subpoenaed before said Committee and that she probably would or might also be called upon to appear because she had been one of his clients and that this understanding and conversation between herself, the defendant Gray and her husband, George Trew, occurred on or about March 1, 1940, at a drug store in the vicinity where she and her said husband lived; that at the time she testified before the said State Bar Committee on or about March 20, 1940, she at all times during said testimony knew and remembered the meeting between herself and her husband, George Trew, and the defendant Gray at the drug store in the vicinity of her home, which took place on or about March 1, 1940, and that with regard to said meeting, that there was conversation between those persons heretofore named about the proposed testimony to be given before the said Bar Committee by herself and her husband and that the defendant Gray then and there made arrangements for her to read the deposition theretofore made by her in connection with her suit against the Los Angeles Railway Corporation, in which the nature and extent of her injuries was mentioned, the defendant Gray then and there further called to her attention the fact that she should testify that she received an amount of approximately Twenty Seven Hundred and no/100 Dollars ($2700.00) as her part of the settlement of said case and that the information should be kept away from the said Bar Committee that the defendant Gray had caused the employment of Dr. Moss to attend upon herself as a physician and surgeon and that she should falsely lead the Committee to believe that Dr. Moss was her family physician and that at all times during the course of her testimony before the said State Bar Committee, she knew and remembered the aforesaid conversation in substance and the approximate date thereof.

"That all of the testimony so given by the said Natalie Patricia Trew as aforesaid, was material to the issue and point of inquiry before the said hearing taking place before the said State Bar Special Local Administrative Committee number 1 while engaged in the matters and considerations heretofore set out and in connection with the matters then pending in said hearing before said State Bar Committee in which such testimony was given, as aforesaid, and thereby she, the said Natalie Patricia Trew, did commit willful and corrupt perjury."

Count X charged appellant with suborning perjury in that on or about March 20, 1940, he procured George Trew to commit perjury in much the same way as alleged in relation to Mrs. Trew in count VIII; that his sworn testimony before the State Bar Special Local Administrative Committee No. 1 was false and untrue in the following particulars: "That he, the said George Trew, did, in truth and in fact, know that his wife, Natalie Patricia Trew, had contacted the defendant Gray by telephone before seeing him on the late afternoon of March 20, 1940, and that said telephone conversation took place several days before March 20, 1940, and in the month of March, 1940, and at a time when the said Natalie Patricia Trew was served with a subpoena to appear before the said State Bar Committee; that the said George Trew had talked with the defendant Gray on the telephone on or about March 1, 1940, and within a short time thereafter and about the same date the said George Trew, Natalie Patricia Trew and defendant Gray met and conversed at a drugstore in the vicinity of the residence of George Trew, on or about March 1, 1940, at which time and place the aforesaid three persons discussed the possibility of Natalie Patricia Trew being called before the State Bar Committee that was investigating matters concerning the conduct of the defendant Gray as a member of the State Bar, and also discussed the manner in which Dr. Moss had been secured to attend upon Natalie Patricia Trew as a result of an accident theretofore had by Natalie Patricia Trew, on or about September 18, 1938, and also discussed that fact that prior to appearing as a witness before said State Bar Committee the said Natalie Patricia Trew should read the deposition which she had given in her case against the Los Angeles Railway Corporation, which deposition was in the office of the defendant Gray; that as a part of the discussion of the said parties, on or about March 1, 1940, the defendant Gray suggested to those present that the State Bar Committee be told that Natalie Patricia Trew received approximately $2700.00 out of the settlement of her case against the Los Angeles Railway Corporation; that the witness George Trew, appearing before the State Bar Committee on March 20, 1940, then and there well knew and well remembered, at all times, that he had seen defendant Gray and talked with him, as aforesaid, on or about March 1, 1940; that in truth and in fact he, the said George Trew, did know the substance of the conversation held on March 4, 1940, when he was asked about the same at said Bar hearing on March 20, 1940, and that he, the said George Trew, in truth and in fact, had paid attention and was interested in the subject matter of the conversation of March 1, 1940, at the time said conversation took place and did, in truth and in fact, remember the conversation between Natalie Patricia Trew and the defendant Gray in substance and in effect; that in truth and in fact the said George Trew was not telling the truth to his best knowledge and belief on March 20, 1940, because at that time he well remembered the conversations of March 1, 1940, in substance and effect; that in truth and in fact the defendant Gray was not given approximately $2700.00 in connection with the settlement of the case theretofore filed by Natalie Patricia Trew against the Los Angeles Railway Company by George Trew, but on the contrary, received the amount of $2700.00 plus approximately $1500.00, which latter sum of $1500.00 had been unlawfully retained by the said Gray and of which sum Natalie Patricia Trew and George Trew had been deprived by the said Gray to the then knowledge of the said George Trew; that in truth and in fact George Trew had not paid the doctors who had attended upon Natalie Patricia Trew, either in cash or otherwise, and that in truth and in fact he did not have left, after paying the doctors, an approximate amount of $2100.00 out of the settlement received by Natalie Patricia Trew, as a result of her suit against the Los Angeles Railway Corporation, and that in truth and in fact the said George Trew had not told the truth in every instance in his testimony, as is hereinbefore indicated in these assignments of falsity of the testimony of George Trew, and on the contrary, the said George Trew well knowing the answers to the questions thus propounded to him claimed in the instances above enumerated that he did not remember the matters and things to which his testimony was thus directed."

From the mass of material contained in the foregoing charges by the Grand Jury and from the evidence reported in the transcript, mention of certain dates and incidents of special importance is desirable at this point, to make clear the sequence of events in which appellant was involved with Mr. and Mrs. Trew.

The first and second charges revolve around Mrs. Trew's deposition taken on February 16, 1939, and concerning which the jury found appellant guilty of soliciting her to commit perjury and also guilty of an attempt to suborn her. They also convicted him of soliciting both Mr. and Mrs.

Trew, a year or so later, when the local committee of the State Bar was investigating appellant's conduct in handling certain of his cases. The hearing on that matter was held on March 20, 1940, and the time of solicitation as to both Mr. and Mrs. Trew was fixed by the grand jury in its indictment (counts V and VI) as on or about March 1, 1940. This was the approximate date when the transcript clearly shows that Mr. and Mrs. Trew were in conference with appellant at a drugstore not far from the Trew residence. It appears from the record that on the night of March 20, 1940, Mr. and Mrs. Trew had dinner with appellant in a restaurant just across the street from the office building in downtown Los Angeles where the hearing was held. An hour or two later Mrs. Trew was called before the committee and lied under oath substantially as set out in count VIII, upon which appellant's conviction of suborning her was based. When it appeared that Mrs. Trew was getting beyond her depth in a morass of false testimony she was temporarily excused and her husband immediately brought before the committee. It was not long before he became involved in contradictory and patently perjurious statements and then both he and Mrs. Trew testified to the falsity of their testimony in the earlier part of the hearing. Upon George Trew's false testimony when first before the committee appellant's conviction of suborning him (count X) is based.

Counsel for appellant argue in their opening brief that the testimony of Mr. and Mrs. Trew is so completely discredited and so inherently improbable and that their testimony and the testimony of Mrs. Davis, the mother of Mrs. Trew, is in such irreconcilable conflict with admitted circumstances that it does not constitute the type of substantial evidence essential to sustain a verdict of conviction on any of the counts involving appellant with Mr. or Mrs. Trew.

In reply to this argument it may be said that the jury was instructed as follows:

"* * * A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony as to any matter material to the cause on trial.

"A witness willfully false in one material part of his or her testimony is to be distrusted in other; that is to say, the jury may reject the whole of the testimony of a witness who has willfully sworn falsely as to a material point; and the jury, being convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but willfully and with the design to deceive, may treat all of his or her testimony with distrust and suspicion, and reject all *unless they shall be convinced that he or she has in other particulars sworn to the truth.*" (Italics added.)

There can be no doubt in the mind of anyone who reads the transcript in this case that the members of this jury knew they were listening to the testimony of admitted perjurers, but they also knew that people of that type are the very ones who may be most easily suborned or successfully solicited to commit perjury. They also saw the appellant on the stand and heard his testimony as a witness in his own behalf. They were charged by the court as to all witnesses as follows:

"The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case. The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility and the facts as to whether they have spoken the truth. And the jury may scrutinize not only the manner of witnesses while on the stand, their relation to the case, if any, but also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, against one or any of the parties; by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity; however, said character evidence is to be considered by you for no other purpose whatever than to aid you in determining the credibility of said witness, or by contradictory evidence."

[1] It is apparent that the jury decided, as was their right, to give credence to the testimony of Mr. and Mrs. Trew on the material points that resulted in appellant's convictions.

[2-5] Notwithstanding the many pages which counsel have devoted to the claimed inherent improbability of the testimony of Mr. and Mrs. Trew, buttressing their arguments with contradictory statements

made by those witnesses at various hearings (including a Grand Jury investigation in March 1940, and hearings before the State Bar trial committee in July and August, 1940), and calling our attention to inconsistencies on divers occasions in their attitude toward appellant, we fail to find it, or the testimony of Mrs. Davis, so "inherently improbable as to be impossible of belief" and therefore that it "must be considered to be in effect no evidence at all." This is the only condition which under the authority of People v. Von Perhacs, 20 Cal.App. 48, 51, 127 P. 1048, and cases therein cited, would warrant this court in disturbing the conclusion of the trial judge in passing upon the sufficiency of the evidence to support the verdicts when considering the motion for a new trial. In the instant case the motion was made upon the ground, among others, that the verdicts rendered by the jury were contrary to the evidence. That there was a substantial conflict in the evidence produced at the trial there can be no doubt, and the rule in such a case is stated in the well-considered case Fowden v. Pacific Coast Steamship Co., 149 Cal. 151, at page 162, 86 P. 178, at page 182: "Where there is a substantial conflict in the evidence, however much the evidence may preponderate against the verdict, the sole remedy of the aggrieved party is his application to the trial judge for a new trial. It is the duty of the trial judge, who has heard the evidence and had ample opportunity to judge as to the amount of credit to be given to the various witnesses, to grant a new trial when he is of the opinion that the verdict is clearly against the weight of evidence, notwithstanding that there is a substantial conflict therein. No such power exists in this court. * * * The final responsibility must rest where it is placed by the well-settled law, * * * with the trial court."

While this was a civil case tried by a jury the rule has at least as much validity in a criminal case, and in this criminal case the motion for a new trial was denied by the trial judge.

We have no doubt that the same arguments touching upon the weakness of the testimony of Mr. and Mrs. Trew, which are presented so ably and at length in the appellant's briefs, were made eloquently and at length before the jury at the close of the trial and again when the motion for a new trial was heard by the trial judge, but it must be noted that the jurors were not limited in their consideration of the evidence to the statements of the Trews. Various other important matters were before them. For example, Cecil Borror, his brother William Floyd Borror and their friend Edward Miller, all of whom were injured in an automobile collision, testified that at approximately the time when they engaged appellant to represent them in damage actions he counselled them to follow a deceptive course which would tend to exaggerate their injuries. According to William Floyd Borror "he said I should lay there in bed, when I first got hurt, a little longer, and it would make the case look better," and Cecil Borror testified, "Well, he was telling Edward Miller not to go to work and my brother to take it easy" and as to his brother, William Floyd, * * * he said something about his head and back injuries would be best because they can't prove you are not hurt in the back and head and spine injuries." Edward Miller gave similar testimony: "He told us he wanted to be sure not to go around very much, because somebody might see us, and to stay off of street cars and everything, because if they would see us jumping on and off street cars like that and would take pictures of us going around like we were not hurt, we wouldn't have any chance. * * * Why, he talked more about the injuries, and I told him my head ached about a day or two days after the accident; and he told me to keep having headaches and playing like I had real dizzy spells, because he said I didn't have to be scared, because no X-rays and no doctor couldn't say there wasn't anything wrong with my head. * * * I told him I was running short of money; and he said I didn't have to worry about that, because he would fix it up to get some money for us so that we could let things get through and all, so that we could get some money; and he told me I couldn't go back to work for quite a while. * * * He said he would let me know when I could go back to work."

Mr. Charles P. Carter was injured in an automobile collision on November 11, 1938, and engaged appellant to represent him. In January following, his deposition was to be taken, and he detailed to the jury some of the advice given him by appellant as follows: "He said to stress my injuries, pile it on, that the doctors would back up whatever I testified to. * * * He said to tell them that I was unconscious for quite a while and to tell them that blood ran out of my ear, and several other things that I don't recall.

"Q. What did you say to him about the proposition of having blood run out of your ears? A. I told him none ran out, and that would be perjury and I wouldn't testify to that.

"Q. What did Mr. Gray say about that? A. He said the value of the case would be decreased considerably.

"Q. Was anything said about X-rays? A. Yes; he said that he would have some X-rays taken later on, that Dr. Walker was an X-ray expert at the Los Angeles County Hospital, and that no two doctors would read them alike and that Dr. Walker's reading of the X-rays would have a lot of weight in the case.

"Q. Did Mr. Gray at any time tell you what the blood in your ear would indicate? * * * As well as I recall, he said a basal fracture."

On cross-examination this witness testified as follows: "Q. Don't you know as a matter of common knowledge that a basal fracture of the skull is one of the most dangerous fractures of the skull and is accompanied by many more symptoms than blood running out of the ear? A. So Mr. Gray told me.

"Q. And don't you know that a person who gets a basal fracture of the skull is a very sick person for weeks at a time, and frequently dies? A. Mr. Gray told me just that."

It may be noted here that Mrs. Trew early in this trial gave the following testimony: "* * * when I entered the office, I asked Mr. Gray how I had done on my deposition; and he told me he was very disappointed and that I had not done as he told me to do; and that cases like that were settled out of court every day for $200.00 or $300.00; and that he had more money than that tied up in the case; and he had done quite a bit of work on it; and he told us then he was just going to have to put more into my deposition; he said he was going to put it in there that I had seen a drop of blood in the lobe of my ear. He said if there is a basic skull fracture and there was no X-ray, no doctor could tell any difference. My husband and I both told him we would not agree to anything like that; and he said, 'Well, it does not matter if you agree or not, I am going to put it in.' We told him if he did put it in he would put it in by himself and we didn't want anything to do with that * * *."

Mr. Trew's version was as follows: "Well, Mr. Gray was very disappointed in my wife's deposition. He told her he was very disappointed in it, and he said he settled cases every day like this for just a little,—he said a specific amount, but I don't remember what it was,—and he scolded her a good deal for not giving a good deposition and not saying everything he had told her to say; and he said that in order to get anything out of the case he would have to add something in the deposition, something about her ear. He said, 'We will put in there that you—I think he said have got a fracture at the base of the ear, and the X-ray can't prove anything there'."

We have thus far discussed the convictions which resulted from appellant's transactions with the Trews. The jury also heard testimony concerning his effort to persuade George Gallina to give false testimony concerning an automobile collision which Gallina witnessed, in the neighborhood of Bakersfield, and convicted him of soliciting perjury in regard thereto. The details of this offense are recited in count XII of the indictment as follows:

"That on or about the 22nd day of May, 1940, the said defendant Bingham Gray then and there knowing and believing that the said George Gallina was to become a witness for the superior court of the State of California, in and for the county of Los Angeles, in connection with the aforesaid actions and suits by the said Jesse Webb, Frank Curtis and William B. Allen, and then and there knowing and believing that the said George Gallina was to be duly sworn to testify to the truth, the whole truth and nothing but the truth with respect to material matters in the taking of testimony on direct and cross examination in the aforesaid suits and actions, said defendant, Bingham Gray, did knowingly, willfully, unlawfully, and corruptly solicit the said George Gallina to willfully, knowingly, falsely and perjuriously testify, swear and state as a witness in the giving and taking of his testimony when called to the witness stand, in substance, as follows:

"That he did not notice whether the parties plaintiff, or any of them, had their hands out, or had a hand out, just prior to the collision, or whether they did not; that he, the said George Gallina did not remember if a hand signal was given and that he, the said George Gallina, should forget a few things and that he should forget that on the night of the accident occurring approximately September 29, 1939, out of which the aforesaid causes of actions arose, he did say that no hand signal was in fact given by parties plaintiff, or any of them, and that he should testify that he did not remember that he saw one way or another with regard to a hand signal being given in connection with the accident he had witnessed.

"That in truth and in fact, to the knowledge of the said defendant Bingham Gray, the said testimony so solicited by him was false in the following particulars:

"That the said George Gallina did have a clear and distinct recollection of the events connected with the accident occurring on September 29, 1939, out of which the aforesaid plaintiffs' causes of actions arose and that he did remember definitely and distinctly that no hand signal was given at any time that he observed the cars involved in the accident by anyone in the car in which plaintiffs were riding.

"That in truth and in fact said defendant Bingham Gray well knew the falsity and perjury of the statements and testimony which were so solicited by him to be made by the said George Gallina, under oath, at the time he was to be called as a witness, as aforesaid, and the said Bingham Gray well knew that the matters and things as to which he was soliciting said George Gallina to testify were not true to the knowledge of said George Gallina."

[6-8] It is contended that the evidence adduced at the trial was insufficient to sustain the conviction on this count. Three points are urged: first, that the subject concerning which perjury was solicited, was immaterial; second, that the testimony of George Gallina was not corroborated; and lastly, that his testimony was inherently improbable. As to the first point, —since the answer to the suit brought by appellant in behalf of his clients set up in general terms contributory negligence on their part, and since, according to Gallina's testimony, appellant solicited him to testify falsely concerning his observation upon that matter, it is apparent that appellant considered the subject very material. And, in our opinion, it was. Furthermore, Gallina told the jury that at the trial of the damage action he testified that he could have seen the hand signal if the driver of the coupe had his hand out; that when the coupe started to turn left he could still see a little ahead of him. The first point then, is not well taken. As to the second point, corroboration was furnished by Ann Gallina, the wife of George, who testified that at the time of the trial of the damage action appellant called at her home about 4:00 p.m. and waited there two hours or more for her husband. Meanwhile, upon learning that Gallina had been subpoenaed he said, according to Mrs. Gallina, "I wouldn't know what they are going to pay George", (referring to the insurance company), "I suppose just a few dollars. * * * Well, if he was my witness I could give him a little more money"; further that appellant said to her, "I wish you would talk to your husband and get him on my side, I would like him to help me." This conversation was said to have occurred some little time, days or weeks, after Gallina, according to his statement to the jury, had told appellant and his brother that he saw no hand out when the coupe made the turn. When, on the afternoon in question, after a two-hour wait on the part of appellant, Mr. Gallina finally came home, he and appellant engaged in conversation and the jury were told by Mrs. Gallina that she heard her husband say, "I am not for no one; I am just telling the truth. * * * I am only going to tell what I saw." Mrs. Gallina testified also that on a prior occasion, but after the accident, appellant called at her home while her husband was away and asked if she and her husband wanted to go out with him; proposed that Mrs. Gallina get him a girl, the four of them to go somewhere. Under the rule cited in People v. Todd, 9 Cal.App.2d 237, 242, 49 P.2d 611, corroborative testimony in a case of this sort need not be strong. We believe it was quite sufficient as herein shown, (See People v. Yeager, 194 Cal. 452, 229 P. 40; People v. Dahl, 107 Cal.App. 302, 290 P. 608; People v. Humphrey, 27 Cal.App.2d 631, 640, 81 P.2d 588), and we therefore omit reference to additional corroboration which was presented to the jury.

[9] As to the last point,—the argument that the testimony of Gallina is inherently improbable carries little weight in view of the fact that appellant called at the Gallina home and according to the witness Alma Pappas who accompanied him there, "mentioned that the Bakersfield case was being tried and Mr. Gallina said Yes, he knew it, he had been subpoenaed by the insurance company and had been in court for several days listening." The jury may have concluded (we almost said "must have concluded") that this visit at this critical time,—while the case in which Gallina was to be a witness was merely adjourned overnight,—had a special purpose and object in view; such, for instance, as a last chance to obtain perjured testimony in the tort action. Gallina's testimony in this criminal trial was not incredible in our opinion; quite to the contrary.

[10] Appellant complains that the court committed error in admitting as hearsay evidence a transcript of the testimony which was given by Mr. and Mrs. Trew during the second part of the proceeding before the State Bar committee on March 20, 1940, a hearing at which appellant was not present. This transcript was read to the jury after objection to its introduction was made and overruled. After the reading the following took place:

"Mr. Hanna (Attorney for Appellant): Your Honor please, at this time we move the court to instruct the jury, first, that no part of this evidence which has been introduced by this transcript of these proceedings before The State Bar committee on the evening of March 20th shall be considered or taken by them as any evidence of the testimony which either Mr. or Mrs. Trew gave that evening was untrue; secondly, that none of this evidence shall be taken by them as any evidence that anything related therein to have been done or said by Mr. Gray was done or was said.

"The Court: What is your position on that motion, Mr. Kearney?

"Mr. Kearney (Deputy District Attorney): Well, I think that motion is probably correct, that they are not to take the inference from the reading of that, they are to take it from the testimony of the witness on the stand; but that is put in merely to show the perjured testimony that is charged in some of the counts of the indictment. They can only take that as proof of what was testified to there, that is proof of the fact they testified there under oath. I think that is correct.

"The Court: The jury will be so instructed and admonished."

It is clear from this that the purpose of the district attorney was to satisfy the jury that the Trews in the second part of the hearing admitted the falsity of their statements, that is, their perjury, during the first part. They gave testimony to the same effect directly to the jury which tried this case, and in the presence of this appellant, thereby curing as respondent points out, any error which otherwise might be said to have arisen, notwithstanding the court's limitation upon the purpose for which the transcript was admitted.

[11] The claim is also made that the court erred in overruling appellant's objection to admission of the testimony of Charles P. Carter, and of Cecil Borror, William Floyd Borror, Edward Francis Miller and his mother, Mrs. Laura Miller. In answer to this objection it may be said that it appeared in certain counts in the indictment, as for example, in count VIII charging subornation, that The State Bar Special Local Administrative Committee, number 1, in pursuance of their duties under the law, conducted an inquiry into the ethics of Bingham Gray in practicing his profession as attorney-at-law and into his conduct as a member of the State Bar; that each of the above named witnesses was called before that committee and examined under oath concerning his dealings with appellant as hereinbefore related, and in view of the advice given the jury at the time objection was made it is our opinion that the court committed no error in this regard. The remarks of the court on this subject were as follows:

"* * * The court will advise the jury at this time that the evidence, if any, of general similar acts and transactions with parties not named in the indictment will be admitted for the limited purpose of evidence of common design of criminal enterprises, if any, charged in the hereinafter designated counts of the indictment, and for the limited purpose of proving a general plan or scheme to defraud, as well as to prove consciousness of guilt. Such evidence will be and is admitted only as to the following counts—and I would suggest that you make notations of these counts as to which this particular line of evidence will be limited—

"Counts 1, 2, 5, 6, 7, 8, 9, 10, 11, 12 and 14."

[12] The jury were also given a written instruction on the same matter which will be quoted hereinafter. The correctness of the ruling as to the testimony of each and all of these witnesses is clearly established by a reference to People v. Baker, 25 Cal.App.2d 1, at page 4, 76 P.2d 111, at page 112, where the court says: "It is the next contention of the defendant that the court erred in refusing to strike the testimony relating to other offenses because the corpus delicti of the alleged similar offenses also was not sufficiently established. This evidence was admissible to show guilty knowledge and the intent of the defendant and to establish a definite prior design or system, and a continuing conspiracy, and it is not essential that such similar transactions shall have resulted in the commission of a crime. It is sufficient if they tend to prove a scheme of the defendant which included the acts charged."

[13] Objection is made by appellant to the latitude permitted by the court in the cross-examination of Miss Alma Pappas, a witness produced by the defense at the trial. It appeared that this witness, a close friend of appellant, who at one time wore his diamond ring, had had a falling-out with him some little time before the trial of this case but that they had made up their differences. When, at the trial, on direct examination she gave testimony strongly in his favor it was but natural and altogether proper for the district attorney to attack her credibility. In this connection he asked her if she had not told an investigator of the State Bar Association "to check the Trew matter, that there was something there and that Gray was plenty worried about it." To this the witness replied, "I may have said that, but it wasn't the truth." Since Miss Pappas had been called before the Grand Jury on March 26, 1940, and there made statements under oath directly contrary to those made under oath to the jury which tried this case the court committed no error in allowing searching cross-examination. Nothing appears in the record to indicate that it went beyond proper bounds in the effort to impeach the witness.

The trial of this case opened on Monday, March 10, 1941, and taking of testimony continued uninterruptedly on all court days until the last witness left the stand on Thursday, April 3rd. It finally went to the jury on Wednesday of the following week, the representatives of the District Attorney's office meantime taking approximately a day to present their opening and closing arguments; the two attorneys representing the appellant, three days. The jury returned with their verdicts on Friday, April 11th.

Considering the length of time spent in trial and the number of counts submitted for the jury's consideration it is not surprising that a large number of instructions were handed to the court. Some were given to the jury; some were refused; others were given as modified. So far as we can determine, the treatment accorded the submitted instructions was, in every instance, correct. Appellant's counsel have taken a different view, and with the same diligence and exhaustive argument that characterized their efforts in the courtroom they present to us, in their briefs, their objections. We have read them all and find that they have been carefully analyzed and ably refuted by respondent. Since the briefs can be read by anyone interested we do not feel warranted in discussing any of these objections at length but shall comment upon a few. One related to character testimony offered for and against the defendant. As to evidence that appellant's reputation for truth, honesty and integrity was bad, the court, at his request, charged the jury that such evidence "does not destroy, impair or affect the presumption of innocence, and must not be considered by you as having any effect toward counteracting that presumption. Neither does such evidence constitute any part of the evidence which the prosecution is required to introduce to prove the defendant guilty beyond a reasonable doubt in order to warrant a conviction upon any count contained in the indictment.

"The prosecution has introduced evidence attacking the general reputation of the defendant for truth, honesty and integrity.

"You are instructed that such evidence may be considered by you for the limited purpose only of determining the credibility of the defendant's testimony and the weight to be given to it. You must not consider such evidence as any evidence that the defendant is guilty of any of the offenses charged in the indictment or as evidence of the probability of the guilt of the defendant of any of the offenses charged in the indictment. Such evidence does not affect the question of guilt or innocence of the defendant to any extent except to the extent that it may be considered by you as affecting the credibility of the defendant's testimony."

At the request of the prosecution the following instruction was given:

> "Evidence of good character is evidence relevant to the question of guilty, or not guilty, and is to be considered by you in connection with the other facts and circumstances in the case. Evidence of good character may raise a reasonable doubt of guilt in a case in which, without such evidence, no such doubt would exist.
>
> "But if you are satisfied to a moral certainty and beyond a reasonable doubt that the defendant is guilty as charged in the information herein, it will be your duty to so find him, notwithstanding such evidence of good character."

[14] Appellant claims that there was an irreconcilable conflict between these two instructions which worked to his detriment. Upon a careful reading, however, it will be seen that the first instruction related to evidence introduced by the prosecution that the appellant's reputation was bad, while the other related to evidence introduced by the appellant that his reputation was good. In other words there was here no instruction upon the weight or effect of character testimony as such, but only as to the consideration that might be given to the evidence bearing upon appellant's bad reputation and to the opposing evidence bearing upon his good reputation. We see no real conflict between these two instructions relating to two different kinds of evidence, but to us it seems clear that, as appellant certainly suffered no impairment of his rights by reason of the instruction which his counsel requested, neither did he, by the instruction which told the jury that evidence of his good character might be sufficient to save him, at the jurors' hands, from what otherwise would be a verdict of guilty. People v. Baldocchi, 10 Cal.App. 42, 47, 101 P. 28; People v. Piner, 11 Cal. App. 542, 553, 105 P. 780; People v. Buchanan, 119 Cal.App. 523, 526, 6 P.2d 538.

[15] After the jurors retired to the jury room they were given all the written instructions which the court had previously read to them. Among these were proper instructions on the doctrine of the presumption of innocence and the requirement of proof beyond reasonable doubt. Another instruction received by the jury read as follows:

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> "(~~You are instructed that~~) ~~y~~ou have no right to disregard the testimony of the defendant on the ground alone that he is a defendant and stands charged with the commission of the crime. (~~The law presumed the defendant to be innocent until he is~~
>
> T
>
> ~~proven guilty, and~~) ~~t~~he law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case, and if from all the evidence you have a reasonable doubt as to the guilt of the defendant, you should acquit him. (~~And in this connection you should remember that the defendant is presumed to speak the truth, and unless this presumption is destroyed by the evidence in the case, your oaths require you to find that he has spoken the truth~~)."

Because the jury thus beheld that the court struck out language which would have been merely repetitious, admitted so to be by appellant's counsel, they now claim that in some way the court erred. This is a groundless claim.

[16] "Appellant testified" (quoting from his counsel's brief) "that in 1938 he handled 27 personal injury cases involving aggregate recoveries of $64,115.00; that in 1939 he handled 27 personal injury cases involving aggregate recoveries of $99,303.45 and that during the first five months of 1940 he handled 12 personal injury cases involving aggregate recoveries of $41,609.54," and "it was shown that The State Bar Investigating Committee investigated approximately seventy-five of appellant's cases." It is urged therefore that the court erred in failing to give, in full, an instruction requested by appellant as follows:

> E
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> ~~"(You are instructed that)~~ ~~e~~vidence has been introduced of alleged offenses committed by the defendant other than those pleaded in the indictment. ~~(You are in-~~
>
> S
>
> ~~structed that)~~ ~~s~~uch evidence may be considered by you only as bearing upon the question of whether there was a system or plan of the defendant to commit offenses of the type charged in the indictment or as evidence of guilty intent or as evidence of consciousness of guilt; (and in this con-

nection you may properly consider the number and relation of the cases and transactions concerning which evidence has been introduced by the prosecution in proportion to the total number of cases or transactions of the defendant during the period of time to which the evidence introduced by the prosecution relates)." Instead, the court drew a line through the words and phrases which we have enclosed in parentheses and suffered the instruction in that condition to be seen by the jury. We do not believe the court erred in disapproving the portion of the instruction which was stricken, nor yet in permitting it to go to the jury in the form which counsel deprecates. If any of the jurors noticed the stricken portion they could only conclude that the court did not agree with appellant's counsel on the principle which they undertook to state, and since in our opinion the court was right, for a number of reasons which we shall not take time to state, no harm was done.

[17] Formula instructions were given on each of the counts upon which appellant was convicted. Each such instruction began with the following phrase in which the word "facts" was used by mistake for "statements." "If you believe from the evidence beyond a reasonable doubt that the following facts are true then you should convict the defendant. * * *" This, as we all know, is a common error in the use of English, but we cannot believe the jurors were in any way misled by it, for by the very words of the quoted phrase they knew that they were charged with the duty of determining upon the evidence which had been presented to them whether certain things, incidents or elements thereafter listed in the instruction were or were not true.

They were also instructed that "Where, as in cases of perjury and of subornation of perjury, several distinct assignments of perjury are laid, the indictment will be sustained if any one of these be proved, if that, by itself, be sufficient to constitute the offense."

The formula instruction on count I read as follows: "If you believe from the evidence beyond a reasonable doubt that the following facts are true, then you should convict the defendant of soliciting another to commit perjury, as charged in count I of the indictment.

"(1) That at all times mentioned in count I of the Indictment there was duly pending in the superior court of the State of California, in and for the county of Los Angeles, the civil action referred to in count I of the Indictment, namely Natalie Patricia Trew v. Los Angeles Railway Corporation.

"(2) That said superior court had jurisdiction of said civil action.

"(3) That on or about February 16, 1939, at and in the County of Los Angeles, State of California, the defendant, knowing that the deposition of said Natalie Patricia Trew would be taken by the defendant in said civil action, and that said Natalie Patricia Trew would be sworn to testify to the truth in said deposition, did knowingly, willfully, unlawfully and corruptly solicit and instruct the said Natalie Patricia Trew to willfully, knowingly, falsely and perjuriously testify as a witness in said deposition in substance and effect as alleged in count I of the Indictment.

"(4) That said solicited testimony was false, as alleged in count I of the Indictment.

"(5) That said defendant knew said solicited testimony was false.

"(6) That said Natalie Patricia Trew knew that said solicited testimony was false.

"(7) That defendant knew that said Natalie Patricia Trew knew that said solicited testimony was false.

"(8) That said solicited testimony was material to the issues involved in said civil action. *I instruct you as a matter of law, that said solicited testimony was material to the issues involved in said civil action.*" (Italics added.)

[18-21] We have emphasized the last sentence to indicate the main ground of appellant's objection to this instruction. Quoting from his brief, "This instruction told the jury, among other things, that all of the alleged solicited testimony, *specified in count I* was material." (Our italics.) He then recites certain items of alleged solicited testimony specified in count I, concluding "The jury was thus told that the above quoted statement about Dr. Moss was material testimony upon the taking of Mrs. Trew's deposition. The fact is that that testimony would never become material unless and until Dr. Moss took the witness stand and testified and then the only materiality of the testimony would be for the purpose of attacking Dr. Moss's credibility by showing his interest." Appellant then argues, "To constitute per-

jury, it is essential that the testimony be material at the time it is given." Here he overlooks the important point that count I did not charge appellant with the crime of perjury, but with the crime of soliciting Mrs. Trew to commit perjury. In such a situation respondent correctly states the rule in his brief: "Appellant argues throughout this topic of his brief the theory that the statements of Mrs. Trew were not perjury because they were not material and therefore appellant could not be guilty of the crime of solicitation under section 653f of the Penal Code. This is where he falls into error, commonly observed when a violation of section 653f of the Penal Code is involved. We repeat again, that in order for a person to be guilty of that section, it is not necessary that the person solicited shall actually commit perjury. Whether the false testimony that she gave at the taking of her deposition, and which was solicited by appellant, was, at the time of the taking of the deposition, perjurious, is entirely immaterial for a deposition taken under the provisions of the Code of Civil Procedure may be read into evidence, § 2022, Code of Civ.Proc., and if read into evidence and the testimony at that time material, it would be perjury. Appellant had no way in the world of knowing that the testimony he solicited Mrs. Trew to testify to falsely would not be material. He had every reason in the world to believe that Dr. Saul Moss, her attending physician, would testify concerning her injuries at the time of trial. That whether or not Dr. Moss was retained by appellant to look after Mrs. Trew (she not having heard of him previously) or whether he was her family physician and had been her aunt's physician for some time would certainly go to the doctor's interest and his credibility in the case. There of course can be no question that perjury can be assigned upon testimony which goes to the credit of a material witness in a case. People v. Metzler, 21 Cal.App. 80, 82, 130 P. 1192; People v. Barry, 63 Cal. 62, 64.

"The test of perjury is not whether the false testimony actually does influence the tribunal or jury but whether it can influence it. In re Braynard, 52 Cal.App. 631, 634, 199 P. 576.

"What has been said about the false testimony pertaining to Dr. Moss is true as to each of the other items of false testimony solicited by appellant of Mrs. Trew and above quoted."

[22] Similar complaints to the formula instructions on count II and count V are correctly disposed of by the same reasoning. As to the formula instruction on count V, appellant also complains that the State Bar Committee "* * * certainly had no power to inquire into the incident as to whether appellant had solicited Mrs. Trew to testify falsely upon the taking of her deposition. Such actions were not within the purview of the investigating authority of the committee and therefore testimony before the committee relating to such subjects was not material." This complaint is effectively answered by the following excerpt from respondent's brief: "Appellant also states that the resolution which was actually adopted authorizing the committee to investigate the subjects mentioned in the resolution confined its activities to ambulance chasing. The authorization quoted may in no way be so limited. It will be noted that the term 'ambulance chasing' is stated parenthetically. Ambulance chasing is properly used to embrace all forms of unethical solicitation and handling of nearly any type of litigation. The resolution permitted the Committee to investigate, among other things, 'evils incident thereto'—evils incident to the 'settlement, prosecution * * * of personal injury, * * * claims and litigation.' Certainly the solicitation of one to commit perjury in connection with the settlement of a personal injury action is an evil, incident to the settlement, prosecution, or defense of that particular personal injury claim.

"It therefore follows that the subject of inquiry followed by the Administrative Committee in question was material to its investigation and properly within the scope of its authorization."

[23] Various objections are made to the formula instruction on count VIII charging appellant with suborning Mrs. Trew, all of which in our opinion are sufficiently answered by respondent, reliance being had upon People v. Follette, 74 Cal.App. 178, at page 199, 240 P. 502, at page 511, in which case the court said: "The indictment, as we have already observed, contains a large number of assignments of perjury. It may be that the evidence is not sufficient to sustain all of such assignments, but the rule is well settled that, while the indictment may embrace two, or more, or many assignments of perjury, if the evidence sustains one or more of the

assignments it is not necessary for the prosecution to prove all of the charges." The court here cites the case of State v. Taylor, 202 Mo. 1, 100 S.W. 41.

The objections to formula instructions on counts X and XII are similar to those urged against other instructions herein mentioned, and are equally groundless.

[24] Appellant claims that he was prejudiced by the court's refusal to instruct the jury as follows: "You are instructed that the fact that the court has advised you to return a verdict of acquittal on two of the counts in the Indictment is not to be taken by you as any indication that you should convict the defendant on any of the counts in the Indictment." Since the jury was adequately instructed upon reasonable doubt and presumption of innocence, he was sufficiently protected under the law; this instruction, therefore, was unnecessary and the court did not err in refusing to give it.

[25] An additional instruction which the court refused to give was this: "You are instructed that counts I and II of the Indictment are alternative counts, and you must not convict the defendant of the offenses charged in both of said counts." Appellant states that "This instruction became particularly essential and proper in view of the fact that the court instructed the jury that they might find the appellant guilty of attempted subornation of perjury under the allegations of count II of the indictment," and argues that counts I and II were based upon identical acts of the appellant. Count I was based on an act charged to have been committed on or about February 2, 1939; namely, soliciting Mrs. Trew to commit perjury. On February 16, 1939, Mrs. Trew went before the notary public who took her deposition, swore to tell the truth and lied. If this were perjury the crime of suborning it would be complete on that date and not before. But section 124, Penal Code, says, "The making of a deposition, affidavit or certificate is deemed to be complete, within the provisions of this chapter, from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true." Mrs. Trew, according to the record, failed to sign or deliver her deposition and it may be that for that reason the court felt justified in instructing the jury that "the evidence as to count II of the indictment has failed to prove the defendant guilty beyond a reasonable doubt of the crime of Subornation of Perjury in violation of section 127 of the Penal Code." This was followed by the further instruction: "You are further advised however, that you have the right, in your discretion under the evidence, as to count II, to find the defendant guilty of the crime of Attempt to commit the crime of Subornation of Perjury, a felony, as the crime of Attempt has been defined for you in these instructions. You are not bound by the court's advice in this connection." The attempt became complete when Mrs. Trew gave her false testimony on February 16th and not until then. It is manifest, therefore, that counts I and II were not based on identical acts and appellant was not aggrieved by the court's refusal to give the requested instruction.

[26, 27] Another instruction which the court refused to give read as follows: "You are instructed that the defendant is presumed not only to be innocent of the offenses charged in the indictment, but of any other offense, and you must presume that the defendant was innocent in all of his other acts and transactions revealed by the evidence, unless you are convinced to the contrary by evidence beyond a reasonable doubt." That no error arose from this refusal appears from the reasoning of respondent as follows: "The instruction thus proposed by appellant, would have made it necessary for the jury to find appellant guilty beyond a reasonable doubt of the other alleged offenses. This is not the law and it is not necessary that the evidence of other offenses be proved beyond a reasonable doubt. In Lund v. State, 1934, 207 Ind. 347, 190 N.E. 850, at page 853, the court said: 'Appellant tendered instruction No. 4, which was to the effect that the evidence concerning other and similar transactions, which was admissible for the purpose of showing knowledge, must be proven beyond a reasonable doubt before it could be considered by the jury. The instruction was properly refused. It is only the ultimate material facts to which the rule of reasonable doubt applies. The facts regarding the other transactions were simply evidentiary facts introduced for the purpose of being considered, together with all of the other evidence in the case, upon the question of criminal knowledge and intent; and though the jury may have entertained some reasonable doubt as to some of the other transactions, or some

of the other items of evidence, which tend to prove guilty knowledge or intent, if, notwithstanding that fact, and having considered the evidentiary facts, doubtful and otherwise, they were convinced beyond a reasonable doubt of the ultimate fact of guilty knowledge and intent, it is sufficient'."

In addition, we may say that defendant was not on trial before this jury for all his other acts and transactions revealed by the evidence. If any of them had been charged as crimes against him of course he would have been entitled, as to each offense so charged, to an instruction such as immediately follows. The court properly instructed the jury as to the counts on which he was tried, in this language: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt."

[28] Appellant claims that error arose when the court refused to instruct the jury as follows: "The court has permitted the prosecution to introduce evidence of other acts of the defendant claimed by the prosecution to constitute offenses similar to those charged in the indictment. You must determine the question as to whether or not the defendant committed any such similar offenses solely upon the evidence introduced, and you must not speculate or indulge in any conjecture that there were any other acts of the defendant which constituted similar offenses and concerning which no evidence has been introduced."

"In the cross-examination of certain witnesses testifying upon the question of the defendant's reputation, questions were asked which implied or suggested that the defendant had been guilty of acts of misconduct concerning which no evidence has been introduced.

"You are instructed that since no evidence upon such subjects was introduced, you must conclusively presume that defendant was innocent of any such suggested acts of misconduct."

Inasmuch as the jury was instructed "to judge of the facts upon the testimony and other evidence produced here in court" and "You are to be governed therefore solely by the evidence introduced in this trial and the law as given you by the court. The law will not permit jurors to be governed by mere sentiment, conjectures * * *," we feel that no error arose in the court's refusal to give these instructions. Respondent calls our attention to the fact that "every objection to questions asked on cross-examination of character witnesses offered by appellant, which questions implied or suggested that appellant had been guilty of acts of misconduct other than those upon which evidence was introduced, was sustained, and the following instruction, therefore, applies: '* * * and if any counsel has intimated by questions, which the court has not permitted to be answered, that certain things are, or are not, true, you must disregard such questions and refrain from any inferences based upon them'"; and "Furthermore, the court expressly instructed the jury at the request of the defendant that evidence attacking the general reputation of the defendant for truth, honesty and integrity should not be considered as evidence that the defendant was guilty of any of the offenses charged in the indictment or as evidence of the probability of guilt of the defendant, and that such evidence was admissible only for the purpose of determining his credibility."

Appellant complains of the court's action in refusing to give other requested instructions but we find no merit in any of them.

[29] He also charges the deputy district attorney who prosecuted this case with misconduct in many particulars; but as to almost all the specifications noted in his brief there was no assignment whatever made during the trial. The rule in such a case was stated in simple language in People v. Brittan, 118 Cal. 409, at page 412, 50 P. 664, at page 666: "As to the misconduct of the district attorney, there was no objection made nor exception taken, and it cannot be reviewed." This rule is established by a legion of authorities, many of which are noted in 7 McKinney's Digest, section 1092 et seq. The reason for it is stated in People v. Stein, 23 Cal.App. 108, at page 118, 137 P. 271, at page 275, as follows: "Over and over again, the appellate courts of this state have held that objectionable remarks by the district attorney in a criminal case will not be reviewed or considered unless they have been objected to at the time they were made,

so that the trial court may be accorded an opportunity to counteract, if it can thus be done, their effect upon the jury." See, also, People v. Kizer, 22 Cal.App. 10, at page 20, 133 P. 516, 520, 521, 134 P. 346. In the latter case the court points out that "It is not, however, in every case that a reviewing court will restrict its examination to cases where objections are made. There are such flagrant violations of the rights of defendants that an admonition by the court, after objection, may not remove the prejudicial impression irresistibly made upon the minds of the jury by such unwarranted comment." We have given careful consideration to each and every charge of misconduct, itemized by this appellant, whether objected to or not, and find that there was no flagrant or any violation of his rights. He had the good fortune to be defended by attorneys, always on the alert to protect him from any possible invasion or disregard of his rights, and all objections interposed in his behalf as the case proceeded were promptly, and in our opinion, fairly ruled upon. And so it was, in regard to the closing argument. It must be remembered that for three full days the cause of the defendant had been presented to the jury by attorneys skilled in logic, rhetoric and oratory but no record of that presentation is before us. It is clear, however, that certain portions of the argument by the people's representative, which appellant's attorneys now find objectionable, were directed to matters discussed by them in their arguments. If such comment were before us it might be that the prosecutor's answer would seem mild indeed, but regardless of that, and studying each instance of alleged misconduct in the light of authorities cited by counsel for the appellant and for the people, we do not feel that this appellant suffered any prejudice to his rights. The remarks of Mr. Justice Burnett in People v. Burke, 18 Cal.App. 72, at pages 102 and 106, 122 P. 435, at pages 449, and 450, are peculiarly applicable to the situation under discussion and we pause to quote them: "* * * Manifestly, some allowance must be made for the zeal of attorneys and some confidence reposed in the intelligence and fairness of the jury, and it may be said, generally, that every statement of the district attorney criticised by appellant is less objectionable than what has been held by the Supreme Court to be insufficient to warrant a reversal of the judgment. * * * The representative of the people, it is true, conducted the prosecution with a good deal of vigor. Without it, however, he could not hope to prevail against the alert, aggressive, and able counsel for appellant who stubbornly contested every inch of the way. * * * In a word, appellant was fairly tried and justly convicted. The record is unusually free from error * * * we are convinced that no appellate court would be justified in interfering with the judgment of the trial court."

[30] As to the charges of misconduct in this case we agree with counsel for respondent when he says: "In many of the instances here claimed to be misconduct, the record shows absolute silence by defense counsel at the time. In others an assignment was made and denied because the conduct was not misconduct. In others the assignment was recognized and the jury properly instructed. Absolutely no showing is made that in the instances where no objection was made an assignment would 'have been futile'." Nor was appellant in any way prejudiced by the court's rulings upon points of evidence or generally in the conduct of his trial. If, notwithstanding our opinion as hereinbefore expressed, any error has crept into this case, the judgments should stand, nevertheless, under section 4½ of article VI of the Constitution of California, since no miscarriage of justice has resulted. The fact that the same jury which convicted appellant upon six counts involving the Trews acquitted him on four others in which they were involved, is an indication that they understood the instructions of the court, bearing upon the presumption of innocence and the requirement of proof beyond reasonable doubt. Their ability to distinguish between the merits of the different counts from a legal point of view satisfies us that they were sensible and reasonable individuals. As such they would have been justified in concluding that Mrs. Trew's injuries did not warrant an honest claim for more than $200 or $300, an estimate of their value which she once attributed to appellant. The evidence showed that on this claim he secured a settlement, within a few months, in the sum of $6,000. The participation of the Trews in that dishonest transaction cannot be excused, but they were not on trial before this jury, while the appellant was. In fact, he was the principal actor, and

the jurors by their verdicts, convicting him of soliciting and suborning perjury in connection with the claim and the investigation concerning it, demonstrated their belief that his was the master mind which conceived and carried out the fraud.

The judgments are each and all affirmed. The order of the trial court denying a new trial upon any of the counts is also affirmed.

YORK, P. J., and DORAN, J., concurred.

52 Cal.App.2d 792

PECK v. PECK.

Civ. 13419.

District Court of Appeal, Second District,
Division 1, California.
June 23, 1942.

1. Divorce 🔑**160**

Where a hearing on defendant's cross-complaint for a divorce was in the nature of a default, trial court was without authority to grant support money to defendant when prayer for support money had been dropped from amended cross-complaint.

2. Judgment 🔑**117**

In any action which is heard as a default matter, the defendant may rely upon the fact that no judgment can be had against him in excess of or beyond the prayer of the complaint.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Edward Bishop Peck against Erna Rubinstein Peck for annulment of marriage in which defendant filed a cross-complaint for divorce. From a decree awarding defendant a divorce and award of alimony, plaintiffs appeal.

Decree modified and as so modified, affirmed.

Shattuck & MacCarthy, of Los Angeles, for appellant.

Elliot F. Wolf, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

In a complaint for annulment of marriage it was alleged that the plaintiff and defendant were married in Yuma, Arizona, and that the defendant refused at all times thereafter to live with or cohabit with the plaintiff as his wife. Answer was filed denying the allegations of refusal to cohabit. The defendant also filed a cross-complaint for divorce alleging cruelty and failure to provide. In the prayer of the cross-complaint was a clause praying for support and maintenance of defendant during the pendency of the action and thereafter. Answer to the cross-complaint was duly filed.

Thereupon defendant filed an amended cross-complaint alleging in addition to the matters above set forth that she and the plaintiff had entered into a property settlement agreement. The property settlement agreement was made a part of the cross-complaint. It provided that the plaintiff pay defendant's counsel fees and costs in the sum of $115, which was agreed to be a full and complete settlement of all claims of defendant upon the plaintiff. Also the amended cross-complaint dropped that clause of the prayer above referred to, asking for support money.

The cause was called for trial as a default on the amended cross-complaint. Counsel for both plaintiff and defendant appeared and participated therein. There was testimony to support a finding of cruelty, although at best the parties lived together a few days less than five months and one was about as able to support himself as the other. The trial judge refused to be bound by the terms of the property agreement in respect of support money for the defendant, and made a minute order directing the preparation of an interlocutory decree of divorce for the defendant and the payment by plaintiff to her of $50 a month until the further order of the court.

Then the trial court of its own motion and without prior notice to counsel vacated the above-mentioned minute order, and set the case down for trial "on its merits." Counsel for plaintiff noticed a motion to be heard at the same time, requesting the court to vacate its order awarding alimony. Upon the hearing thus set by the court, both plaintiff and defendant and their counsel appeared, testimony was taken and argument was had. The motion to enter different decree was denied, and the decree awarding defendant $50 per month was ordered to stand. Upon the same date the trial court signed the interlocutory divorce, and award of alimony, from which this appeal is taken.

[1] While there is some dissimilarity in the facts involved, the situation so far as the law is concerned is the same as in the recent case of Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64. In the present case, regardless of the statement in the minute order setting a date for trial on the merits, both hearings on the cross-complaint were in the nature of a default. There being no prayer for it in the cross-complaint, the trial court was without authority to grant any support money to the defendant and cross-complainant. Darsie v. Darsie, supra, and cases therein cited.

[2] The gravamen of the rule to be here applied is that in any action which is heard as a default matter, the defendant may rely upon the fact that no judgment can be had against him in excess of or beyond the prayer of the complaint. Without such a rule, no defendant would be safe in permitting any case to go against him by default, because there could be no assurance that the judgment would not go beyond the relief prayed for in the complaint. In the case now under consideration, the plaintiff and cross-defendant and his counsel had every right to rely upon the fact that no alimony was asked for in the cross-complaint. As pointed out in the Darsie case, this rule does not deprive the court of the power to grant alimony in a proper case. This could have been done by ordering that the default be set aside, the prayer of the cross-complaint amended to demand alimony, and served upon the plaintiff, or by appropriate proceedings upon an order to show cause.

The decree is modified by striking therefrom the following: "It is adjudged further that plaintiff and cross-defendant, Edward Bishop Peck, pay to defendant and cross-complainant, Erna Rubinstein Peck, the sum of Fifty Dollars ($50.00) per month as and for her support and maintenance, beginning on the 1st day of September, 1941, and payable in monthly installments thereafter until further Order of Court." As so modified the decree is affirmed.

DORAN, Acting P. J., and WHITE, J., concurred.

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53 Cal.App.2d 49

EQUITABLE LIFE ASSUR. SOC. OF UNITED STATES v. JOHNSON, State Treasurer.

Civ. 11914.

District Court of Appeal, First District, Division 1, California.

June 29, 1942.

Rehearing Denied July 29, 1942.

Hearing Denied Aug. 27, 1942.

1. Statutes ⚷218

Contemporaneous construction is a guide to interpretation of a doubtful statute.

2. Annuities ⚷1
Insurance ⚷124

An "annuity contract" differs from a "life insurance contract" in that risk assumed in life insurance contract is to pay upon assured's death, while risk assumed in annuity contract is to pay as long as assured may live.

See Words and Phrases, Permanent Edition, for all other definitions of "Annuity Contract" and "Life Insurance Contract".

3. Taxation ⚷140, 164

The selling of annuity contracts is part of "business done in state" by life insurance companies, as such terms are used in constitutional provision imposing tax on insurance companies and associations doing business in state upon amount of gross premiums received upon their business done in the state. St.1935, pp. 500, 639, §§ 101, 10170; St.1939, p. 2637, § 100; Const. art. 13, § 14(b), added in 1910.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Done in State".

4. Taxation ⚷140, 168

The constitutional provision imposing a tax on insurance companies and associations doing business in the state upon amount of gross premiums received upon their business done in the state is not limited to gross premiums of a company or association on its life insurance business done in state. Const. art. 13, § 14(b), added in 1910.

5. Taxation ⚷543(7)

In action to recover taxes paid under protest, evidence failed to establish that taxing authorities had construed term "premium", as used in constitutional provision imposing tax on insurance companies and associations doing business in state upon amount of gross premiums received upon their business done in state, as not imposing a tax on consideration received for annuities, and hence did not support contention that considerations received for annuities were not "premiums" within constitutional provision. Const. art. 13, § 14(b), added in 1910.

6. Taxation 🔑140, 168

Considerations paid to life insurance company for issuance of annuities were "premiums" within constitutional provision imposing tax on insurance companies and associations doing business in state upon amount of gross premiums received upon their business done in state, so as to be taxable thereunder. Const. art. 13, § 14(b), added in 1910.

The term "premium" is generally defined as the consideration paid for a contract of insurance.

See Words and Phrases, Permanent Edition, for all other definitions of "Premium".

7. Taxation 🔑140, 168

The constitutional provision imposing tax on insurance companies and associations doing business in the state upon amount of gross premiums received upon their business done in the state, less return premiums, does not limit deduction to cases where tax was paid on the original premiums. Const. art. 13, § 14(b), added in 1910.

8. Taxation 🔑387

A foreign insurance company could not be precluded from securing a deduction for return premiums in 1935, under constitutional provision imposing tax on insurance companies and associations doing business in state upon amount of gross premiums received upon their business done in state less return premiums, by reason that sometime in the past, company failed to pay the tax on considerations secured by it upon sale of annuities. Const. art. 13, § 14(b), added in 1910.

9. Annuities 🔑6
Insurance 🔑198(1)

The statute providing that a person insured is entitled to return of premium when contract is voidable, on account of fraud or misrepresentation of insurer, or on account of facts of existence of which insured was ignorant without his fault, or when, by any default of insured other than actual fraud, insurer never incurred any liability under the policy, is applicable to life insurance and annuity policies. St.1935, p. 509; St.1939, p. 2290.

10. Taxation 🔑140, 168

The cash or surrender values paid upon cancellation of life policies, except when contract is voidable under circumstances enumerated in statute, were not "return premiums", within constitutional provision imposing tax on insurance companies and associations doing business in state upon amount of gross premiums received upon their business done in state, less return premiums. St.1935, p. 509; St.1939, p. 2290; Const. art. 13, § 14(b), added in 1910.

See Words and Phrases, Permanent Edition, for all other definitions of "Return Premium".

11. Taxation 🔑140, 168

The phrase "return premiums", within constitutional provision imposing tax on insurance companies and associations doing business in state upon amount of gross premiums received upon business done in state, less return premiums, means repayment of whole or a ratable part of premium paid for an insurance policy upon cancellation of policy before time fixed for its expiration. Const. art. 13, § 14(b), added in 1910.

12. Taxation 🔑387, 397

Cash or surrender values paid on cancellation of a pure annuity contract prior to starting of payments to annuitant were "return premiums", within constitutional provision imposing tax on insurance companies and associations doing business in state upon amount of gross premiums received upon their business done in state, less return premiums, so as to be deductible thereunder. St.1935, p. 509; St.1939, p. 2290; Const. art. 13, § 14(b), added in 1910.

13. Taxation 🔑535

A taxpayer seeking a refund has burden of showing that he is entitled thereto.

14. Taxation 🔑543(7)

In action to recover taxes paid, evidence was insufficient to entitle insurance company to recover for refusal to allow deduction for cash surrender values paid on annuity policies as "return premiums" under constitutional provision imposing tax on insurance companies and associations doing business in state upon amount of gross premiums received upon their business done in state, less return premiums, where it appeared that policies had connected with annuity feature, a life insurance feature in varying degrees, and what amount of return premiums paid to holders was predicated on original premiums charged for life insurance feature and what portion was attributable to annuity feature did not appear. Const. art. 13, § 14(b), added in 1910.

Appeals from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge.

Action by the Equitable Life Assurance Society of the United States against Charles G. Johnson, as State Treasurer, etc., to recover taxes paid under protest. From judgment entered, both parties appeal.

Affirmed in part and reversed in part with directions.

Hearing denied; SHENK and EDMONDS, JJ., not participating; SPENCE, J., acting pro tem.

Pillsbury, Madison & Sutro, Felix T. Smith, Leland B. Groezinger, and Scott C. Lambert, all of San Francisco, for plaintiff and respondent.

Earl Warren, Atty. Gen., and Neil Cunningham and H. H. Linney, Deputy Attys. Gen., for defendant and appellant.

PETERS, Presiding Justice.

Plaintiff insurance company brought this action to recover taxes paid under protest to defendant state treasurer. The amended complaint prayed for a total refund of $330,348.22. At the time of trial plaintiff dismissed a portion of its claim amounting to $32,002.62, leaving in issue its claim for a refund in the amount of $298,345.60. The trial court, by its judgment, determined that plaintiff was entitled to a refund of $17,443.66. From this judgment both the insurance company and the state treasurer appeal, plaintiff claiming it is entitled to a refund of the total amount claimed, and defendant claiming that plaintiff is entitled to no refund at all.

The tax here in controversy is provided for by article XIII, section 14(b) of the Constitution. The section was added to our Constitution in 1910 and reads as follows: "Every insurance company or association doing business in this state shall annually pay to the state a tax of one and one half per cent upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state * * * ." Section 14 was materially amended in 1933, and again in 1938, but, so far as the problem here presented is concerned, the language of this portion of the section has not been materially changed. It will be noted that under the constitutional provision the tax is imposed on "every insurance company * * * doing business in this state" and is levied upon "gross premiums received upon its business done in this state, less return premiums * * *."

This litigation involves the tax payable by plaintiff in the year 1935, predicated upon business transacted in this state during the calendar year 1934. It was stipulated that in 1935 the State Board of Equalization assessed and levied a tax against plaintiff of $490,584.14 and that included therein were taxes of $298,345.60 based on the amounts received during 1934 by plaintiff as considerations for annuity contracts sold by it in California. On plaintiff's appeal the sole question presented is whether the considerations received by it upon the sale in California of annuity contracts are taxable under the above quoted constitutional provision. This turns upon whether such considerations can properly be considered as "gross premiums received upon its business done in this state" as those terms are used in the constitutional provision. The trial court held that such considerations were part of plaintiff's "gross premiums" and were therefore taxable.

It was also stipulated that during the calendar year 1934 plaintiff paid refunds and cash values to holders of annuity contracts residing in California in the sum of $670,909.94. The trial court held that these refunds and cash values were "return premiums" as those terms are used in the constitutional provision above quoted, and held that the tax on the same amounting to $17,443.66, should be refunded. It is from this portion of the judgment that defendant appeals.

Appeal of Equitable Life Assurance Society of the United States.

As already indicated, plaintiff paid the questioned tax under protest, and brought this action for a refund. The trial court overruled the demurrer of defendant, indicating that he then believed that the complaint, prima facie, stated a cause of action and that the case should go to trial where evidence of contemporaneous construction of the constitutional provision could be introduced. Although the parties stipulated to many facts, a protracted trial was had to determine the proper construction of the section, and to determine whether there had been a contemporaneous construction of the section by the taxing authorities. On the basic questions presented to it the trial court found:

"VI. That at the time of the adoption of article XIII, section 14(b) of the Constitution of California in the year 1910, the word 'premium' was used by various life insurance companies and others to describe the consideration for annuity contracts; that at that time, prior thereto, and ever since, and now, life insurance companies have engaged and do now engage in the business of writing such annuity contracts, and that the business of writing such annuity contracts has ever since been and is now one of the recognized businesses in California in which life insurance companies as such were and are authorized to engage."

"VII. That since the adoption of said article XIII, section 14(b) of the Constitution of California, life insurance companies have been at all times required by law to make and file annually with the Insurance Commissioner of the State of California a report or return showing the total amount of gross premiums received from business done in this state; that the several insurance commissioners since the adoption of said article XIII, section 14(b), have at all times required life insurers to include in such return of their gross premium receipts for taxation purposes the considerations or premiums received from the issuance and sale of annuity contracts in the State of California; that prior to and since the adoption of said article XIII, section 14(b), of the Constitution, the several insurance commissioners have construed said article XIII, section 14(b), of the Constitution of California as requiring the inclusion of such annuity premiums as a part of their return of gross premiums from business done in this state upon which the tax is authorized to be levied by said constitutional provision."

On this appeal the contending parties each rely on two main lines of argument. Plaintiff contends that the word "premiums" as used by insurance companies, by people connected therewith, and by the public generally, in 1910, did not include the considerations paid for annuity contracts. Defendant makes the opposite contention, it being his position that the consideration paid for an annuity contract is commonly referred to by experts and by the public as a "premium," and that the term should be so construed in the constitutional provision here in question.

Plaintiff next contends that, if the word, as used in the constitutional provision, is ambiguous, the ambiguity was removed by administrative interpretation both before and after the adoption of the constitutional provision, and that this contemporaneous construction should control. Defendant seeks to demonstrate in his brief that the administrative authorities never construed the tax provision as not applying to the consideration paid for annuities.

The problem as to whether a tax on "premiums" includes a tax on the consideration paid for an annuity, while never before directly presented in this state, has been presented to the appellate courts of several of the states. An examination of those cases shows that they are in hopeless conflict with strong dissenting opinions in each line of authority. These cases will be referred to later in this opinion, reference now being made to the conflicting lines of authority for whatever weight such fact may have in determining whether the term is ambiguous.

As already indicated, the trial court found on the disputed question of administrative construction that since the adoption of the constitutional provision the various insurance commissioners had at all times required life insurers to include in their return of gross premiums the considerations received from the issuance of annuity contracts, and that prior to, and since, 1910, the several insurance commissioners construed the provision as requiring the inclusion of annuity premiums.

Plaintiff refers to a discussion between court and counsel with regard to this finding which it seeks to construe in its favor. During a discussion over the settlement of findings the trial court expressed some doubt as to whether such a finding should have been made, and finally stated: "In other words, I don't think there is any real conflict on either question, although I do appreciate that the Courts have held that conflicting inferences may be drawn from the same facts." Plaintiff suggests that this finding was outside the issues, and contends that the evidence shows incontrovertibly that the contemporaneous administrative construction was opposed to the finding, and interprets the above statement of the trial court as supporting that contention. Such interpretation is not correct. It is quite clear that the trial court meant that a "finding" on this issue had no place in the findings because it believed that there was no conflict in the evidence as to the interpretation of the commissioners, which interpretation was to the effect that considerations paid for annuities must be included as "premiums"; that the legal effect of such administrative interpretation in fixing the meaning of the constitutional provision was a question of law, and did not involve a resolution of a conflict in the evidence. Certainly, the trial court did not indicate that it believed the finding was opposed to the evidence.

[1] As to the finding being outside the issues, it is quite clear that contemporaneous construction is a guide to the interpretation of a doubtful statute. A finding as to such construction in the present case would be without the issues only if the present provision can be said to be free from ambiguity. Of course, each party to this appeal contends that it is free from ambiguity, each ascribing a different meaning to the term. In view of the contrariety of decisions, and prevalence of dissenting opinions in each line, it seems quite clear that the meaning of the term is not entirely free from doubt.

Before directly discussing the proper meaning of the provision in question some reference must be made to its background and to related statutory provisions. Prior to 1910 insurance companies were taxed by statute, the tax being based on a percentage of "gross premiums." Stats. of 1903, p. 359; Stats. of 1905, p. 136. The constitutional provision here in question was adopted in 1910 as part of a rather broad revision of the tax structure. The report of the tax commission indicates that, so far as the insurance company tax is concerned, the constitutional amendment was not designed to make a change in the existing system. Plaintiff contends that before the provision was placed in the Constitution it had acquired a well-defined meaning which excluded the consideration paid for annuities from the category of "premiums," and contends that the presumption is, that the provision, when placed in the Constitution, was intended to have the same meaning.

[2, 3] It is quite clear that an annuity contract differs from a life insurance contract. The risk is fundamentally different in the two contracts. In a life insurance policy the risk assumed is to pay upon the assured's death; in a pure annuity contract the risk assumed is to pay as long as the assured may live. But, although an annuity contract is not a life insurance contract it is equally clear that the sale of annuity contracts in California is part of the business done by insurance companies. In fact, only insurance companies may engage in the sale of annuities in this state. As early as 1913 the attorney general of this state ruled that in order to qualify for the purpose of selling annuities, a company had to qualify as an insurance company. This opinion is undoubtedly in conformance with past and existing statutory provisions. Section 594 of the Political Code a originally enacted in 1907, Stats. of 1907, p. 141, classified "all insurance business" in this state into "thirteen kinds." The first subdivision then read as follows: "Life insurance business, including endowments and annuities * * * ." Although that section has frequently been amended, substantially that same language has remained in the law since 1907. In 1935, section 594 of the Political Code was repealed and its provisions carried into the Insurance Code. Stats. of 1935, p. 496. As amended in 1939 (Stats. of 1939, p. 2637), section 100 of that code divides insurance into twenty classes, of which subd. 1 is life insurance. Section 101 reads: "Life insurance includes insurance upon the lives of persons or appertaining thereto, and the granting, purchasing, or disposing of annuities." See, also § 2762, Civ.Code, now § 10170, Insurance Code. St.1935, p. 639. This statutory classification makes it clear that in this state the selling of annuities is part of the "business done in this state" by life insurance companies as such terms are used in article XIII, section 14(b). If the tax imposed by the Constitution were simply on "business done in this state" by insurance companies there could be no doubt at all but that the considerations received upon the sale of annuities would be taxable. But the constitutional provision is more limited. It does not impose the tax on all business done by insurance companies in this state, but only on the "gross premiums received upon its business done in this state." It is obvious that the constitutional provision did not intend to tax all receipts of insurance companies. It is not a gross receipts tax. Income from rentals, investments, etc., is obviously not included. But it seems equally clear that it was the intent of the constitutional provision to tax all receipts that could reasonably be classified as "premiums." With this obvious purpose in mind

we turn then to the question as to whether the term "premiums" reasonably includes considerations received on the sale of annuity contracts.

Plaintiff urges that the term "premiums" technically, historically and generally refers only to the consideration received upon the sale of a life insurance policy. In its opening brief it makes the statement: "Historically, also, the word 'premium' means a compensation paid for insurance. As used by legal writers, the compensation for an annuity is never termed a 'premium,' but is spoken of consistently as the 'consideration.'" App.Op.Br., p. 6. Again at page 36 of that brief appears the following: "At the time of the constitutional amendment of 1910, and for centuries before that, neither the general public, nor legislators, lawyers, nor judges used the word 'premium' to designate the consideration for an annuity." If these statements were borne out by the record they would constitute a complete justification for plaintiff's position, and require a reversal. But the plain fact is that such statements are in direct opposition to what the record here shows. A considerable portion of defendant's case was devoted to demonstrating that in 1910, and prior and subsequent thereto, life insurance companies, their actuaries and agents, authors of legal texts, and judges and authors of insurance texts, referred to the consideration paid for an annuity as a "premium." Several hundred pages of transcript are devoted to that sole purpose as are many of the exhibits. In view of this overwhelming showing, the statements above quoted are simply contrary to the evidence.

Space does not permit an exhaustive reference to the many exhibits introduced or read into evidence by defendant on this issue. A few will suffice to demonstrate the point. Defendant's exhibit 26 was an excerpt from "Practical Lessons in Actuarial Science" (2d ed., 1905), by Miles Dawson, a recognized authority in the insurance field. In a chapter headed "Definition of 'Premium'" Mr. Dawson states: "The Institute of Actuaries' Text-Book defines Premium as follows: 'The sum, whether single or periodical, which is payable in consideration of a benefit, is usually called a premium.' This definition does not include the idea that the premium must be sufficient or at least equal to the present value of the benefit, nor indeed does that idea properly enter into the definition of the word. The distinction is all the more important as the actuary in his ordinary work is engaged in finding present values of sufficient premiums and thus always has the question of the sufficiency of a premium in view. It is beyond question, however, that a sum of money paid and received in consideration for an insurance, endowment or annuity is a premium, whether it be sufficient or not from an actuarial standpoint. A very simple definition would seem to be: 'A premium is the price of an insurance, endowment or annuity.'" Defendant has collected on pages 21 to 30 of his brief quotations from eight or nine recognized text books in the insurance field, some written prior to 1910 and some subsequent thereto, all referring to the consideration paid for an annuity as a "premium." In Blackstone's Commentaries, Book II, page 461 (Lewis' Edition) appears the following: "Thirdly, the practice of purchasing annuities for lives at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. * * *"

In the Encyclopedia Britannica published in 1907 there is an article on "Annuities" and many examples of how they are computed in which the consideration for an annuity is referred to as the "annual premium."

There were introduced into evidence by defendant several booklets of the Actuarial Society of America published in 1905, 1907, 1908 and 1910. These exhibits contain questions given in examinations by the Society to applicants for membership. In many of the questions therein referring to annuities the consideration therefor was designated as a "premium." Rate books of various insurance companies doing business in California prior and subsequent to 1910, including some of plaintiff's, were admitted in evidence. In practically all of these rate books, including some introduced by plaintiff, the consideration for an annuity was referred to as a "premium." Professor Mowbray, an outstanding authority in the insurance field, and consulting actuary for the insurance commissioner, and who was a fulltime actuary with that department from 1908–10, when asked what was generally the term applied to the consideration paid to insurance companies for annuities at or about 1910, testified: "As I recall the books and articles that were written prior to that time, and having to rule out some that I have been familiar with since, the terminology varied somewhat. The term 'premium' was sometimes used; the term 'value of annuities,' particularly in technical actuarial work, was used; and in some instances 'consideration'; but my recollection is that the more common use was to designate it as 'premiums.'" This was based on information gained from insurance texts, rate books, etc. He also testified that he had examined several books, popular and technical, written about that period and that he was quite sure that he did not find one in which the word "premium" was not used in connection with annuity contracts. Mae Barr Long, deputy insurance commissioner since 1923 and who has been connected with the department since 1906, testified that in all rate books she examined prior to 1910 compensation for annuities was always referred to as a "premium."

In addition to this exhaustive and convincing proof as to the meaning of the term "premium" at or about 1910, and later, the parties stipulated that the tax here involved was imposed upon considerations received on certain designated types of policies which were attached to the stipulation. There are several very interesting facts about these policies. In the first place, nearly every one of them refers to the consideration to be paid as a "premium." In the second place, almost all the policies had incorporated therein a life insurance feature. A few examples will suffice to demonstrate the point. The first policy introduced is called a "Retirement Annuity." Throughout that form the consideration for the policy is referred to as a "premium." On the outside of the specimen policy appears "Life Annuity beginning at age 65 of $79.00 per month. Number of Premium Units:—Two; Age at Issue 35; Annual Premium $200.00. * * * Premiums payable until commencement of annuities." The contract entered into is to pay the annuitant a specified number of monthly payments beginning at a specified age. In giving the annuitant various options, the phrase "provided premiums have been duly paid" several times appears. In the event the annuitant dies before any payments are made, a minor life insurance feature is incorporated in the policy.

The next policy introduced was called a "Cash Refund Annuity." While it has no life insurance features, on the outside of the policy appears "Single Premium, Non-Participating."

The third policy—Exhibit C—is a deferred annuity. It has a column headed "Annual Premium"; and another "Annual Premium Payable for * * * Years", and provides that in case of death of annuitant prior to the date of the first annuity payment "all premiums paid hereon" shall be refunded to a designated person. It also provides that annuity payments are in consideration of a designated number of "full years' premiums." A grace of thirty-one days "will be granted for the payment of every premium. * * *" In several other places the consideration paid for the policy is described as a "premium." An insurance feature is a part of this policy.

In all but one of the specimen policies a similar situation prevails. They all consistently refer to the consideration paid by the purchaser as a premium and nearly all of them have incorporated in varying degrees a life insurance feature.

While it is true that these are policies issued in 1934 (the year here in question) and not the policies issued in 1910, they are some evidence of what this plaintiff now considers the proper interpretation of the word under construction.

In the face of this evidence, it is obvious that the term "gross premiums," as used in the constitutional provision, is, to say the least, capable of the interpretation that it includes the consideration paid for an annuity. It is true that plaintiff refers to several dictionary definitions of the term "premium" (Webster, Century, Bouvier and other authorities) which generally describe the term as the consideration paid for "a contract of insurance." It is very natural to find in such general definitions a reference to contracts of insurance, but the showing made by plaintiff demonstrates that the overwhelming number of authorities, both technical and general, when speaking specifically of annuities, refer to the consideration paid therefor as a "premium."

To overcome this showing plaintiff relies on two main arguments:

[4] First, it urges, that if the consideration for an annuity be called a "premium," it is not a premium for "life insurance." In plaintiff's analysis, the tax, so far as it is concerned, reaches only premiums paid on life insurance. The section does not so provide. It imposes the tax on every insurance company doing business in this state, and the tax is imposed upon "the gross premiums received upon its business done in this state * * *" —not upon gross premiums on its life insurance business done in this state. As already pointed out, the sale of annuities is part of the business done by insurance companies in this state. This argument is without merit.

[5] The second argument advanced by plaintiff to meet the convincing showing made by defendant as to the proper meaning of the term "premiums," is that prior to 1910, and for twenty years thereafter, the constitutional provision was interpreted by the taxing authorities as not imposing a tax on the consideration received for annuities. The complete answer to this argument is that the record does not support plaintiff's contention. While it is true that the record definitely shows that the plaintiff did not include annuity premiums in its annual returns made to the insurance commissioner for the years 1930 to 1934, the record is very sketchy as to what plaintiff did prior to that time. Moreover, there is no evidence that the insurance commissioner knew that this plaintiff or any other insurance company was not reporting annuity considerations, or that he actively or passively acquiesced in such practice. Plaintiff relies strongly on the form provided by the insurance commissioner prior and subsequent to 1910 for the report of the gross premiums of insurance companies for purposes of the tax. This state form, in use in substantially the same form so far as this problem is concerned from 1906 to 1934, merely required "gross premiums" to be shown in one column, with no segregation between life insurance and annuity premiums, and another column was entitled "amount insured." The use of the phrase "amount insured," in plaintiff's view, is inconsistent with a request for the return of premiums received on annuity contracts. Professor Mowbray testified that it was feasible from an insurance standpoint to list the "amount of outstanding annuities," and explained in detail how that would, or could, be done. This destroys plaintiff's major premise that the heading "amount insured" necessarily meant that the insurance commissioners had determined that annuity premiums should not be returned. Moreover, the evidence shows that the various foreign insurance companies also filed with the insurance commissioner so-called "convention" returns, setting forth their national annual business, in which form the number of outstanding annuity policies were listed together with the amount of annual payments represented thereby. In some of these annual statements one column was entitled "Gross Premiums less Reinsurance" received on annuities. In the annual statement of 1910 the consideration received for annuities in that year was included within the "Total of New Premiums" column. In line 17 of the form are listed "Renewal premiums for deferred annuities." It would be a reasonable assumption on the part of the insurance commissioner of California, in view of the care with which annuities were included in the convention form, that the same had been carried over into the California form without segregation. That is exactly what the commissioner did assume. The evidence shows that in 1910 the annuity business of life insurance companies was trivial in comparison with their life business. The annuity business remained a relatively minor part of the insurance business until about 1930 when the late depression caused a huge spurt in the annuity business. Certainly, the form of the return is not such as to compel the conclusion that the insurance commissioner knew that annuity considerations were not being included in the state returns.

In support of its contention that the insurance commissioner must have known that annuity considerations were not being returned, the plaintiff points to the state return made by the Metropolitan Life Insurance Company in 1911, the first year returns were made after the constitutional amendment went into effect. That company reported gross premiums for that year of $1,790,672.38, on a printed form. Underneath this figure, and outside the space on the form where gross premiums were required to be reported, in very small handwriting appears this notation: "1,007.24 Consideration for Annuities not included in above." So far as the evidence is concerned, this is the only return filed from 1911 to 1934 by any insurance company that showed on its face that annuities were not included therein. From this isolated instance plaintiff argues that thereafter for over twenty years the commissioner acquiesced in the noninclusion of annuity considerations. To this argument there are several answers. The notation is written in such small writing that it is not unreasonable to infer that it was so inconspicuous that it escaped official notice. There is no evidence at all that the notation was observed and acquiesced in by the insurance department—in fact, at one time plaintiff professed a willingness to stipulate that if Mae Barr Long, whose duty it was then to examine such returns, were recalled as a witness, she would testify that she never observed the notation in question. It is hardly reasonable to argue that from this one isolated incident it can be inferred that every succeeding commissioner from 1910 on, knowingly acquiesced in the failure to report annuity considerations.

Except for the Metropolitan incident there is very little in the record to show what the contemporaneous construction of the department was for the period 1910 to 1927. Most of the records of the department for most of the period had been destroyed pursuant to statutory authority so that any formal rulings by the department on this question, if any, were not available. A fair reading of the testimony of the various excommissioners who were available at the time of the trial, of Mae Barr Long, of William Tinkler, at present the principal examiner of the insurance department and a long time employee, and of H. F. Risbrough, who has been deputy commissioner since 1908, demonstrates that during this period the situation was as follows:

The insurance department did not examine foreign insurance companies carefully except when the company first qualified to do business in this state; because of lack of clerical and expert help, California was compelled to accept the careful periodical examination of the books of such companies made by the "home" state of the company; that these convention examinations of the nationwide business of such companies did not disclose the fact that these companies were not including the considerations received upon the sale of annuities for tax purposes, because, as already pointed out, the convention form definitely included receipts from the sale of annuities; that because of this fact, and, because during these years the annuity business was not a material portion of the business, the various insurance commissioners and their expert staff members simply "assumed" that annuity receipts were included. Certainly there is no evidence that anyone was ever informed by the department that annuity premiums were not to be included in the return. It was simply a situation where the department assumed the companies were including annuity receipts. Some companies apparently included annuity premiums while other companies apparently failed to do so. Certainly, such a factual situation cannot be distorted into a contemporaneous construction to the effect that such premiums properly could be excluded.

From the year 1927 on, there can be no doubt but that the department, in answer to several inquiries, uniformly ruled that annuity receipts must be included. On January 13, 1927, the then insurance commissioner, Charles R. Detrick, received a letter from the vice-president of the West Coast Insurance Company asking if the purchase money of a single payment life annuity came under the heading "gross premiums received" for taxation purposes. Under date of January 14, 1927, a letter was sent to that company signed "Charles R. Detrick, Insurance Commissioner, by Barrett N. Coates," a consulting actuary of the department, stating that "it is our understanding that the single premium received by your company as consideration for the issuance of a life annuity contract constitutes a gross premium * * * and that such premium should be included in the statement for tax purposes." There is nothing in the record to rebut the inference that that letter was merely a routine reply stating the well settled policy of the insurance commissioner's office toward that problem.

In 1932 the then commissioner E. Forrest Mitchell engaged in correspondence with the Pacific Mutual Life Insurance Company concerning this problem. During that year the attorney general of the State of Oregon had rendered an opinion that annuity considerations were not taxable in that state. This opinion provoked the request from the Pacific Mutual as to the law of this state. The problem was submitted to the late Frank L. Guerena, then attorney for Commissioner Mitchell. Mr. Guerena gave a written opinion to the commissioner in which he pointed out the differences between the Oregon and California statutory provisions, and in which he held that annuity receipts were taxable in this state. He also stated: "I am also advised that it has been the practice of insurance companies for many years to report their income from annuity contracts as taxable income. * * *" A copy of Mr. Guerena's opinion was sent to Mr. Davis, vice-president and general counsel of the Pacific Mutual. Mr. Davis, under date of September 16, 1932, wrote to Commissioner Mitchell thanking him for a copy of the Guerena opinion, and stating: "I quite agree with the conclusion reached by Mr. Guerena, and now that that matter is settled, the main point is to determine that all companies operating in California are taxed upon the basis of the inclusion of annuity premiums in their statements." He also stated that he had been given to understand "that a number of Eastern companies were not paying taxes on these amounts." Under date of September 20, 1932, Mitchell wrote to Davis telling him he was glad that Davis agreed with Guerena on the question of the taxability of annuity premiums and continuing: "You may rest assured that every company operating in the State of California will be required to include annuity premiums in their statement. A special communication insisting on this point will be addressed to all concerned and the matter will be carefully watched by this Division." No such special communication was then sent out. From this fact, plaintiff argues that the commissioner acquiesced in the non-payment of such taxes. No such inference is permissible. A reading of the correspondence indicates that apparently some companies were paying the tax including, inferentially, Pacific Mutual, and some others were probably not paying it; that the commissioner determined to investigate, but, because of the tremendous work in connection with receiverships growing out of problems caused by the depression, did not get around to it until 1934 when the new forms for tax returns were prepared which provoked this litigation.

In 1933 the commissioner first became aware of the fact that a particular company had not paid the tax on its annuity considerations. In that year the Missouri State Life Insurance Company of Missouri was insolvent, and proceedings in connection therewith were pending in that state. In examining that company's books it was discovered that it had not included in its California tax returns annuity considerations sold in California. The Missouri court rejected this state's claim for such taxes, holding that there had been a long administrative interpretation in this state that such premiums were not taxable. Defendant states in his brief, and this fact is not challenged by plaintiff, that subsequent to the trial of the present case assets of the Missouri company in California were by stipulated judgment applied to pay the challenged tax.

In May of 1934 the Union Labor Life Insurance Company inquired of the insurance commissioner if the annuity considerations were taxable in California. Mr. Mitchell replied that they were, and stated that if the company had not theretofore reported them it should inform him of the amount of such business. Under date of June 11, 1934, the company replied that such annuities had been included in its 1933 report.

The record need not be further analyzed. It is apparent from the above analysis of the evidence that:

1. The word "premium" for many years prior to 1910 was used technically and generally by insurance companies, insurance and legal writers and others to include the consideration received by the company on the sale of an annuity.

2. Contrary to the contentions of plaintiff there has not been an administrative interpretation over many years to the effect that such considerations need not be included. The most that can be said is that some companies did not include them, but that the insurance commissioner's office at all times assumed that such premiums were being included; that in view of the nature of the convention form this was a reasonable assumption; that whenever the problem was presented to the insurance commissioner he always replied that such considerations were taxable.

[6] Without reference to the cases from other jurisdictions, it seems quite clear that under the constitutional and statutory provisions of this state, in view of the generally accepted meaning of the term "premium," and in view of what the record shows as to contemporaneous construction in this state, the holding of the trial court that annuity considerations are taxable as gross premiums was correct and should be affirmed. Some reference,

however, should be made to the cases from other states.

An examination of such cases demonstrates that there is a hopeless conflict on the question presented on this appeal. There is a respectable number of cases holding that considerations paid for annuities are not premiums and are not taxable as such. Practically all cases so holding place their main reliance on a Pennsylvania case decided in 1916 and a New York case decided in 1920. The Pennsylvania case is Commonwealth v. Metropolitan Life Ins. Co., 254 Pa. 510, 98 A. 1072, 1073. The opinion in this case was written by the trial judge and was adopted by the supreme court of Pennsylvania without comment of its own. The first point discussed in the opinion was whether insurance companies could deduct dividends paid to policyholders by allowing them to be applied on premiums. After disposing of that point the trial judge considered whether the considerations received by the company upon the sale of annuities were premiums within the meaning of the Pennsylvania tax statute. The court first distinguished annuities from life insurance and then held: "The consideration for an annuity contract is not generally regarded as a premium * * *." Not one authority is cited to support that conclusion.

The problem was next presented in 1920 to the New York intermediate appellate court in People v. Knapp, 193 App. Div. 413, 184 N.Y.S. 345. Five judges sat in that case. The so-called majority opinion was prepared by Judge Henry Kellogg and was concurred in by but one other judge. In this opinion annuities are first distinguished from life insurance, and then, in reliance on the Pennsylvania case, supra, it is held that the considerations received on the sale of annuities are not premiums within the meaning of the tax statute there involved. The only other authorities cited are the general dictionary definitions of "premium" found in Webster, the Century dictionary and Bouvier, heretofore referred to in this opinion.

It will be noted that in the Pennsylvania case and in Judge Henry Kellogg's decision in the New York case the theory seems to be that since annuities are not life insurance, the consideration paid for annuities cannot be held to be premiums. That is a clear non sequitur.

In the New York case Judge Kiley filed a special concurring opinion. The opinion opens with this sentence (184 N.Y.S. at page 348): "I cannot find that any other term has been used to designate the amount paid for an annuity contract than the word 'premium.'" He then agrees with Judge Henry Kellogg that there must be a reversal because the state failed to introduce any evidence on the question as to how the state had construed the provision in the past.

John M. Kellogg, P. J., wrote a dissenting opinion in which one other judge concurred, in which he held that the obvious intent of the taxing law was to tax the business of insurance companies; that the sale of annuities was part of the business of insurance companies; that the word "premium" includes consideration paid for annuities.

Thus it will be noted that three of the five judges agreed that the term "premium" included considerations received on the sale of annuities. In 231 N.Y. 630, 132 N.E. 916, five judges of the court of appeals, with one judge absent, and Pound, J., dissenting, approved the following order: "Per Curiam. Order affirmed, with costs, on opinion of H. T. Kellogg, J., below."

Following these two decisions the following cases have held that annuity considerations are not premiums and are not taxable: Daniel v. Life Ins. Co. of Virginia, Tex.Civ.App. 1937, 102 S.W.2d 256; State v. Equitable Life Assur. Soc., 1938, 68 N.D. 641, 282 N.W. 411; State v. Ham, 1939, 54 Wyo. 148, 88 P.2d 484.

In the North Dakota case, supra, there was a strong, well reasoned dissent. All of the cases place great reliance on the frail support of the Pennsylvania and New York cases, and in some of them great weight is placed on the fact that in the particular state there had been an administrative construction adverse to the inclusion of annuity considerations in the tax. In some of the cases the statutory provisions are dissimilar to those in this state, so that the opinions may be predicated on the language of the particular statute.

As opposed to these cases, the following cases have held that the considerations paid for annuities are premiums and are taxable: Northwestern Mut. Life Ins. Co. v. Murphy, 1937, 223 Iowa 333, 271 N.W. 899, 109 A.L.R. 1054 (an exceptionally well reasoned opinion discussing all prior cases and concurred in by all eight justices of the court); New York Life Ins. Co. v. Sullivan, 1937, 89 N.H. 21, 192 A. 297 (a unanimous opinion that considers and finds wanting most of the arguments advanced by plaintiff in the present case); State v. New York Life Ins. Co., 1939, 198 Ark. 820, 131 S.W.2d 639 (a decision by a divided court. The evidence showed that the insurance commissioner, following the decisions in Pennsylvania and New York, supra, had ruled that such considerations were not taxable. The dissenting opinion is predicated partly on this administrative construction and partly on the peculiar legislative provisions in Arkansas); State v. Mutual Life Ins. Co. of New York, 1940, 189 Miss. 830, 196 So. 796, 800, 198 So. 763 (where the majority held that the meaning of the terms "gross amount of premium receipts" included annuity considerations and that there was no ambiguity in the statute); State v. Lucas, 1941, 348 Mo. 286, 153 S.W.2d 10, 12 (a unanimous opinion where, after careful consideration, it was held that the contention that the money paid for an annuity was a "consideration" and not a "premium" must be overruled, for text-writers, insurance departments, those familiar with the insurance business, insurance men, including relator's agents, and the public have been, for many years, referring to annuity contracts as policies, and referring to the money paid for an annuity as a premium"); Equitable Life Assur. Soc. v. Hobbs, 1941, 154 Kan. 1, 114 P.2d 871, 135 A.L.R. 1234 (a decision by a divided court, the majority, after discussing all prior cases, holding that such considerations were taxable).

After reading all of the above cases we are convinced that the New York and Pennsylvania cases, and the cases following them, are unsound, and are predicated upon false premises and should not be followed. We are also convinced that the cases last above cited enunciate the proper rule and should be followed.

It follows, from an analysis of the California constitutional and statutory provisions, from an analysis of the proper meaning of the term "premium," and from the weight of authority outside the state, that considerations received upon the sale of annuities are "premiums" and are taxable as such, and that the position taken by plaintiff on its appeal is unsound.

Appeal of Charles G. Johnson, State Treasurer of the State of California.

As already pointed out, the trial court held that plaintiff insurance company was entitled to a refund of taxes paid under protest in 1935 in the amount of $17,443.66. The defendant state treasurer appeals from the judgment in favor of plaintiff for this amount.

Under article XIII, section 14(b) of the Constitution the tax is computed upon "gross premiums received upon its business done in this state, less return premiums * * *." It was here stipulated that plaintiff received as gross premiums in 1934 (including annuity considerations) $11,474,830.61 on business done in this state. During the same year, according to the stipulation of facts, "plaintiff paid refunds and cash values to holders of annuity contracts residing in the State of California in the sum of $670,909.94 * * *" on the types of annuity policies itemized in the stipulation. The tax, as assessed by the state, did not make a deduction for this item. The judgment for $17,443.66 is predicated on the deductibility of these "refunds and cash values" as "return premiums." The exact nature of these payments is not entirely clear from the record. Wendell Milliman, assistant actuary of the plaintiff, testified that these payments did not include "annuity payments made to annuitants under annuity contracts," but that such sums included "amounts returned to annuity purchasers on the surrender of annuity contracts." This witness conceded that cash and surrender values paid to holders of life insurance contracts were not deductible by his company; that the refund was claimed on annuity contracts because "upon surrendering the contract the annuitant foregoes the payment of any future amount provided for by that contract and covered by his original consideration. The amount returned to the annuitant at the time of the surrender of the contract is in that respect a return of the original consideration, or a portion of the original consideration."

Defendant contends that, even if such payments are "return premiums," as those terms are used in the Constitution, in this particular case they are not deductible because no tax was in fact paid on the premiums when received. It is argued that the theory of the deduction provision is that the company should not be required to pay a tax on premiums which are not retained by it but are returned to the purchaser of the annuity; that the "return premiums" here involved were paid to California residents in 1934, but were on policies issued prior to that year; that prior to 1934 the company interpreted the constitutional provision as not requiring the return of premiums paid for annuities; that, as a result, no tax was paid on the premiums when first received by the company, and, therefore, no refund should be allowed when a portion of such premiums is later returned to such purchaser. Plaintiff contends that the effect of the defendant's construction is to read into the constitutional provision following the words "return premiums" the words "previously taxed," without any warrant for such judicial interpolation. In support of his position, defendant cites a number of cases involving situations not allied to that herein, but which are cited to show that the courts adopt a realistic approach to the construction of tax statutes, but admittedly none of the cited cases approaches the present one on the facts.

[7] The argument of defendant, so far as this point is concerned, amounts to this: These refunds are "return premiums" as those terms are used in the constitutional provision, and, under normal circumstances, could be deducted, but, some time in the past, this company failed to pay the tax on the considerations secured upon the sale of annuities, and therefore, for these past sins, it should be precluded from securing a refund on return premiums in 1935 when it has not paid the tax on the original premiums some years before. This argument assumes that recovery for the past unpaid taxes is barred by the statute of limitations. We will assume, without deciding, that such recovery is barred. There is nothing in the constitutional provision intimating that return premiums are only deductible when the tax was paid on the original premium. When the tax statute was first passed in 1903, or when the constitutional provision was first passed in 1910, there can be no doubt that in those first few years most return premiums would be on policies issued prior to those dates. It would be a forced construction of the provision to say that such return premiums were not deductible because not previously taxed.

[8] If the company were suing for a refund for the tax paid in 1935 on return premiums paid over in that year, and, if the state's action to recover for unpaid 1935 taxes on premiums was barred by the statute of limitations, we have no doubt at all that the unpaid taxes would be offset against the claim for a refund. That is as far as the cases cited by defendant go. But if defendant is correct, claims for taxes that we have assumed are barred by the statute of limitations may thus be recovered indirectly. That would violate the fundamental theory underlying statutes of limitations in tax statutes. Such a doctrine might well bankrupt a company where it had changed its position in reliance on the erroneous but good faith belief that no tax was due. If defendant's position is correct, whenever the government desired to collect a tax already barred by the statute of limitations, all it would have to do would be to levy an excessive tax for one year, and, when the taxpayer sued for a refund, claim that it had the right to offset taxes not paid many years before. We think the position taken by defendant on this point is untenable.

Defendant next contends that the amounts paid to holders of annuity contracts upon the surrender and cancellation of such contracts are not "return premiums" within the meaning of the Constitution. In this connection he also urges that even if such payments are "return premiums," such deductions are allowed only "upon business done in this state" and there is no evidence that payments were made on policies originally sold in California. He also contends that such payments were made on policies that to some extent contained life insurance features. These contentions present several difficult and debatable propositions.

The most obvious example of a return premium is presented by the situation when a fire insurance policy is cancelled. Normally, such policies are issued for three years, and the total premium for the three-year period is paid when the policy is issued. If the policy is cancelled at the end of one year, the insured is entitled to a return of two years' premium. In connection with a life policy, the most obvious illustration is where the premium is paid, but, before the policy takes effect, it is cancelled because of fraud. The amount returned to the policyholder is clearly a return premium. Defendant contends that the phrase must be limited to such or similar situations and cannot be extended to include refunds and cash values paid to holders of annuity contracts upon the cancellation of their policies before the annuity takes effect. This contention is predicated on the argument that prior to the enactment of the constitutional tax provision, or the statute that preceded it, the phrase "return premiums" had acquired a well-defined meaning under which it was applicable to fire and other types of insurance, but not to life insurance or contracts of annuity. He further contends that in 1910, and for many years before that date, the law prohibited making cash payments upon the cancellation of life policies, and, in his analysis, upon the cancellation of annuity contracts.

[9] We do not believe that the statutory provisions cited by defendant are conclusive on this question. Since 1872 the Civil Code has provided for the return of premiums in three code sections—sections 2617, 2618 and 2619 (now §§ 481, 482 and 483, Insurance Code, St.1935, p. 509; St. 1939, p. 2290). No useful purpose would be served by quoting those sections in this opinion. They are obviously applicable to insurance such as fire insurance, but less obviously applicable to life insurance or annuities. However, section 2619 of the Civil Code, as originally enacted provided: "A person insured is entitled to a return of the premium when the contract is voidable, on account of the fraud or misrepresentation of the insurer, or on account of facts, of the existence of which the insured was ignorant without his fault; or when, by any default of the insured other than actual fraud, the insurer never incurred any liability under the policy." Clearly, that section could, and does, apply to life insurance and annuity policies. The other sections do not suggest what should be done on the cancellation of a life policy or an annuity policy.

So far as life insurance policies are concerned, from an early date there has been a specific provision which has regulated what shall be done on cancellation of such policies, which provision did not use the phrase "return of premiums." Section 451 of the Civil Code, enacted in 1873, provided for payment to the insured of a sum equal to 75 per cent of the then present value of the policy as ascertained by section 447 of the Civil Code. There can be no doubt that from this early date the legislature treated return premiums as one thing, and cash paid on surrender or cancellation of life policies as quite another. That this surrender value did not apply to annuities is made quite clear by the subsequent statutory history. Long prior to 1910 the provision requiring the cash payment was repealed, and a new system of surrender values was adopted and set forth in section 450 of the Civil Code. By this section it was provided that on cancellation the entire net reserve value of the policy should be applied either to the purchase of non-participating term insurance for the full amount of the policy, or to the purchase of a non-participating paid up policy. This provision continued in force until 1911, and hence was in effect when the constitutional tax amendment was adopted. It is this provision which causes defendant to argue that when the tax amendment was adopted payment of cash was prohibited, with the result that at that time there could not have been a "return premium" on a life policy, and so, he urges, on an annuity policy. In 1911, section 450 was amended to direct payment of cash surrender values, but its application to annuities and certain other policies was expressly excluded.

It seems plain to us that section 450 of the Civil Code, either in its original or amended form, did not apply to annuity contracts. Its inapplicability as amended is express, and, if applied to annuities in its original form, such application would result in an absurdity. As already pointed out, an annuity is different from a life policy. It would be absurd to say that the holder of an annuity, on cancellation, must accept term or paid up life insurance —something entirely different from an annuity, something he did not purchase and presumably did not desire.

[10] From this analysis we think it quite clear that, except for the limited situations set forth in section 2619 of the Civil Code, supra, the Legislature, from an early date, so far as life policies are concerned, has distinguished between a "return premium" and the cash or surrender value paid upon the cancellation of such policies. Stated another way, except for the situations set forth in section 2619 of the Civil Code, the cash or surrender values paid upon the cancellation of life policies are not "return premiums" as those terms are used in the constitutional provision in question. They are not deductible from the amount of gross premiums received. The plaintiff's witness Milliman agreed that

such payments on life policies were not deductible.

[11] Some brief reference should be made to two California cases cited by the parties on this point. The first of these is Northwestern M. L. Ins. Co. v. Roberts, 177 Cal. 540, 171 P. 313. The sole question involved in that case was whether "dividends" paid to holders of life insurance policies in a mutual benefit company were "return premiums" within the meaning of the tax provision here under discussion. The court held that they were not. The court found that the phrase "return premiums" as applied to life policies had a well-defined technical and limited meaning which was not broad enough to extend to such dividends. The court quoted, with approval, the definition of the phrase in Black's Law Dictionary as follows (177 Cal. at page 543, 171 P. at page 314): " 'The repayment of the whole or a ratable part of the premium paid for a policy of insurance upon the cancellation of the contract before the time fixed for its expiration.' " On the same page the court stated: "In Joyce on Insurance and also in Elliott on Insurance—the two main modern text-books on this branch of the law—there are to be found in each an entire subdivision devoted to the subject of 'Return of premiums and assessments,' in which these terms are given application to cases wherein the risk has not attached, or where the policy is void, or has been issued through a mistake of law or fact, or has been procured through fraud and the like, and wherein the use of the phrase is limited to the class of cases above enumerated. Joyce on Insurance, c. 35; Elliott on Insurance, § 299. See, also, Dawson's Elements of Life Ins. p. 166. Nowhere, in fact, so far as the industry of counsel in the search for precedents have gone, or as our own independent research has extended, had the phrase 'return premium' ever been given in the domain of either fire or life insurance, prior to the enactment of the amendment to our constitution under review any other than the limited meaning in which that phrase has been defined and discussed by the law dictionaries and law-writers above referred to."

The court went on to hold that, so far as life insurance was concerned, the phrase, as used in the Constitution, had this limited and technical meaning. The court did not consider the question whether a similar rule applied to annuities, nor did it consider the question whether "premiums" paid for an annuity were "gross premiums." The court was not dealing with annuity contracts at all.

The other case referred to, and relied upon by plaintiff, is Mutual Benefit L. Ins. Co. v. Richardson, 192 Cal. 369, 219 P. 1003. That case did not involve the interpretation of the phrase "return premiums" at all. It held that where dividends are applied to payment of the premium, the "gross premium" to be returned is the amount of the premium fixed by the policy as reduced by the dividend. It will be noted that by this decision the insurance companies accomplished the result they unsuccessfully attempted to secure in the Northwestern case, supra, but upon an entirely different theory. The decision did not purport to overrule the reasoning of the Northwestern case.

[12] Under the decision in the Mutual Benefit case it is apparent that the insurance companies had been reporting gross premiums in excess of those required by law and were entitled to refunds. This led, in 1925, to the state and the insurance companies entering into a statutory stipulation providing, among other things, that "matured endowments or surrender values" on cancellation of life contracts should not be deducted as return premiums. Stats. of 1925, p. 218.

For these many reasons, we think it to be clear that cash or surrender values paid on the cancellation of a life insurance policy are not return premiums as used in the tax provision in question. But that does not determine that cash or surrender values paid on the cancellation of a pure annuity contract prior to the starting of payments to the annuitant are not return premiums. Section 2619 of the Civil Code, supra, obviously refers to annuity contracts, but that does not mean that the phrase "return premiums" is limited to the situations there set forth. Annuity contracts provide by their terms for refunds to the purchaser upon cancellation. If they did not so provide, few purchasers would be found for them. Payments so refunded before the risk attaches—i. e., before payments start to the annuitant—regardless of whether sections 2617 and 2618 of the Civil Code are applicable, are by contract "return premiums" within the meaning of the Constitution.

It seems quite clear that in the early statutory provisions in this state prior to 1910 the Legislature did not have specifically in mind cash or surrender values of annuity policies. That form of policy, in those early years, was such a minor part of the insurance business, that, so far as cash and surrender values are concerned, the Legislature did not find it necessary to protect the holders of such policies by specific statutory regulation. Section 594 of the Political Code, for reasons already set forth, did not make all provisions of the law relating to life insurance ipso facto applicable to annuities without regard to their obvious inappropriateness. So far as the cash and surrender values of annuities are concerned, the Legislature, apparently, was willing to let them be determined by the contract of the parties.

The conclusions so far advanced in this opinion, while in accord with plaintiff's main contentions on this appeal and in accord with the conclusions of the trial court, do not necessarily mean that the particular items involved on this appeal are deductible. An examination of the record discloses that there are several reasons why the evidence is insufficient to support the findings and conclusions of the trial court that these items are deductible.

[13, 14] It must be kept in mind that plaintiff is suing for a refund, and that, therefore, the burden of proof was on it to show that it was entitled to the refund. Miller v. McColgan, 17 Cal.2d 432, 110 P.2d 419, 134 A.L.R. 1424; Connecticut Gen. Life Ins. Co. v. Johnson, 3 Cal.2d 83, 43 P.2d 278. According to the stipulation of facts, these return premiums were paid on policies denominated as "Retirement, Cash Refund, Life, Refund, Special Life, Income Bond and Group Annuity." As to several of these types of policies, Professor Mowbray testified that they had connected with the annuity feature, a life insurance feature in varying degrees—that is, such policies had included therein some provision based upon a life contingency. What amount of the return premiums paid to the holders of such policies was predicated on original premiums charged for the life insurance feature, and what portion was attributable to the annuity feature, does not appear in the evidence. Cash surrender values on life policies are not deductible. Moreover, it is only those cash surrender values paid on annuity policies cancelled before the risk attaches—that is, before payments have started to the annuitant—that are deductible as return premiums. The evidence fails to disclose the matters from which a proper computation can be made. For that reason, this portion of the judgment must be reversed. Justice requires that this issue be retried where the parties can introduce evidence on these factors.

There is one other matter that should be mentioned. According to the stipulation, the so-called return premiums were paid to "holders of annuity contracts residing in the State of California." There is no indication in the stipulation, or in the evidence, that such return premiums were paid on policies originally written in California. The defendant views as shocking the contention of the plaintiff that return premiums paid to residents of this state without regard to where the original premiums were collected or the annuity contracts entered into are deductible as return premiums. The constitutional provision imposes the tax on the "amount of the gross premiums received upon its business done in this state, less return premiums. * * *" The defendant contends that the deduction or credit allowed for "return premiums" is, in legal effect, an exemption from liability, and, as such, must be strictly construed against the taxpayer (Miller v. McColgan, supra, 17 Cal.2d at page 442, 110 P.2d 419, 134 A.L.R. 1424); that, reasonably interpreted, the constitutional provision means that return premiums can be deducted only when the original policy was issued in this state. The plaintiff contends that any return premium paid to a resident of California is deductible whether or not the original premium was collected in California. Thus, plaintiff contends that, if an annuity policy was issued in a foreign state, and, thereafter, the policyholder becomes a resident of California and while residing here cancels the annuity contract under such circumstances that the surrender value is a return premium, the payment is deductible although the original policy was not sold in this state. The constitutional provision is not clear on this point. It would appear that the phrase "business done in this state" qualifies both "gross premiums" and "return premiums." It is a possible construction to say that it was the purpose of the provision to allow a deduction for the return of the premium only where the original premium was collected in California, that is, was part of the "business done in this state" by the insurance company; that, otherwise, the "return premium" is not on "business done in this state" as that phrase is used in the provision in question.

On the other hand, the construction contended for by plaintiff is also possible. The solution of this problem affects not only companies selling annuity policies, but every company selling any type of policy in this state. The problem was only incidentally presented to the trial court and is only cursorily treated in the briefs. It seems more than likely that evidence is available as to how the taxing authorities and the insurance companies have interpreted this problem during the almost forty-year period that this provision, or its counterpart, has been in effect. Plaintiff contends that it would be impossible, from an accounting standpoint, to apply the section as interpreted by defendant. That contention, if true, would certainly be a factor in interpreting the section. Obviously, it will not be presumed that the provision would grant a reduction and then deny it because it cannot be computed. But that is a matter that can only be proved by expert testimony. For these reasons, inasmuch as this phase of the case must be retried for other reasons, the court expresses no opinion on the point under consideration. That point can be more fairly determined after a trial at which both litigants may offer what evidence is available on the issue.

Summary and Conclusion.

As heretofore pointed out, this action was brought by plaintiff for the refund of taxes paid by it under protest in the amount of $330,348.22, reduced at the trial to $298,345.60. The theory of plaintiff was that the considerations paid for annuities were not "gross premiums" within the meaning of article XIII, section 14 (b) of the Constitution. The trial court held adversely to this contention of plaintiff. The trial court did hold, however, that plaintiff was entitled to a refund of $17,443.66, and entered judgment in plaintiff's favor in this amount. This judgment was predicated on the theory that plaintiff was entitled to deduct from its gross premiums received in 1934 the amount of $670,909.94 —the amount of refunds and cash values paid by plaintiff in that year to holders of annuity contracts residing in this state. From this judgment both plaintiff and defendant have appealed, the former contending that it is entitled to a refund of the total amount claimed, and the latter claiming that plaintiff is entitled to no refund at all.

In this opinion we have held that the trial court was correct in its holding that the considerations paid for annuity contracts constitute "gross premiums" as those terms are used in the taxing provision in question. That issue has been determined and should not be retried.

On the appeal by the defendant we have held that the evidence does not sustain the findings that the sum fixed in the judgment is deductible. Plaintiff is entitled to some deduction if it can present the evidence required under the rules laid down in this opinion. Justice requires that it be given the opportunity, if it so desires, to present that evidence. If the plaintiff be so inclined, a retrial should be had solely to determine the amount of return premiums which plaintiff may be entitled to receive under the rules set forth in this opinion.

For the foregoing reasons, on the appeal of defendant, the judgment is reversed for the limited purposes heretofore indicated, and the trial court directed to proceed as herein set forth, the defendant to recover costs on both appeals.

WARD, J., and CONLAN, Justice pro tem., concurred.

52 Cal.App.2d 753

CONSOLIDATED PRODUCE CO., Limited, v. TAKAHASHI et al.

Civ. 2808.

District Court of Appeal, Fourth District, California.

June 18, 1942.

Hearing Denied Aug. 13, 1942.

1. Appeal and error ⚿544(3)

A party dissatisfied with a judgment may appeal on the judgment roll alone, and, when he does so, the appeal must be decided on that record.

2. Appeal and error ⚿659(3)

On appeal on judgment roll alone, reviewing court could not order up any part of the record which properly should have been included in a reporter's transcript had one been ordered, but which formed no proper part of the clerk's transcript on appeal.

3. Appeal and error ⚿907(3)

On appeal on judgment roll alone, reviewing court must resolve all intendments in favor of the judgment and hence was required to presume that case was tried on the theory that a ground of waiver of security relied on by trial court in support of its judgment but not supported by any sufficient pleading was properly before the court, that evidence was received thereon without objection, and that the evidence sustained the finding.

4. Appeal and error ⚿882(17)

The general rule is that a finding outside the issues must be disregarded on appeal, but, where the parties voluntarily submit and try an issue without any specific pleadings, they may not thereafter complain that the findings and judgment were not within the issues framed by the pleadings.

5. Chattel mortgages ⚿225(1), 227

Where mortgagor wrongfully removes mortgaged crop from the land without mortgagee's knowledge and consent, mortgagee may follow it and under certain circumstances may claim the proceeds from a wrongful sale of such mortgaged property. Civ.Code, § 2972.

6. Chattel mortgages ⚿136

Where mortgagee of tomato crop breached contract with mortgagor, refused to accept the tomatoes which contract required mortgagor to deliver to mortgagee for sale, acquiesced in mortgagor's sale thereof to third parties, and did not assert mortgage lien, but brought action on note and obtained attachment on ground that mortgage security was valueless, lien of mortgage was "waived" and another attaching creditor whose writ of attachment was served on purchaser of tomatoes prior to mortgagee's attachment was entitled to proceeds of sale of the tomatoes. Civ.Code, § 2972.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

◆

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action in interpleader by the Consolidated Produce Company, Limited, against K. Takahashi and others, wherein Mrs. K. Takahashi, as administratrix of the estate of K. Takahashi, deceased, was substituted as defendant. From a judgment in favor of named defendant, defendant George Manos appeals on the judgment roll, and moves for an order to transmit an exhibit for use on the appeal.

Motion denied and judgment affirmed.

Stickney & Stickney and William H. Wylie, all of San Diego, for appellant.

Elmer W. Heald, Frank Birkhauser, and Harry W. Horton, all of El Centro, for respondent.

MARKS, Justice.

This is an appeal from a judgment awarding respondent money, deposited in court, in an action in interpleader brought to determine the claimant entitled to receive this money. Appellant has also moved the court for an order to transmit a certain exhibit here for use on this appeal.

Pending this appeal K. Takahashi died, and his widow, Mrs. K. Takahashi, as administratrix of his estate, has been substituted in his stead.

[1,2] This appeal was taken on the judgment roll. As far as the record shows no steps were taken in the court below for the preparation of a reporter's transcript or a bill of exceptions. A party dissatisfied with a judgment may appeal on the judgment roll alone, and when he does, his appeal must be decided on that record. Under such circumstances we cannot order up any part of the record which properly should have been included in a reporter's transcript, had one been ordered, but which forms no

proper part of the clerk's transcript on appeal. Borenstein v. Borenstein, 20 Cal.2d 379, 125 P.2d 465; Sutcliffe v. Sutcliffe, 220 Cal. 398, 31 P.2d 195; Stern & Goodman Inv. Co. v. Danziger, 206 Cal. 456, 274 P. 748.

To understand the issues involved, a somewhat detailed statement of facts is required. Some of the facts are set forth in Takahashi v. Kunishima, 34 Cal.App.2d 367, 93 P.2d 645.

Manos Brothers was a partnership composed of George and William Manos.

In 1937, Harry K. Kunishima had possession of twenty acres of land in Imperial County on which he raised tomatoes. The trial court found: "That the said Harry K. Kunishima had, on or about the 30th day of August, 1937, made and entered into a marketing contract and agreement with the defendant George Manos, by the terms of which contract the said George Manos agreed to advance to the said Harry K. Kunishima certain sums of money at specified times and agreed to do and furnish certain things, including the payment to the said Harry K. Kunishima of sixty cents ($.60) per crate of tomatoes, advancing the same on Tuesday and Friday of each week as said tomatoes were harvested and packed."

On December 11, 1937, Kunishima executed a promissory note for $4,000 payable to Manos Brothers, which was secured by a mortgage on the tomato crop. This mortgage was duly recorded. The promissory note and crop mortgage were sold and assigned to George Manos by Manos Brothers on July 10, 1938.

About July 12, 1938, Takahashi filed suit in the Superior Court of Imperial County against Harry K. Kunishima to recover judgment on his own and assigned claims for wages. He recovered judgment on July 26, 1938, for $1,064. A writ of attachment had been issued and served on Consolidated Produce Company, Ltd. After judgment execution was issued and served on that company. A return was made showing the company held the sum of $1,140.91 as the sale price of tomatoes delivered by Harry K. Kunishima.

On July 22, 1938, George Manos filed suit against Harry K. Kunishima on the promissory note. In this action he did not seek to foreclose the crop mortgage securing the note. Manos filed an affidavit for an attachment in which he stated that the note "was secured by a mortgage upon personal property, but that said security has become valueless." A writ of attachment was issued and served on Consolidated Produce Company, Ltd., subsequent to the levy made in the action of Takahashi v. Kunishima.

Consolidated Produce Company, Ltd., brought this action in interpleader against K. Takahashi, Harry K. Kunishima, George Manos and Manos Brothers to require them to litigate their claims to the money it held which was deposited in court.

Harry K. Kunishima filed an answer in which he asserted no claim to the money.

Various pleadings under various names were filed by Takahashi and George Manos. They are certainly not examples of good pleading. When stripped of their unnecessary verbiage we believe they sufficiently set forth the ultimate facts upon which their respective claims to the money are founded.

Manos bases his claim upon the lien of the crop mortgage and upon the alleged conversion of the mortgaged tomato crop by Kunishima.

Takahashi bases his claim on the liens of the attachment and execution and on the alleged waiver of the security of the mortgage by Manos Brothers and George Manos. As a ground of waiver Takahashi pleaded the suit on the promissory note, the facts stated in the affidavit for an attachment, and the fact of the issuance and levy of the writ of attachment on plaintiff in the action by Manos.

The trial court found the facts in accordance with the allegations in the pleadings of Takahashi, concluded that the security had been waived and gave judgment for Takahashi.

As an additional ground of waiver the trial court also found:

"That in the spring of 1938 and as soon as said tomatoes were ripe and ready for harvesting, the defendant Harry K. Kunishima commenced the harvesting and packing of said tomatoes and delivered the same to the defendants George Manos or Manos Brothers until a date in May, 1938, when the said George Manos and Manos Brothers then and there refused to accept delivery of said tomatoes or to receive the same for resale, or otherwise, and on or before the 20th day of May, 1938, the said George Manos and Manos Brothers did authorize and direct the said Harry K. Kunishima to harvest and pack said tomatoes remaining on said property and to sell the same himself directly to such purchaser or purchasers as he might be able to find for said unsold tomatoes. That the said George Manos and Manos Brothers did cease advancing to the said Harry K. Kunishima the amounts of money provided for in said marketing contract and thereafter and commencing with the 20th of May, 1938, the said Harry K. Kunishima, with the full knowledge and consent of the defendants George Manos and Manos Brothers, did sell the balance of said tomatoes that were harvested from said premises to the plaintiff Consolidated Produce Company, Ltd., a corporation, harvesting, marketing and selling the same to said Consolidated Produce Company, Ltd., openly and notoriously and with the full knowledge, consent and approval of the defendant George Manos and the defendant Manos Brothers, and that the said Manos Brothers and George Manos did authorize the sale of said tomatoes by the said Harry K. Kunishima to the said Consolidated Produce Company, Ltd., free from any lien of said mortgage and did waive any rights of the said George Manos and Manos Brothers to the lien of said mortgage or to the enforcement of said mortgage as to said remaining tomatoes and/or the proceeds thereof."

[3] It is true, as maintained by Manos, that the foregoing finding of waiver is not supported by any sufficient pleading. However, as the appeal is on the judgment roll alone, we are required to resolve all presumptions and intendments in favor of the judgment to the extent that we must presume that the case was tried upon the theory that this particular ground of waiver was properly before the court; that evidence was received on this subject without objection; that the evidence sustained this finding.

[4] The rule governing us in cases of this kind is clearly set forth in Freeman v. Gray-Cowan, Inc., 219 Cal. 85, 25 P.2d 415, 416, as follows:

"The general rule is that a finding outside the issues must be disregarded. However, where the parties voluntarily submit and try an issue without any specific pleadings they may not thereafter complain that the findings and judgment were not within the issues framed by the pleadings. McDougald v. Hulet, 132 Cal. 154, 64 P. 278; Poledori v. Newman, 116 Cal. 375, 48 P. 325; Baar v. Smith, 201 Cal. 87, 255 P. 827; Kirk v. Culley, 202 Cal. 501, 505, 261 P. 994. * * *

"However, the record is not before us and it is impossible to determine whether objections were made to the introduction of the deeds which established title in the plaintiff. Nor is it possible to ascertain with respect to what issue or for what purpose the offer was made. In accordance with the rule that every intendment must be indulged in favor of the judgment, we must assume that the evidence was introduced in support of the issue of title. In Silvers v. Grossman, 183 Cal. 696, 702, 192 P. 534, 537, it is said: 'And where the appeal is upon the judgment roll alone, so that the record fails to disclose whether or not, at the trial, objections were interposed to evidence as not within the issues, it has been held that it will be presumed in support of the findings and judgment that the pleadings were treated as sufficient to raise the issues upon which the findings were made and that evidence in support of such issues was introduced and went in without objection (Illinois Trust & S. Bank v. Pacific Ry. Co., 115 Cal. 285, 296, 47 P. 60; McDougald v. Hulet, 132 Cal. 154, 159, 64 P. 278; Beardsley v. Clem, 137 Cal. 328, 332, 70 P. 175), although the rule may be different where such a presumption would result in the reversal of the judgment. (Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400).' A most pertinent statement is also found in Poledori v. Newman, supra, 116 Cal. at page 377, 48 P. at page 326, as follows: 'Upon a direct appeal from the judgment, upon the judgment roll alone, it will be assumed in support of the judgment that all objections to evidence in support of the findings were waived. If objection to the introduction of any evidence had been made upon the ground that the defect to which it related was not alleged in the complaint, the court would have permitted the plaintiffs to amend their complaint. Parties will not be permitted to lie by and keep silent when evidence is offered, and after the court has rendered its judgment, object thereto upon the ground that the evidence sustaining it was inadmissible under the issues presented by the pleadings.'"

To the same effect are the cases of Peck v. Noee, 154 Cal. 351, 97 P. 865; Saere v. Imperial Water Co. No. 3, 206 Cal. 13, 272 P. 1044; Dodge v. National Surety Co., 110 Cal.App. 618, 294 P. 741; Harper v. Buckles, 19 Cal.App.2d 481, 65 P.2d 947; Dorris v. Crowder, 26 Cal.App.2d 49, 78 P.2d 1039; Bicknell v. Strawn, 26 Cal.

App.2d 491, 79 P.2d 775, and Fresno City High School Dist. v. De Caristo, 33 Cal. App.2d 666, 92 P.2d 668.

The sole question presented to us for decision is this: Do the facts found support the conclusion of waiver of the security and thus support the judgment?

[5] Section 2972 of the Civil Code provides that the lien of a crop mortgage continues on the crop after its severance from the ground so long as it remains on the land of the mortgagor. It is also settled that if the mortgagor wrongfully removes the crop from his land without the knowledge and consent of the mortgagee, the mortgagee may follow it. Also that under certain circumstances a mortgagee may claim the proceeds from a wrongful sale of the mortgaged property. McIntyre v. Hauser, 131 Cal. 11, 63 P. 69.

[6] We have no such state of facts here. The mortgagee breached its contract with the mortgagor and refused to accept the tomatoes which the mortgage required be delivered to the mortgagee for sale at the best price obtainable, told the mortgagor to sell the crop elsewhere, and knew that the tomatoes had been sold and delivered to plaintiff. Under the findings it is clear that after May 20, 1938, neither Manos Brothers nor George Manos made any objection to the sale to plaintiff nor made any claim on the crop or the proceeds of its sale until after Takahashi had attached the money in the hands of plaintiff. In the action in which the attachment was issued, George Manos, the owner of the note, did not claim the money by virtue of the lien of the mortgage but by means of a writ of attachment issued in an action on the promissory note and not to foreclose the mortgage. Nor did he then seek possession of the tomatoes by reason of the lien of the mortgage and their tortious removal by the mortgagor. His claim to the tomatoes and the money representing their sale price was first asserted in this action.

Under similar circumstances it has been held that the mortgagee waived the lien of the mortgage. See Ramsey v. California Packing Corp., 51 Cal.App. 517, 201 P. 481; Riddle v. Etling, 84 Cal.App. 460, 258 P. 162; Valley Bank v. Hillside Packing Co., 91 Cal.App. 738, 267 P. 746; Haber v. J. G. Boswell Co., 130 Cal.App. 514, 20 P.2d 100; I. S. Chapman & Co. v. Ulery, 15 Cal.App.2d 452, 59 P.2d 602; Wingard v. Banning, 39 Cal. 543.

In I. S. Chapman & Co. v. Ulery, supra [15 Cal.App.2d 452, 59 P.2d 604], the court quoted from Ramsey v. California Packing Corp., supra, as follows: "'* * * obviously, if the crops were removed by and with the consent of the plaintiff, then they were not wrongfully or tortiously removed, and in that case the lien of the mortgage ceased upon such removal by operation of law. This proposition follows from the terms of section 2972 of the Civil Code. * * * This agreement (allowing the mortgagors to sell the mortgaged crops and turn over the proceeds of sale to plaintiff and Emerson) amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage.' * * *"

As the lien of the mortgage had been waived, and as the lien secured by Takahashi in his action against Harry K. Kunishima was prior to the lien of the attachment by Manos in his action on the promissory note, the trial court correctly awarded the funds in controversy to Takahashi.

The motion to order an exhibit transferred to this court is denied.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

53 Cal.App.2d 11

PEOPLE v. ARNOLD.

Cr. 3570.

District Court of Appeal, Second District, Division 2, California.

June 25, 1942.

Hearing Denied July 23, 1942.

1. Criminal law 🔑1159(2)

If circumstances shown in evidence reasonably justify verdict, the opinion that those circumstances might also reasonably be reconciled with defendant's innocence will not warrant interference by a reviewing court.

2. Arson 🔑37(1)

Circumstantial evidence supported conviction of arson and of burning insured property.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

William Arnold was convicted on both counts of an information charging him with arson and with burning insured property, and he appeals

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

In an information containing two counts defendant was charged with arson and with burning insured property. He was convicted on both counts. The appeal is from an order denying his motion for a new trial.

Defendant contends that the evidence is insufficient to justify the conviction. A statement of the more important facts brought out in the testimony shows that this contention is without merit. Carl Schou, who lived about thirty feet from defendant's residence at 8927 Ellis Avenue in the city of Palms, arrived home at about 3 o'clock in the morning and through his bedroom window noticed that defendant's residence was afire. He at once aroused defendant and a Mrs. Paulson, also known as Mrs. Arnold, who was living in the house with defendant. He then went to his landlady's residence and telephoned the fire department and upon returning met defendant coming out of the house. Together they secured a hose from the premises, sprayed water on the fire and put it out. The firemen arrived promptly and were met in front of the house by defendand who told them: "The fire is out; never mind." After several questions the firemen learned from defendant that the fire had been in the back of the house. They investigated and found that sparks and live embers were in the eaves and smoke was still coming out. The firemen entered the attic through a scuttle hole on the service porch and found three tin cans, each partly filled with kerosene, fresh newspapers spread out in a row in the center of the attic, a roll of tar paper and some charred wood and paper. The rear wall had been burned above and around one of the cans of kerosene. A wheel-type can opener was found in the kitchen. Two of the kerosene cans had been opened by a can opener of that type. Both defendant and Mrs. Paulson stated that they were unable to use the can opener. The cans and the can opener were examined by an expert, who found nothing wrong with the can opener. He stated that from his examination and test he had determined that the particular can opener in question had been used to open one of the cans found in the attic. The newspapers found in the attic bore the dates of February 7, 10, and 11 of 1941. Defendant had stored his old newspapers in a pile in the garage, which was kept locked, but the investigator checked the pile of papers and found that the papers of the dates of those found in the attic were missing from the pile.

Defendant told an investigator that when he retired on the night of the fire all of the doors, including the screen door and the garage door, were locked. Investigators examined the exterior of the house with defendant, using their flashlights, and found no evidence that anyone had tried to enter any of the doors or windows by force and that the screen door to the service porch was undamaged. When an investigator returned the following morning defendant showed him a cut in the screen next to the casing of the door to the service porch and stated that Mrs. Paulson had discovered the cut shortly after daylight.

Defendant and Mrs. Paulson had purchased the four-room house early in 1940, taking the deed as husband and wife and as joint tenants, the purchase price being $2,025. The lot was valued at $850. At that time the buildings were insured in the sum of $1,600. In December, 1940, defendant secured $2,000 additional insurance on the property, making a total of $3,600. In the meantime improvements made by defendant on the property had cost between $400 and $500.

[1, 2] Since the decision in People v. Newland, 15 Cal.2d 678, 104 P.2d 778, the rule applicable in cases of circumstantial evidence has been definitely established. If the circumstances shown in evidence reasonably justify the verdict of the jury the opinion that those circumstances might also reasonably be reconciled with the innocence of defendant will not warrant interference by a reviewing court. People v. Miller, 41 Cal.App.2d 252, 106 P.2d 239. In the present case the jury might reasonably have concluded that the fire was of incendiary origin; that it was what is commonly known as an "inside job;" and that defendant set fire to the house for the purpose of securing the relatively large amount of insurance which had been placed upon it.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

53 Cal.App.2d 40

KING v. SAN JOSE KEYSTONE MINING CO. et al.

Civ. 6686.

District Court of Appeal, Third District, California.

June 26, 1942.

1. Appeal and error 🔑931(1), 989

On defendants' appeal from judgment for plaintiff, Appellate Court must disregard conflicting evidence and must consider the evidence most favorable to plaintiff.

2. Master and servant 🔑80(10)

A former employee could not recover for work done while away from employer's property on ground that he was "under the impression" from what was said at employer's directors' meeting that he was to be paid a regular salary while away, since his "impressions" were insufficient to establish an enforceable contract, and trial court in effect found that he performed no work off the property for which he could recover compensation.

3. Judgment 🔑255

Where employer allegedly had agreed to pay employee a salary of $180 per month and employee's own testimony revealed that he had worked only nine months and received cash, stock and lodging valued at $620, and employee owed employer $149.50 for use of a tractor, a judgment for employee for $1,840.50 was erroneous.

◆

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Don R. King against the San Jose Keystone Mining Company and others to recover a balance due for services performed for defendants, wherein defendants filed a counterclaim. From adverse judgments, defendants appeal.

Reversed.

C. B. Wooster, of San Jose, for appellants.

T. L. Chamberlain, of Auburn, and Harold Ropers, of San Francisco, for respondent.

PER CURIAM.

Plaintiff and respondent recovered a judgment for a balance due for services performed for defendants and appellants herein, and the sole question raised on this appeal is as to the sufficiency of the evidence to support the findings.

Plaintiff alleged that "commencing on the 6th day of May, 1936, and continuing to and including the 24th day of January, 1938, in the County of Placer, State of California, at the special instance and request of the defendants San Jose Keystone Mining Company, H. Bert Walton and C. B. Wooster, and each of them, and upon the promise of the said last-named defendants, as hereinafter set forth, the plaintiff performed work and labor for the defendants in and about that certain mining property known as the San Jose Keystone Mine, which said work consisted of surveying above and underground, drawing plans and working maps of said mine, and the real property upon which it is situate, drawing plans for compressor house and ore bin, felling trees, installing air and water pipe-line, installing electric motors, telephone system and wire lines, buying supplies, and like services required in the preparation of said property for mining operations and the commencement of mining operations; that all of said work and labor was done and performed on said San Jose Keystone Mining property." It was further alleged that defendants promised, at the time of the commencement of the work, to pay therefor at the rate of $180 a month, and that after allowing deductions for time off, plaintiff was entitled to compensation for working eighteen months and nine days. Plaintiff admitted receipt of $250 in cash, stock work $250, and board and lodging valued at $120.

Defendant denied the existence of an agreement to pay plaintiff a fixed salary; admitted that plaintiff worked on the mine but alleged that he had been paid in full. A counterclaim for $149.50 for the use of a tractor was set up and allowed by the court.

The court found that all the facts alleged in the complaint were true, except that the work was not done at the special instance and request of H. Bert Walton and C. B. Wooster, individually. Judgment was given for $1,063.

We have, then, the simple question: How much, if anything, was plaintiff entitled to recover for the services rendered?

Considering the total credits admitted by plaintiff, the amount of the judgment and the counterclaim allowed, and the finding that plaintiff was entitled to compensation at the rate of $180 a month, it appears that the court determined the total value of the services rendered to be $1,840.50. To have earned this amount, at the foregoing rate, plaintiff must have worked a little more than ten months and six days.

In view of the conclusions we have reached, we find it unnecessary to set forth the evidence adduced in support of the finding that defendant had agreed to pay plaintiff a salary of $180 a month. For the purposes of this appeal, we may assume that the evidence was sufficient to support such a finding.

[1] Disregarding conflicting evidence and considering, as we must, the evidence most favorable to plaintiff, we are unable to discover any evidence that would justify a judgment for the amount given. Plaintiff was called as a witness and the following questions were asked and answers given:

"Q. Your complaint sets forth here that you worked for the mine for eighteen months and nine days. That period of time, how much time would you say you spent there on the mine property? A. I would say at least half that time.

"Q. Roughly, how many months? A. Nine months, nine to ten months."

There is nothing in the record showing that plaintiff worked on the property for a greater length of time than that shown by his own statement as given above. Keeping in mind the well-recognized rules as to certainty in matters of this kind, it is apparent from the plaintiff's own testimony that he is not sure he worked more than nine months on the property, and that testimony concerning anything in excess of that amount was pure conjecture. Plaintiff further testified that he made a number of trips from the mine to Sacramento and other points to purchase supplies, but as far as the record shows, this was included in the estimate of nine months.

[2, 3] Plaintiff sought to recover for work done while he was away from the property and living in San Jose, and in this connection testified that he was "under the impression" from what was said at a directors' meeting that he was to be paid a regular salary between the dates mentioned in his complaint, and that he had spent considerable time away from the mine, trying to interest people in the purchase of mining stock and in performing other services for the company. Without pausing to analyze the evidence on this point, we are of the opinion that this testimony tends in no way to support plaintiff's contentions. In the first place, plaintiff's "impressions" as to what happened at the directors' meeting were not sufficient to establish a definite and enforceable contract, and the trial court specifically found that the allegation in the complaint "that all of said work and labor was done and performed on said San Jose Keystone Mining Property" was true. This amounted to a finding that plaintiff performed no work off of the property for which he could recover compensation.

A number of other points are raised but inasmuch as we have reached the conclusion that there is no evidence sufficient to support a judgment for the amount given, it is unnecessary to discuss them.

The judgment is reversed.

BEEMS et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13714.

District Court of Appeal, Second District, Division 2, California.

June 22, 1942.

Hearing Denied July 23, 1942.

Taxation 🔑538

Tax payments which were voluntarily made could not be recovered.

Proceedings by Edgard W. Beems and others against the Superior Court of Los Angeles County for a writ of prohibition.

Petition denied.

Holbrook & Tarr, of Los Angeles, for petitioners.

J. H. O'Connor, Co. Counsel, of Los Angeles, for respondent.

PER CURIAM.

It is ordered that the petition herein be and the same is hereby denied upon the ground that all tax payments involved herein were voluntarily made.

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53 Cal.App.2d 1

PANSINI et al. v. WEBER et al.

Civ. 12031.

District Court of Appeal, First District, Division 1, California.

June 25, 1942.

Hearing Denied Aug. 20, 1942.

1. Quieting title 🔑44(4)

In suit to quiet title to realty, defended on ground that defendants were beneficiaries under a deed of trust given by codefendant covering a leasehold interest and that such interest was still in effect and that plaintiffs acquired title subject to the interest and deed of trust, evidence was not sufficient to entitle defendants to a judgment sustaining their claims.

2. Witnesses 🔑397

In suit to quiet title to realty, recitals in a title company's unsigned and uncertified preliminary title report on the property which report was admitted for purpose of impeachment were not competent proof of execution or recordation of a lease and deed of trust upon which defendants relied.

3. Evidence 🔑202
Witnesses 🔑397

To bring a statement or declaration within the rule that when a witness is a party to an action any statement made by that party may be considered not only for purpose of impeachment but as an admission against interest and as proof of facts in issue to which it relates, it must be shown that the statement or declaration was signed or made by the party against whose interest it is sought to have it applied.

4. Vendor and purchaser 🔑244

That an agreement for sale of realty stated that purchaser agreed to take title temporarily subject to "Exception three" as shown by preliminary title report wherein "Exception three" mentioned a lease executed by vendor and a trust deed covering leasehold interest did not show that purchaser had actual "notice" of lease and trust deed, in view of purchaser's other testimony, and hence purchaser did not take title subject to lease and trust deed where there was no competent proof that such instruments were executed or recorded.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Suit by Andrew Pansini and others against Jerome Weber and others to quiet title to real property. From a judgment for plaintiffs, defendants Alfonso T. Sepulveda and others appeal.

Affirmed.

John J. Wilson and Bartlett & Kearney, all of Los Angeles, for appellants.

Mitchell, Silberberg, Roth & Knupp and C. E. Erkel, all of Los Angeles, for respondents.

KNIGHT, Justice.

Respondents brought this action to quiet title to real property in Los Angeles County purchased by them from the Lurie Company, a corporation. Among the defendants sued were Gerald E. Arbuckle, Mae B. Ingraham, Jerome Weber, William I. Heffron, trustee in bankruptcy of the estate of Gerald E. Arbuckle, a bankrupt, and these appellants. The first three filed disclaimers, and Heffron defaulted. Appellants answered, alleging that they were the beneficiaries named in a trust deed given by Arbuckle covering a leasehold interest theretofore acquired by him in the property; and on information and belief appellants alleged that said leasehold interest was still in full force and effect, and that respondents acquired their title subject to said leasehold interest and the deed of trust. The judgment decreed that respondents' title be quieted, that the alleged adverse claims of appellants were void and invalid, and that appellants be enjoined from asserting claims to or any interest in the property.

[1, 2] Appellants contend that the evidence was sufficient to entitle them to a judgment sustaining their claims. There is no merit in the contention. The only evidence relating to their claims consisted of the recitals in an unsigned and uncertified preliminary title report on the property, which, in connection with another document, was admitted in evidence for the purpose of impeachment; and it is apparent that such recitals do not constitute competent proof of the execution or recordation of either of the instruments upon which appellants relied to establish their claims. The proceedings leading up to the introduction in evidence of the report were as follows: Respondents proved title and right of possession by the oral testimony of the respondent Andrew Pansini, and a grant deed conveying the property to respondents by the Lurie Company, the owner of the property. Pansini testified that pending negotiations for the purchase of the property and on July 1, 1939, respondents entered into possession as tenants from day to day at a rental of $40 a day; that thereafter the property was deeded to them by the Lurie Company, and that continuously since July 1, 1939, they had been and were then in possession of the property. The deed from the the Lurie Company to them was offered and received in evidence. It was dated July 15th, acknowledged on July 21st, and recorded on August 1, 1939. On cross-examination and evidently for the purpose of showing knowledge on the part of respondents of the Arbuckle lease and the trust deed, respondent was asked whether during the negotiations for the purchase of the property Mr. Lurie ever told him "that the property was involved in some difficulties," and respondent gave a negative answer. Thereupon counsel for appellants called respondent's attention to certain testimony theretofore given by him by way of deposition to the effect that preceding the sale of the property to them the Lurie Company and respondents had entered into some sort of a written agreement; and counsel for appellants then asked for the agreement. It was produced and counsel for appellants started to read certain provisions therefrom. Objection was made upon the ground that no part of it could be read into the record unless the document itself was admissible; whereupon counsel for appellants offered the agreement in evidence. Respondents objected on several grounds, among them being that the agreement was not in response to any issue made by the pleadings and had no bearing upon the case. In answer to the objection appellants' counsel stated: "I am offering it for the purpose of impeaching his testimony," and the court said, "For the purpose of impeachment, at least, the document is now admissible in evidence, and is received as Defendants' Exhibit A." The instrument proved to be an agreement of purchase and sale, and counsel for appellants then read the following provision therefrom: "Second parties agree to take title to said property subject to Exceptions one, two and four as shown on the preliminary report of Title Guarantee and Trust Company, of Los Angeles, No. 1173476, and to take said title temporarily subject to Exception three, the first party agrees to remove said Exception three within a reasonable time. First party agrees to pay title fees and any expenses involved in connection with the removal of said Exception three." The cross-examination then continued as follows: "With respect to Exception three, have you got the preliminary report of the title company? A. No, sir. Q. Have you seen the report? A. No, sir. Q. Do you know what exception three referred to in the agreement is? A. No, sir." Thereafter and as part of their case appellants offered the report in evidence, and it was admitted over respondents' objections that it was not the best evidence and did not tend to prove any of the issues in the case. The report is dated July 19, 1939, and the first line reads: "The Lurie Company, a corporation." Then after describing the property it purports to set forth the "ex-

ceptions" referred to in the agreement of purchase and sale. The first and second refer to taxes and an easement for a public street. The third is as follows: "3. A lease dated July 1, 1938, executed by The Lurie Company, a California corporation, as lessor, and by G. E. Arbuckle, as lessee, for the term of 99 years from July 1, 1938, upon terms, conditions and covenants therein provided recorded December 5, 1938, in Book 16291 Page 16 O.R. and as modified by agreement executed by said lessor and lessee dated November 30, 1938, recorded December 5, 1938, in Book 16182 Page 510 of O.R. said leasehold estate is subject to: * * *." Then follows the enumeration of several unrecorded subleases, and the recordation of two trust deeds purporting to have been executed by Arbuckle covering the master lease, and given to secure loans. Mae B. Ingraham, who disclaimed, appears as the beneficiary in the first trust deed, and the appellants Alfonso T. Sepulveda, Concepcion Finley, Laura Thesing and Candelaria Bernstein in the other. However, appellants made no attempt to follow up by offering in evidence either the Arbuckle lease or the trust deed, nor did they offer in evidence any certified copies thereof or any oral testimony whatever concerning their execution or recordation; so that those instruments were connected with the case only indirectly by way of recital in the preliminary title report; and as will be noted, the agreement and title report were offered and received in evidence, not as proof of title or adverse claims, but only for the purpose of impeaching a statement made by respondent on cross-examination. It follows, therefore, that in the absence of any competent proof of the execution or recordation either of the Arbuckle lease or the trust deed, appellants failed to substantiate the allegations of their answers as to the existence of these alleged adverse claims.

[3] In contending that the recitals in said preliminary report do serve as competent proof of the matters therein recited, appellants seek to invoke the rule that "when a witness is a party to an action any statement made by that party may be considered not only for the purpose of impeachment but as an admission against interest and as proof of the facts in issue to which it relates." However, that rule has no application here for the simple reason that the preliminary title report was not the statement or declaration of either the respondents or the Lurie Company from which respondents derived title. As stated, it was an unsigned, uncertified report prepared by the title company making search of the title; and the testimony of both Pansini and Lurie shows that neither had ever seen the report or knew of its contents. Pansini's testimony, in this regard, has already been quoted; and Lurie testified that he was "under the impression that there was a title report," but that he did not know what it contained; that his attorney handled those matters. As shown by the cases cited by appellants on this point, in order to bring a statement or declaration within the operation of the rule contended for it must be shown that the statement or declaration was signed or made by the party against whose interest it is sought to have it apply; and that is not the situation here presented.

[4] Appellants argue that since the agreement stated that respondents agreed "to take said title temporarily subject to Exception three (3)" as shown by the preliminary title report, which the Lurie Company agreed to remove within a reasonable time, respondents had actual notice of the contents of the title report. This contention is negatived by respondent's testimony wherein he stated positively that he had never seen the preliminary report and that he did not know what was referred to in the agreement as "exception three." Appellants also argue that "respondents had constructive notice of appellants' title by the prior recording of the instruments upon which appellants' title is founded." But as already pointed out, there is no competent proof upon which a finding could be based that the instruments so relied upon by appellants were ever executed or recorded.

Moreover and in any event, even though the recitals in the uncertified and unsigned preliminary title report could be considered as some evidence of the execution or recordation of the Arbuckle lease and trust deed, there would still be a fatal defect in appellants' proof in that they offered no evidence whatever in support of the allegations of their answers that said lease and trust deed were "still in full force and effect."

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

53 Cal.App.2d 99

PEOPLE v. DUNKIN.

Cr. 3512.

District Court of Appeal, Second District,
Division 1, California.

June 29, 1942.

1. False pretenses 🔑49(3)

Evidence that defendant's account in a bank had been overdrawn for ten weeks prior to his issuance of two checks, and that he had no account in the branch bank upon which two other checks were drawn, and that he had made no arrangements with the bank for extension of credit, was sufficient to sustain conviction of issuing checks without sufficient funds. Pen.Code, § 476a.

2. False pretenses 🔑49(3)

Testimony of an officer of the bank upon which check was drawn that the drawer had neither an account with the bank nor any credit therewith is "prima facie evidence" of the fictitious character of the check.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

3. False pretenses 🔑49(2, 4)

In prosecution for issuing checks without sufficient funds, the intent to defraud and defendant's knowledge of the fictitious character of the check could reasonably have been inferred from all circumstances shown. Pen.Code, § 476a.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Samuel J. Dunkin was convicted of issuing checks without sufficient funds, and he appeals.

Affirmed.

Samuel J. Dunkin, in pro. per.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged in an amended information containing four counts with issuing checks without sufficient funds, and with a prior conviction of the same offense. He pleaded not guilty to the charge, denied the prior conviction and also pleaded not guilty by reason of insanity. The jury found him guilty on all four counts; found that the allegation of the prior conviction was true, and that he was sane at the time of the commission of the offenses charged in the amended information.

This appeal is prosecuted from the order denying motion for new trial and from the judgment of conviction.

The sole contention presented is the sufficiency of the evidence to show that appellant had no credit arrangement with the Bank of America to pay the checks at the time they were drawn or issued. In this connection, appellant asserts that by merely ascertaining the fact that he did not have a general credit arrangement with the bank, instead of establishing "whether there was an 'understanding or credit arrangement' with the Bank of America with regard to the four checks here in question," the prosecution failed to prove the offense defined by section 476a of the Penal Code, to wit: "(Issuance of check, draft or order without sufficient funds or credit with intent to defraud: Punishment: * * * 'Credit' defined: * * *) Any person who for himself * * * willfully, with intent to defraud, makes or draws or utters or delivers any check, or draft or order upon any bank * * * for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer * * * has not sufficient funds in, or credit with said bank * * * for the payment of such check, draft or order, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than fourteen years. * * * 'Credit' defined. The word 'credit' as used herein shall be construed to mean an arrangement or understanding with the bank * * * for the payment of such check, draft or order."

The checks forming the basis of counts I and II were drawn on the Monterey Park branch of the Bank of America and were cashed by attendants at two Standard Oil Company service stations in the city of Los Angeles on April 1 and 2, 1941. The checks upon which counts III and IV were based were drawn on the Slauson and Vermont branch of the Bank of America and were cashed at Standard Oil Company service stations in Long Beach and Wilmington on May 23, 1941.

The four checks were introduced in evidence and the manager of the Monterey Park branch of the Bank of America testified that appellant had an account with that branch on April 1, 1941, but that the account was overdrawn on that date in the sum of $7.30; that on February 17, 1941, the overdrawn draft amounted to $1.30 and no deposits were made in the account after that date, except deposits made by the bank itself to offset charges made against the account by the return of such checks as the two checks here in question; that the account was finally closed by the bank on May 31, 1941, with an overdraft against the account at that time. This witness who, as manager of the particular branch, was familiar with the records of the bank, testified that he knew appellant and knew that no arrangement for credit to appellant had been made by the bank.

Mr. Hemmele, the teller of the Slauson and Vermont branch of the Bank of America, testified that he had access to the records of the bank, that he had examined the same and found there was no record of any account in appellant's name or in any similar name; that no arrangement for an extension of credit to appellant was ever made by the said bank, and that both checks (Exhibits 3 and 4) were rejected by the bank upon presentation. Neither of these witnesses was cross-examined by appellant, and he offered no evidence in conflict with their testimony.

[1] In view of the fact that appellant's account in the Monterey Park branch had been overdrawn for at least ten weeks prior to the issuance by him of the two checks covered by counts I and II of the amended information, together with the further fact that he had no account in the Slauson and Vermont branch upon which the two checks covered by counts III and IV were drawn, the testimony of the officers of these two branches of the Bank of America that appellant had made no arrangement with the bank for an extension of credit is conclusive.

This testimony in conjunction with the evidence of other witnesses adduced at the trial was legally sufficient to sustain the jury's verdict of appellant's guilt and to support the judgment of conviction.

[2, 3] As stated in People v. Schneider, 36 Cal.App.2d 292, 296, 98 P.2d 215, 217: "Answering the two additional points made by appellant relating to the evidence tending to establish guilt, it will suffice to say that the testimony given by the manager of the bank upon which the check was drawn that the person whose name was signed thereto had neither an account with the bank nor any credit therewith, was prima facie evidence of the fictitious character of the check, People v. Thal, 61 Cal. App. 48, 214 P. 296; People v. Roche, 74 Cal.App. 556, 241 P. 279; People v. Walker, 15 Cal.App. 400, 114 P. 1009; People v. Bernard, 21 Cal.App. 56, 130 P. 1063, and that the intent to defraud and appellant's knowledge of the fictitious character of the check might reasonably have been inferred by the jury from all the circumstances shown by the evidence. People v. Roche, supra; People v. Thal, supra; People v. Hamby, 55 Cal.App. 37, 202 P. 907."

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concurred.

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53 Cal.App.2d 43

SMITH et ux. v. POPE.

Civ. 2834.

District Court of Appeal, Fourth District, California.

June 27, 1942.
Hearing Denied Aug. 24, 1942.

1. Automobiles 🔑181(2)

In order for motorist to claim benefit of lessened liability provided by guest statute, motorist must show that injured party accepted a ride in a vehicle and was injured during such ride. Vehicle Code, § 403, St. 1935, p. 154.

2. Automobiles 🔑181(2)

Under guest statute applicable to one who accepts a ride "in any vehicle" the quoted words do not require that the person be actually seated within the enclosure of the automobile in order to render the statute applicable and one invited to ride on vehicle other than within the enclosure is within the statute. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "In Any Vehicle".

3. Automobiles ⚷181(2)

Under guest statute relating to liability of motorist for injuries to guest who accepts ride in an automobile, in case injury occurs "during such ride", the quoted words contemplate that the ride must have been actually commenced at time of injury. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "During Such Ride".

4. Automobiles ⚷181(2)

Where motorist's foot slipped from clutch pedal of automobile which was in gear, at time when motorist's friend who had been invited to ride in the automobile was opening door, preparatory to entering automobile, so that automobile jerked forward and the friend was thrown to ground and injured, the friend was not "riding" in automobile and accident did not occur "during such ride" within guest statute, and therefore the friend was not a "guest" and could recover for injuries sustained on proof of ordinary negligence on part of the motorist. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest" and "Riding".

5. Automobiles ⚷181(1)

Under common law and law of California prior to enactment of guest statute, driver of an automobile was liable to his guest for acts of ordinary negligence.

6. Automobiles ⚷181(1)

The guest statute is in derogation of the common law right and may be extended only so far as strict construction of the language of the statute makes it imperative. Vehicle Code, § 403, St.1935, p. 154.

7. Automobiles ⚷181(1)

Where common law right of having redress for injuries wrongfully inflicted are lessened by statute such as guest statute. the statute must be strictly construed and cases will not be held to be within provisions of the statute unless it clearly appears that it should be so determined. Vehicle Code, § 403, St.1935, p. 154.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by F. Carleton Smith and wife against Clara H. Pope for damages resulting from injuries sustained by the wife in an accident which occurred while she was entering defendant's automobile. From judgment for the plaintiffs, defendant appeals.

Affirmed.

Dempster McKee, of San Diego, for appellant.

Clarence Harden, of San Diego, for respondents.

GRIFFIN, Justice.

This is an appeal from a judgment in favor of plaintiffs and respondents, husband and wife, rendered by the court sitting without a jury against Clara H. Pope, defendant and appellant, for damages for personal injuries. The question involved turns on the construction of the so-called "guest statute." § 403 Vehicle Code, St. 1935, p. 154.

The facts of the case are not in dispute. The trial court specifically found as to the facts. We will therefore summarize them as found by the court. The injuries received by respondent Margaret D. Smith occurred on May 10, 1940, just before she entered an automobile driven by appellant. Appellant had arranged by telephone to take Mrs. Smith, without compensation, to a luncheon to which both women had been invited. Upon her arrival at the Smith home Mrs. Pope stopped her car at the curb. Mrs. Smith came out of her front door and walked toward the Pope car. The car was parked on the left or wrong side of the street, with the engine running and in gear. The driver remained seated in the car which was parked next to the sidewalk curb. Mrs. Smith went around the front end of the car and took hold of the handle of the door of the car opposite the driver's seat. Mrs. Pope is a short woman and, for convenient operation of the car, had attached to the clutch pedal an extension, the better to enable her to depress the clutch pedal and bring the car to a stop without shifting gears. On this occasion she operated the car in this fashion. She was wearing new shoes, the soles of which were slippery. The evidence indicates that Mrs. Pope reached across the car, unlatched the door which Mrs. Smith was approaching, and was in the process of opening it, or had opened it, when Mrs. Smith took hold of the handle of the door. Mrs. Pope's foot slipped off the clutch pedal just as Mrs. Smith grasped the door handle, causing her body to be thrown against the ground. At the instant when she had one foot on the ground, one foot in the air, but not yet on the running board and while she still had the handle of the car door in her grasp, the car jerked forward and Mrs. Smith was thrown thereby to the ground with resultant injuries. This act was found by the court to have been an act of negligence. It is conceded that this act of negligence did not constitute wilful misconduct permitting a recovery under the guest law. The injuries suffered were quite severe. Mrs. Smith's hip was broken. An operation became necessary and her recovery was slow. The court assessed the general damages recoverable by her at $4,000. The expenses incurred in treatment recoverable by Mr. Smith amounted to $1,397.54, and his general damages were assessed at $500. Appellant does not complain of the amount of the judgment. The court made findings of the evidentiary facts substantially as above and drew from these facts a conclusion that respondents were entitled to judgment.

Appellant now contends that Mrs. Smith was, as a matter of law, a guest within the meaning of section 403 of the Vehicle Code, and for that reason the judgment must be reversed. Respondents, of course, contend that the guest-host relationship was not established and that Mrs. Smith had not yet become a guest within the meaning of that section and that the finding of the trial court to that effect is controlling on appeal.

The original section 141¾ of the California Vehicle Act, St.1923, p. 517, as added by St.1929, p. 1580, in so far as it is pertinent to this discussion, reads as follows:

> "Any person who as a guest accepts a ride in any vehicle, moving upon any of the public highways * * * and while so riding * * * receives * * * an injury, shall have no right of recovery against the owner * * *."

The section as it then stood was construed in Moreas v. Ferry, 135 Cal.App. 202, 26 P.2d 886, wherein the court analyzed the wording of the section. In that case, the plaintiff rode with the defendant to a theater. That theater was crowded. They decided to seek another place of entertainment. The defendant was sitting by the steering wheel and requested the plaintiff to crank the car. The plaintiff cranked the car and the crank kicked, breaking plaintiff's arm. The court held that under such circumstances the injury was not inflicted in any vehicle "moving upon any highway" and was not inflicted upon the guest "while so riding."

That section was also construed in Prager v. Isreal, 15 Cal.2d 89, 98 P.2d 729, 730, where it was held not applicable to a case where the defendant driver, who had been sitting in the automobile, started to leave the automobile and go around to the other side while plaintiff, in stepping from the automobile, had one foot on the ground and the other foot on the running board and the car moved forward throwing her to the ground. In other words, it was held that the plaintiff was not a guest under those circumstances, within the meaning of the act, who had accepted a ride in a vehicle *"moving upon any of the public highways"*, and "while so riding as such guest" was injured, and that the plaintiff could not be said to "be riding" in said automobile within the meaning of said statute.

Subsequently, the Legislature recast the section and eliminated from it the wording "moving upon any of the public highways" and inserted the words "in any vehicle upon a highway" and further eliminated entirely the use of the phrase "while so riding."

Section 403 of the Vehicle Code now reads in part, in so far as here applicable, as follows:

> "No person who as a guest accepts a ride *in any vehicle* upon a highway without giving compensation for such ride * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to * * * such guest *during such ride* * * *." (Italics ours.)

[1-4] The conditions for the exemption from liability thus granted are two. (1) A guest shall accept a ride "in any vehicle"; and (2) the injury must occur "during such ride." In order to claim the benefit of the lessened liability provided by this section the defendant must show that the "guest" first accepted a ride *in a vehicle* and was thereafter injured *during such ride*. The term "in any vehicle" as here used, is not, and by force of reason

would not be, limited to the construction that a person must be actually seated within the enclosure of the automobile before a person could be said to be "in any vehicle". It might well be anticipated that a person could be invited to ride on a vehicle other than within the enclosure so provided and still be a guest "in any vehicle," but we believe the additional term used, i. e., that the person must be injured "during such ride" contemplates that such a ride by the guest must have been actually commenced. In other words, it was not necessary, as it was before under the former section, to show that the vehicle was "moving upon any * * * highway," but only to show that the injury occurred "during the ride" which would include in that category all the time elapsed from the time of entering the vehicle, and while so continuing such occupancy, until the journey's end. This construction receives support in Frankenstein v. House, 1940, 41 Cal.App.2d 813, at page 815, 107 P.2d 624, at page 625, where it is said in discussing the time when the guest-host relationship begins: "Having placed herself under his care for a ride in his vehicle, and having remained therein until she was thrown therefrom 'on the highway', the relation of host and guest continued at all times *from her entry into the automobile* until she was thrown to the street." (Italics ours.) The court, in a recent case, Harrison v. Gamatero, 52 Cal.App.2d 178, 125 P.2d 904, decided May 21, 1942, has duly emphasized the term "during such ride," still remaining in the act, and has held that it must be shown that the injury occurred "during such ride." In Prager v. Isreal, supra, 15 Cal.2d at page 94, 98 P.2d at page 732, the court said: "We are likewise of the opinion that a person alighting from an automobile, who is in a position with one foot on the ground and the other on the running board when it so moves cannot be said to be 'riding' in said automobile within the meaning of said statute." The converse must therefore be true and it must follow that a person occupying practically the same position preparatory to entering a car cannot be said to be "riding" in said automobile within the meaning of the statute. See, also, Nemoitin v. Berger, 111 Conn. 88, 149 A. 233; Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431. Citations from the several states are not particularly helpful to the solution of this question, due to the difference in the wording of their guest statutes. The Iowa statute is quite similar to ours. Code of Iowa 1927, 1935, § 5026-b1, and Code of Iowa 1939, § 5037.10. It provides: "Guest statute. The owner * * * shall not be liable for any damages to any passenger * * * *riding in* said motor vehicle as a guest * * *." (Italics ours.) In construing that statute in Samuelson v. Sherrill, 225 Iowa 421, 280 N.W. 596, the court cited with approval Puckett v. Pailthorpe, 207 Iowa 613, 223 N.W. 254, 256, which was a case somewhat similar to the instant case. There, as here, the plaintiff was about to enter the car of defendant to begin a journey. Plaintiff had met the defendant, but by no prearrangement, at a restaurant, and defendant had invited the plaintiff to ride in his car on his return home. Plaintiff went ahead of the defendant to the car and, reaching it took hold of the handle of the door. The door came loose from its fastening and fell upon plaintiff. Unlike the case at bar, defendant was not seated in the car at the time the door fell on the plaintiff. But while this was one of the circumstances held by the court to be controlling in its determination that the guest-host relationship had not begun, the court put stress on a second and independent ground. Upon this second ground the court reasoned that the plaintiff was not "riding" in the car at the time of receiving her injuries, and held that because the plaintiff had not entered the car the guest statute did not apply. It said: "Moreover, the one who is called a 'passenger' must be riding in the car. To place emphasis upon this interpretation, the Legislature confined the passenger or person named in the section [5026–b1] to one who is 'riding in a motor vehicle 'as a guest or by invitation, and not for hire.' Then if such 'guest or person' is not 'riding,' the statute under consideration has no application. 'Riding modifies both passenger and person."

[5-7] The reasoning of the Iowa court in the Puckett case applied to the facts of the case at bar would place Mrs. Smith definitely outside the purview of the statute. Prior to the enactment of any "guest statute" in California, the driver of an automobile was liable to his guest for acts of ordinary negligence. This was the common law rule. Callet v. Alioto, 210 Cal. 65, 290 P. 438. The overwhelming weight of authority in this country is to the effect that in the absence of statute, under the common law, a guest may recover for fail-

ure of the driver to use ordinary care. It has consequently been held that section 403 of the Vehicle Code (the guest statute) was but a restriction on a common law right, and being in derogation of a common law right, such a statute may be extended only so far as a strict construction of the language of the statute makes it imperative. McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909; Callet v. Alioto, supra. Therefore, only those persons who were guests within the definition adopted by the Legislature may be considered to have been deprived of the right to recover except for injuries due to the wilful misconduct or intoxication of the driver. The common law right of having redress for injuries wrongfully inflicted being lessened by such statute, necessitates a strict construction of the statute. The rule adopted in Prager v. Isreal, supra, to the effect that "cases be not held within the provisions of such statutes unless it clearly appears that it should be so determined" must here apply.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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53 Cal.App.2d 95

BROOKS v. BROOKS.

Civ. 13673.

District Court of Appeal, Second District, Division 1, California.

June 29, 1942.

Hearing Denied Aug. 27, 1942.

1. Divorce 🔑37(7)

Continuous absence for one year without the consent of the spouse seeking a divorce is an essential element of a cause of divorce on the ground of "desertion".

See Words and Phrases, Permanent Edition, for all other definitions of "Desertion".

2. Divorce 🔑37(7)

Husband's action for divorce on ground of cruelty filed 24 days after wife left husband was in effect an assent to separation and an expression of husband's desire to terminate marriage as of date of filing and husband was not entitled to divorce on ground of "desertion" under supplemental amended complaint filed slightly more than a year after separation, since continuous absence of wife for one year without husband's consent was lacking.

3. Divorce 🔑286

Where husband was erroneously awarded an interlocutory decree of divorce on ground of desertion, wife's appeal from portion of judgment canceling and assigning to husband homestead selected by wife from husband's separate property was dismissed as involving a "moot question". Civ.Code, § 146.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

Appeal from Superior Court, Los Angeles County; Rollin L. McNitt, Judge pro tem.

Action for divorce by James Robert Brooks against Bessie Marie Brooks, wherein defendant filed a cross-complaint for divorce. From portions of a judgment for plaintiff, defendant appeals.

Appeal dismissed in part and judgment reversed in part.

See, also, 127 P.2d 298.

Perry F. Backus, of Los Angeles, for appellant.

Newby & Newby, of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff and defendant intermarried on September 29, 1936, and separated on or about June 28, 1940, there being no children of the union.

On July 22, 1940, plaintiff husband filed his complaint for divorce alleging extreme cruelty as the ground therefor, to which defendant wife's demurrer was sustained, and on August 16, 1940, husband filed his amended complaint in which he more specifically alleged the acts of cruelty on the part of defendant wife. On February 4, 1941, defendant filed her cross-complaint and on March 14, 1941, her supplemental cross-complaint for divorce both of which alleged cruelty on the part of the plaintiff and cross-defendant husband.

The cause came on for trial on August 1, 2 and 4, 1941, and upon the conclusion of the introduction of evidence, plaintiff husband made a motion in open court for leave to file a supplemental amended complaint to conform to proof, alleging a cause of action for divorce on the ground of wilful desertion of defendant wife. This motion was granted, service of a copy of said supplemental amended complaint was made in open court, the original supplemental amended complaint was filed on August 4, 1941, and it was announced by the court that the allegations thereof would be deemed denied. "The parties introduced evidence in support of the allegations of their respective pleadings"; the court made its findings of fact and conclusions of law to the effect that "the plaintiff is entitled to a divorce from the defendant on the ground of wilful desertion," and on August 26, 1941, an interlocutory decree of divorce was accordingly entered, specifically dividing certain personal property between the parties; ordering the cancellation of a homestead selected by defendant wife from the separate property of plaintiff husband, and ordering plaintiff husband to pay to defendant wife $650 for her support and maintenance in monthly installments of $50 each beginning August 19, 1941. Thereafter, defendant made her motion for a new trial which was by the court denied.

This appeal is prosecuted by defendant wife from that portion of the judgment which grants to plaintiff husband "an interlocutory decree of divorce on the ground of desertion, as well as that part thereof purporting to cancel the homestead and set aside the same to the plaintiff above named."

Appellant urges that the supplemental amended complaint to conform to proof was simply an amended complaint referring back to the commencement of the original action; that "wilful desertion as a cause of action for divorce in this state is a separation by one of the parties, *against the will and without the consent of the other, for a period of one year*"; and that "By the filing of his several complaints and answers his (husband's record 'affirmatively' shows that his wife's absence was not without his consent"; but that "after his commencement of the action the separation was *with* his consent." (Italics included.) In support of this position appellant cites the case of Ewing v. Ewing, 16 Cal.2d 208, 105 P.2d 586.

Said cited case "came on for trial upon pleadings by which each of the parties charged the other with cruelty. The appellant [husband] then filed an amended complaint alleging a cause of action for wilful desertion and the respondent [wife] filed an amended cross-complaint upon the same ground. At the time the suit was brought they had been separated less than three months, but more than one year had elapsed between the date of separation and the filing of the amended pleadings. An interlocutory decree granted the respondent upon her cross-complaint is challenged by the appellant upon two grounds. He asserts that the time during which an action for divorce is pending may not be included in computing the one-year period during which wilful desertion must continue if it is to be the basis for divorce, and that if such period may properly be included, the evidence does not support a finding that his desertion continued for one year prior to the filing of the amended cross-complaint." Ewing v. Ewing, supra.

It was there held at page 209 of 16 Cal.2d, at page 586 of 105 P.2d: "To sustain the decree in this case, the evidence must show that the appellant left his wife with the intention to desert her, and that his desertion continued for one year. Benkert v. Benkert, 32 Cal. 467; Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248. Also, Mrs. Ewing must have been willing to have her husband return and resume marital relations during that period. This court has repeatedly held that to constitute a cause of action for divorce, absence must continue for one year without the consent of the spouse seeking the decree." The court then continues that the action of Mrs. Ewing in filing a cross-complaint less than ten months after the parties separated in which she charged her husband with numerous acts of cruelty and prayed for an absolute divorce "was in effect an assent to the separation and an expression of her desire to terminate the marriage as of that date. From that time until the complaint and cross-complaint were amended, neither party could justly claim that the necessary elements for desertion were present. Even had the trial court found that in October, 1935, the appellant left his wife against her wishes and that his desertion continued although she was willing that he return to her, that attitude certainly did not continue after August 4, 1936, when she asked the court to grant her a divorce upon the ground that her husband's conduct had been such 'as to render the continuance of their present relationship intolerable'. Silva v. Silva, 32 Cal.App. 115, 116, 162 P. 142."

[1, 2] In the instant case the appellant wife left respondent husband on June 28, 1940, and on July 22, 1940—24 days later—husband filed his action for divorce on the ground of cruelty alleging that the conduct of his wife had "completely wrecked and destroyed the legitimate ends and objects of the marital relation of plaintiff and defendant." While it is true that slightly more than one year elapsed between the time appellant wife separated from her husband and the date on which said husband filed his supplemental amended complaint on the ground of desertion alleging "That on or about the 28th day of June, 1940, the defendant Bessie Marie Brooks, disregarding the solemnity of her marriage vow, wilfully and without cause, deserted and abandoned the plaintiff and ever since has and still continues to so wilfully and without cause desert and abandon said plaintiff and live separate and apart from him, without sufficient cause or any reason, and *against his will and without his consent*"; nevertheless, his action for absolute divorce on the ground of cruelty which he filed on July 22, 1940, "was in effect an assent to the separation and an expression of [his] desire to terminate the marriage as of that date." Ewing v. Ewing, supra. As result, an essential element of a cause of divorce on the ground of desertion is lacking, to-wit: Continuous absence for one year without the consent of the spouse seeking the decree. For the reasons stated, appellant's contention in this regard must be sustained.

Whether the supplemental amended complaint was merely an amendment to the original complaint or was "in reality a substituted pleading, complete in itself," as is contended by respondent, it is not necessary to decide in view of the conclusion heretofore reached.

[3] With respect to the appeal from that portion of the decree which cancelled and assigned to respondent husband the homestead selected by appellant wife from the separate property of said husband, section 146 of the Civil Code provides: "If a homestead has been selected from the separate property of either [husband or wife], in cases in which the decree is rendered upon any ground other than incurable insanity, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the party to whom the divorce is granted * * *." See, also, Glass v. Glass, 4 Cal. App. 604, 88 P. 734; Greenlee v. Greenlee, 7 Cal.2d 579, 61 P.2d 1157.

Because of the conclusion reached upon the principal point presented by this appeal, this question as to the homestead has become moot, therefore the appeal from that portion of the interlocutory decree with reference thereto is dismissed. That portion of the interlocutory decree granting to respondent husband a divorce on the ground of desertion is reversed.

DORAN and WHITE, JJ., concurred.

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53 Cal.App.2d 93

BROOKS v. BROOKS.

Civ. 13593.

District Court of Appeal, Second District,

Division 1, California.

June 29, 1942.

1. Divorce 🔑249(3)

Where trial court found that husband suing for divorce owned separate property worth much more than separate property owned by wife and that the only community property was two articles of furniture worth $60, and court granted a divorce to husband on ground of desertion, portion of interlocutory decree ordering husband to pay $650 for support and maintenance of wife was improper as making allowance from husband's separate property.

2. Divorce 🔑249(3)

In a divorce action, only the community property and the homestead may be awarded, and the court is not authorized to assign the separate property of one spouse to the other nor to require one to pay to the other any amount in lieu of an assignment or division of it.

3. Divorce 🔑238

An innocent husband who is granted a divorce from a guilty wife because of her desertion cannot be compelled to pay wife permanent support money after divorce, and that portion of an interlocutory decree which attempts to award the guilty wife support money is void.

Appeal from Superior Court, Los Angeles County; Rollin L. McNitt, Judge pro tem.

Action for divorce by James Robert Brooks against Bessie Marie Brooks, wherein defendant filed a cross-complaint for divorce. From that portion of an interlocutory decree for plaintiff ordering plaintiff to pay $650 for defendant's support and maintenance, plaintiff appeals.

Reversed.

See, also, 127 P.2d 296.

Newby & Newby, of Los Angeles, for appellant.

Perry F. Backus, of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from that portion of an interlocutory decree (granting to appellant a divorce on the ground of desertion) by which he was ordered to pay $650 for the support and maintenance of respondent wife, in monthly installments of $50 each, beginning August 19, 1941.

Appellant urges that it is only when the divorce is granted for the offense of the husband that such support may be awarded to the wife.

The parties hereto intermarried on September 29, 1936, and separated on or about June 28, 1940, there being no children of the union. On July 22, 1940, appellant husband filed an action for divorce on the ground of cruelty; thereafter respondent wife filed a cross-complaint alleging cruelty on the part of appellant husband. At the conclusion of the trial on August 4, 1941, appellant was permitted to file a supplemental amended complaint to conform to proof setting up a cause of action against respondent wife for desertion. Thereafter the trial court made its interlocutory decree granting a divorce to appellant husband for the desertion of respondent wife, divided certain personal property between them pursuant to a stipulation theretofore entered into by them, cancelled and awarded to appellant a homestead which had been selected by respondent from the separate property of appellant, and ordered appellant to pay $650 to respondent for her support and maintenance in monthly installments of $50 each beginning August 19, 1941.

[1] The court found that "plaintiff has expended since his said marriage, for necessary living and other expenses, more than he has earned"; that husband owns separate property of the value of $15,000 and defendant and cross-complainant owns separate property of the approximate value of $2,500. It was also found that the only articles of community property of the parties were an overstuffed davenport and chair of the value of $60 located in the home of appellant.

In view of these findings of fact made upon issues presented by the pleadings with respect to the character of the property owned by the parties hereto, it is obvious that the allowance to the wife for her support and maintenance was made from the separate property of the husband.

[2] In the case of Fox v. Fox, 18 Cal.2d 645, 646, 117 P.2d 325, 326, the husband was awarded an interlocutory decree of divorce from the wife on the ground of extreme cruelty. The court ordered him to pay her $840. It was there held: "In an action for divorce, only the community property and the homestead may be awarded; the court is not authorized to assign the separate property of one of the spouses to the other, nor to require one to pay to the other any amount in lieu of an assignment or division of it. Conard v. Conard, 5 Cal.App.2d 91, 41 P.2d 968. The decree in the present case violates this rule and must be modified by striking therefrom the provisions relating to the payment of $840."

[3] In Harwell v. Harwell, 26 Cal.App.2d 143, 144, 78 P.2d 1167, it was held: "* * * an innocent husband, who is given a divorce from a guilty wife because of her desertion, cannot be compelled to pay her permanent support money after the divorce. If the interlocutory decree attempts to award the guilty wife support money, that portion of it is void. Lampson v. Lampson, 171 Cal. 332, 153 P. 238; Johnson v. Johnson, 104 Cal.App. 283, 285 P. 902; Johnson v. Superior Court, 128 Cal.App. 584, 17 P.2d 1055; Schluter v. Schluter, 130 Cal.App. 780, 20 P.2d 723; Gaudio v. Gaudio, 138 Cal.App. 289, 32 P.2d 156."

For the reasons stated, that portion of the interlocutory decree awarding the sum of $650 to respondent for support and maintenance is reversed.

DORAN and WHITE, JJ., concurred.

52 Cal.App.2d 766

MOORE v. STELLA et al.

Civ. 12730.

District Court of Appeal, Second District, Division 3, California.

June 19, 1942.

Hearing Denied Aug. 17, 1942.

1. Licenses 🔑18½

In determining whether a given instrument is a "security" within Corporate Securities Act, the courts will look through mere form to substance. Gen.Laws 1937, Act 3814 § 2(a) 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

2. Licenses 🔑18½

Where prospective oil land was divided into small parcels, and mineral deeds purporting to be an outright assignment of parcels were thereafter sold, mineral deeds were "certificates of interest" in an oil, gas and mining title and, therefore, were "securities" within Corporate Securities Act prohibiting sale without a permit, notwithstanding that purchasers were not required to execute community leases in connection with original sale to them of mineral rights, where it appeared that execution of such leases was essential to exploration of the land and was only deferred to some indefinite future time. Gen.Laws 1937, Act 3814, § 2(a) 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Certificate of Interest".

3. Evidence 🔑20(1)

It is common knowledge that exploration for new oil field is carried on under leases embracing large areas, and that it is only in proven oil fields which have first been developed by those holding large acreage that further development is carried on under leases of smaller tracts.

4. Licenses 🔑18½

It is policy of the state to subject to regulation all schemes for investment, regardless of forms of procedure employed which are designed to lead investors into enterprises where the earnings and profits of business or speculative ventures must come through management, control and operations of others and which, regardless of form have characteristics of operations by corporations, trusts or similar business structures. Gen.Laws 1937, Act 3814.

5. Licenses 🔑39

Evidence established that defendant corporation participated in sale of parcels of oil land in violation of Corporate Securities Act without a permit, whether it was a principal in the transaction and profited thereby or acted only as an individual defendant's agent, so as to be jointly liable with individual defendant for violation of act. Gen. Laws 1937, Act No. 3814, § 2(a) 7.

6. Licenses 🔑18½

Where it appeared that individual defendants were not disposing of their own stock in companies organized for purpose of carrying on oil well development work for their own account as bona fide owners, but were making sales for benefit of issuing companies to finance drilling operations on behalf of companies, sales were not exempted from provisions of Corporate Securities Act prohibiting sale of "securities" without a permit. Gen.Laws 1937, Act No. 3814, §§ 2(a) 7, 2(c) 3.

7. Licenses 🔑39

A buyer of mineral deeds and stocks in three corporations was not entitled to rescind transactions and recover sums paid on ground that instruments involved were securities, within meaning of Corporate Securities Act and were sold without a permit in violation of the Act, without restoring to sellers the interests in realty and stock which buyer received in the transactions Gen.Laws 1937, Act No. 3814, § 2(a) 7.

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Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Elma I. Moore against E. F. Stella, individually and as trustee, etc., and others, for recovery of sums paid by plaintiff for conveyances of mineral rights in prospective oil lands, and the purchase of stock of three corporations, from all of which transactions plaintiff had withdrawn by notice of rescission. From a judgment for plaintiff, the defendants appeal.

Modified and affirmed.

For prior opinion, see 124 P.2d 167.

Chas. I. Rosin, of Los Angeles, for appellants.

Maurice Gordon, of Los Angeles, amicus curiae, for appellants.

Joseph N. Owen, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff recovered judgment against defendant E. F. Stella upon thirteen causes of action in the sum of $9,775; upon one cause of action Stella-Harold Development Company, a corporation, was held jointly liable with Stella in the sum of $2,000, and upon three of the causes of action defendant Dallas M. Steele was held jointly liable with Stella in the sum of $1,200. The action is one for the recovery of sums paid by plaintiff for conveyances of mineral rights in prospective oil land in Glenn and Tehama counties, California, which were the subject of nine of the causes of action, and the purchase of stock of three corporations from defendant Steele, an agent of defendant Stella, from all of which transactions plaintiff had withdrawn by notice of rescission. The thirteenth cause of action was for money had and received and encompassed the matters covered by the other twelve causes of action. The basis of the judgment was that the instruments involved were securities within the meaning of the Corporate Securities Act, Gen.Laws 1937, Act 3814, and were sold without a permit of that Department and with intent upon the part of the sellers to violate and evade the provisions of the act.

Defendant Stella was a licensed real estate broker but held no broker's license from the Department of Corporations. Defendant Steele was employed by Stella as a member of his sales organization and received a commission of 25 per cent on sales made by her.

Stella acquired the mineral rights, but not surface rights, in some 1,546 acres in Tehama County and 5,760 acres in Glenn County. The Tehama County land was divided in parcels of two and one-half acres each, and the Glenn County land into one-acre parcels, and these were offered for sale and were sold and deeds were given to the public without any permit from the Department of Corporations. The subdivision plan had been submitted to the office of the Real Estate Commissioner and, except as hereinafter noted, the provisions of the California Real Estate Act, Stats. 1919, p. 1252, as amended, Deering's Gen. Laws,1937, Act 112, appear to have been complied with.

The sales of mineral rights were initiated by written agreement between Stella and the purchaser one of them with plaintiff and which was typical of all of them, reading as follows:

"By this agreement, E. F. Stella agrees to sell and assign, and Mrs. Elma I. Moore agrees to buy, all of the mineral rights in and to 2 acre ½ to be selected by E. F. Stella, out of the acreage contained in Section 24, T. 23 N., R. 4 West, Tehama County, California, for the full purchase price of five hundred Dollars ($500.00) payable in the following manner: $500.00 cash, the receipt of which is hereby acknowledged and the balance of $ *cash in full.*

"Upon receipt of said payment at the time and in the manner agreed, the party of the first part agrees to deliver to the party of the second part, heirs or assigns, a good and sufficient assignment of said 2½ acre parcel, on or before thirty (30) days from the date of last payment.

"Time is of the essence of this agreement and in the event of a failure to comply with the terms hereof by the said party of the second part, the said party of the first part shall be released from all obligations in law or equity to deed said parcel, and the said party of the second part shall forfeit all right thereto, and the right of possession thereof and to any money paid thereon.

"In Witness Whereof, I have hereunto set my hand this 22 day of Mar., 1938.
"Accepted: E. F. Stella
By Dallas M. Steele
"Name: Mrs. Elma I. Moore
"Address 420 So. Oxford Ave.
"Phone FE 9553

"If official acknowledgment of this agreement or any future payments is not received by purchaser within 5 days from date thereto, notify E. F. Stella, 831 West Second Street, Los Angeles, California.

"(Make all checks, drafts or money orders payable to E. F. Stella, Trustee)

"Notice: E. F. Stella will not be responsible for payments made with currency unless said currency has actually been received by him."

Pursuant to the agreements of sale conveyances were made in the following form:

"Reference is made to the fact that the undersigned, by a grant deed dated January 25, 1938, and recorded on the 26th day of January, 1938, in the office of the County Recorder of Tehama County, California, in Liber. 94 of Offical Records, page 406, Records of Tehama County, became the owner of the mineral rights on the acreage therein described.

"The undersigned hereby sells, assigns, transfer... and conveys to Elma I. Moore of 420 South Oxford Ave., Los Angeles, California any and all mineral rights in and to the following described parcel of property. The Northeast ¼ of the Northeast ¼ of the Southeast ¼ of the Northeast ¼ of Section 24, Township 23 North, Range 4 West, M. D. B. & M., and containing 2½ acres.

"In witness whereof, I have hereunto set my hand this 24th day of March, 1938.

"E. F. Stella"

It is to be noted that by the agreement Stella had the right to select the particular parcel to be conveyed from a described section of land, which, after being selected by him, was particularly described in a later instrument designated "Assignment." These conveyances transferred no surface rights to the respective purchasers. So-called assignments, which were in reality deeds of mineral rights, were made of all the interests purchased by plaintiff of land in Tehama County. She purchased twenty acres of land in Glenn County from Stella under the same form of agreement, which gave Stella the right to select the parcel or parcels he might choose to convey, but no deed was ever delivered to plaintiff on this purchase, although she paid Stella $1,200 as the full purchase price.

The court found that the transfers of mineral rights constituted securities within the meaning of the Corporate Securities Act; that the sales were made without a permit and in violation of sections 3, 4, 6, 7 and 9 of that Act. It was further found that four of said parcels lying in Tehama County were sold in violation of a *permit* issued by the Real Estate Commissioner, in that by the terms of the *permit* the same were not to be sold until the land had been surveyed and a map thereof filed and recorded with the county recorder of Tehama County, which survey was never made.

Before discussing questions as to the applicability of the Corporate Securities Act to the conveyances of mineral rights, it should be mentioned that the complaint was also based upon charges of actual fraud. It was alleged that false statements were made to plaintiff concerning the value of said mineral rights and with respect to operations that were represented as being under way for the drilling of oil wells close to the lands sold to plaintiff and which were represented as about to be brought in as productive wells; that plaintiff was nearly eighty years of age, inexperienced in business, had no knowledge and received no independent advice concerning the matters as to which the representations were made; that the representations were wholly false, and that plaintiff was deceived thereby. The case was tried upon the issues relating to the alleged violations of the Corporate Securities Act by the defendants and not upon the issue of actual fraud, although the court made findings in plaintiff's favor upon the latter issue. Plaintiff does not contend that these findings are supported by the evidence, which on this phase of the case was quite incomplete, and they will be disregarded in our discussion.

Stella had been sales manager of El Claro Oil and Gas Company, a corporation which in 1932 was engaged in selling oil investments in Glenn County under a scheme which was denounced in a decision of the District Court of Appeal in El Claro Oil, etc., Co. v. Daugherty, 1936, 11 Cal. App.2d 274, 53 P.2d 1028, 55 P.2d 488 as in violation of the Corporate Securities Act. The operations which are involved in the instant case were a continuation of the same general promotional activities in different property under a slightly different scheme. However the one here under review, we think, failed, as the one denounced in the El Claro case did, to successfully circumvent the provisions of the Corporate Securities Act. The property which was acquired by the investors consisted of a right to extract oil, gas and other mineral substances from the parcels of land conveyed and, it may be assumed for the purposes of this decision, such surface rights as would have been necessary in order to carry on proper exploratory and development work. The question before the trial court, which is determinative of the question of legality, was whether, in practical effect, the scheme under which the deeds were given contemplated and involved investment by the purchasers in an enterprise or venture conducted by others for earnings and profits or, more specifically, whether investors were led to part with their money upon the promise and in the expectation that they would be able at some future time to lease their interests to some oil company upon a royalty basis and whether this inducement, though not expressed in writing, was the sum and substance of the entire scheme of investment. If the correct answer to this question is in the affirmative, then the deeds partook of the very essence of those types of investment contracts which throughout the history of legislation on the subject in this state have been deemed to be proper subjects for regulatory supervision. It is not necessary to assume, and it is not assumed, that every conveyance of mineral rights in a parcel of land comprising one acre or two and one-half acres is necessarily a security within the meaning of the Corporate Securities Act, Stats.1917, p. 673, as amended, Deering's Gen.Laws, 1937, Act 3814.

Section 2(a) 7 of the Act includes in the definition of the word "security" "any * * * certificate of interest in an oil, gas or mining title or lease," and the decisive question is whether the deeds issued to plaintiff fall within that definition. A deed to mineral rights may or may not be a security. The determination of its true character requires an inquiry which goes beyond the mere name of the instrument or the nature of the interest conveyed.

[1] In deciding whether a given instrument is a security the courts have invariably looked through mere form to substance. People v. McCalla, 1923, 63 Cal. App. 783, 791, 220 P. 436; People v. Eiseman, 1926, 78 Cal.App. 223, 241, 248 P. 716; People v. Smith, 1931, 111 Cal.App. 177, 186, 295 P. 105; People v. Ratliff, 1933, 131 Cal.App. 763, 772, 22 P.2d 245; People v. Reese, 1934, 136 Cal.App. 657, 672, 29 P.2d 450; El Claro Oil, etc., Co. v. Daugherty, 1936, 11 Cal.App.2d 274, 281, 53 P.2d 1028, 55 P.2d 488; People v. Yant, 1938, 26 Cal.App.2d 725, 736, 80 P.2d 506; Domestic & Foreign Pet. Co., Ltd., v. Long, 1935, 4 Cal.2d 547, 555, 51 P.2d 73.

[2] We are of the opinion that the evidence fully supports the finding that the mineral deeds were "certificates of interest" in an oil, gas or mining title and were therefore "securities" which could not be sold without a permit. In considering the nature of the instruments it is necessary to have an understanding of the mutual purposes and expectations of the parties and of the potentialities of the rights acquired by the grantees as investments. Whether the transactions were clean-cut transfers of interests in real estate to be held, used, or sold by the grantees without participation with others in a profit-sharing venture on the one hand, or whether upon the other hand, while they were conveyances of definite interests in real property, they were intended by both seller and buyer to transfer rights to participate in earnings or profits in the nature of landowner's oil royalties that might inure to the benefit of numerous landowner lessors under community leases, was necessarily a question of fact for the trial court. Ther was evidence, both direct and circumstantial, which tended strongly to support the implied finding that the transactions were essentially of the latter class. For the following discussion we accept certain deductions of fact which we believe necessarily led the trial court to the ultimate finding of fact that the mineral deeds were securities. We regard the latter as a finding of fact rather than as a conclusion of law because it encompasses determinations of certain evidentiary facts relating to the nature of the rights acquired by the purchasers of "mineral rights," to the reasonable probabilities of the realization of returns in the way of oil or gas production, and to the practical and not merely the theoretical positions the purchasers occupied as owners of mineral rights in small parcels of land in a wilderness of undeveloped and unproven acreage. We believe that the trial court must have been satisfied from the evidence that it was highly improbable that these parcels could have been developed for oil by the owners or that either the defendants or the purchasers expected that they would be developed at all unless they should be grouped into tracts of sufficient size to justify expensive exploratory drilling. Our conclusions are to be understood as being predicated substantially upon the deductions mentioned.

In the El Claro Company case sales and assignments had been made by the corporation of interests in oil leases which it held as lessee, the lessee's rights being assigned to buyers as to certain specific parcels of the total acreage under lease. The purchasers then by separate instruments assigned their holdings to another corporation which was to drill and divide proceeds from production among the investors upon a pro rata basis. The interests sold by the corporation were held to be securities for the reason that the scheme, viewed in its entirety, contemplated participation by the investors in returns from oil development to be conducted by the operating company. The fundamental facts and principles of the El Claro case cannot be distinguished from those of the instant case. To be sure, the investors here were not offered the opportunity to join in community leases or subleases, as they were in the El Claro case, but from the nature of the transactions and the surrounding circumstances it is clear that such leases were contemplated and in a practical sense that they were necessary in order to accomplish the exploration and development of the land for oil. The lands were located in unproven territory. There was a well producing gas which was under the control of Stella, who was financing the drilling of another well in the same locality. The cost of the latter well, if it should be drilled without mechanical trouble, was estimated by Stella at $75,000. There was no pretense at the trial and nothing in the evidence to suggest that any of the investors would ever have been able to drill oil wells themselves or that they had any intention of doing so. In a letter to the Real Estate Commissioner dated June 21, 1937, Stella said in part, referring to the well he was drilling: "I should complete it within a short period of time providing I am able to meet the financial requirements for the carrying on of the uninterrupted drilling. I find however that since the permit was granted my volume of sales has been very disappointing due to the fact that I am compelled to sell two and a half acre drill sites and must require down payments of not less than $25 and $25 monthly payments thereafter. I know of a good many worthy people who hold fairly good positions and have been steadily employed for many years and have been steadily employed by the same people for whom they are working who are really desirous of acquiring one of these drill sites, but the payment of $25 per month is more than they can possibly stand, and therefore they have to forego the opportunity of purchasing same." The letter was written as a request that the sale of drill sites of one acre each without change of existing prices might be authorized.

[3] The court asked defendant Stella the following question: "Do you think it was within the contemplation of the parties that the plaintiff was going to go in there and put an oil well up?" to which Stella replied, "She can lease it to some one else" and further, "The court: Just like when you are selling these fractional interests or anything else. For instance, these people certainly could not go in and drill this property when they haven't right of ingress or egress. The Witness: Oh, they can lease it, your Honor." Defendant Steele had acquired from Stella from time to time certain of the same type of mineral rights as those sold to plaintiff. She had been employed by El Claro Company as a member of its sales force. She testified with relation to her holdings in the present venture as follows: "Q. Well, this oil purchase was really your first venture in oil, wasn't it? A. No, I lost this old syndicate, this old stock that you read in the law books, I lost in that, but I thought when I could buy my own deed and own the land myself and let the major companies do the drilling of the wells, I would have something worth holding for." Nowhere in the record is there to be found any testimony which even suggests a possibility of exploitation or development of an oil field in the lands in question other than through the medium of community leases. Of course each owner of a drill site would have the right to drill a well on it or to lease it separately for the drilling of a well (assuming that he also held the necessary surface rights), but the scheme of the promotion cannot be given a pattern drawn on this fantastic possibility. In his testimony defendant Stella frequently referred to sales and leases of small tracts of land in proven oil fields as justifying the prices he was receiving from investors in his own promotional schemes, and the inference is inescapable that these same arguments must have been a part of the stock in trade of the defendants and their salesmen. In theory an oil field might have been developed of such great value that each investor would have been able to lease each drill site he owned separately and without joining with other owners in a community lease. From a practical viewpoint this possibility was so remote as to be nonexistent for the simple reason that under the only feasible plan of development through the blocking up of large acreage in a common lease the several owners would have had no drill sites left upon which to give separate leases. It is a matter of common knowledge that exploration for new oil fields is carried on under leases embracing large areas and that it is only in proven oil fields which have first been developed by those holding large acreage that further development is carried on under leases of smaller tracts, that the instances are yet more rare in which the development goes into closely subdivided areas under community leases, and that in yet rarer instances so-called "drill sites" in well proven fields become the subject of independent development.

The deviations of the scheme from the one denounced in the El Claro case were of form and not substance, the only difference being that under the scheme used by the El Claro Company community leases were executed in connection with the original sale of mineral rights, whereas under the scheme involved in the instant case the actual execution of community leases, while essential to the exploration of the lands of the investors, was deferred to some indefinite future time when conditions might warrant the leasing of the land by oil-producing companies financially able to conduct oil development in a normal and businesslike manner. These are the principal reasons why we believe the trial court was justified in concluding that the mineral rights involved would be, in a practical sense, incapable of development except in the event and by means of operations conducted by others in which the several investors, as lessors, would be given the right to share ratably in landowners' royalties. The significance of this conclusion is obvious.

There have been frequent changes in the definition of the word "security" as used in the Corporate Securities Act in the interest of clarity and precision, but they have denoted no changes in the essential policy of the law. Apparently the amendments with respect to phraseology have been considered necessary in order to keep pace with the ingenuity of those promoters who persist in hunting for some hole in the law that is not plugged with a word. Deeds to interests in real property may be "certificates of interest" and hence "securities" although the word "deed" is not used in the definition.

In situations in which the facts were not different in fundamental respects from those disclosed in the instant case, the courts have held that conveyances in the form of deeds, employed as instruments for the transfer of interests in oil production, were in reality certificates of interest in oil and gas titles. People v. Jackson, 1937, 24 Cal.App.2d 182, 188, 74 P.2d 1085; People v. Daniels, 1938, 25 Cal.App.2d 64, 66, 67, 76 P.2d 556. Repetition of the reasoning which the courts followed in reaching this conclusion is wholly unnecessary, as is also citation of the authorities discussed and followed therein. It is true that the conveyances involved in those cases were of small interests in the fee title, or title to mineral rights, in land which was already under lease for oil development, whereas, as we have pointed out, the several parcels of land in which plaintiff invested were not subject to an oil lease or leases. The parcels involved in the Daniels case were described by the court as being "infinitesimal" in area and those considered in the Jackson case were referred to as "exceedingly small" but these were only evidentiary facts mentioned by the court as bearing upon the essential features of the promotional plans under which the small participating interests were sold. It is not the area of the land sold that determines the question of validity of the deed; it is the nature of the rights acquired by the purchaser, considered as an investment. We have stated at length reasons why the circumstance that the land was not already under lease is not determinative as to the essential nature of the transactions in question. Plaintiff and others who invested in the enterprises of the defendants would have been in a better position had the land been under lease to a responsible oil company; at least they would have had the assurance that the exploration of the oil possibilities of their holdings would be conducted by a competent operator and in a manner and under a plan of development that would be fair to the lessors.

It is contended by defendants and in a brief of amicus curiae which we have allowed to be filed, that to require a permit for the sale of mineral rights under such schemes as defendants were using would infringe upon the rights of owners of land which may be oil-bearing to dispose of the same in small parcels, as owners of other lands have the unquestioned right to do without regulation under the Corporate Securities Act, and that the Act does not provide for such regulation. The proposition suggests a non sequitur. In holding that the deeds to mineral rights issued by the defendants without a permit were invalid, we of course do not hold that every conveyance of a fractional interest in prospective oil land or of a segregated parcel thereof is a security or, more specifically, that it is a certificate of interest in an oil title. What we do decide is that the deeds issued by defendants under the circumstances related in this opinion and in light of the intentions and purposes of the parties with respect to possible returns to the investors as we understand them to have been, were certificates of interest in an oil title which could not lawfully be sold except under a permit of the Commissioner of Corporations. If we were to hold otherwise the bars would be thrown down for promoters of oil ventures to go to the public with deeds to mineral rights instead of corporate stock, withholding the actual giving of oil leases until the land had been unloaded or perhaps not leasing the land at all, and the law as to such operations would be completely nullified. The Legislature has not either intentionally or inadvertently allowed a means of escape from regulation through such devices.

The brief of amicus curiae quotes at length from People v. Anderson, 1939, 35 Cal.App.2d 23, 94 P.2d 627, a case in which it was held that sales of ore yet to be mined with a guarantee of a return of double the money invested were not sales of securities. That is not at all like our case. Had the sales in the Anderson case been of square-foot areas of a mining claim, with knowledge of the sellers and the purchasers that the latter did not intend to and could not work their several interests, but intended to lease them for a common operation under which they would be entitled to royalties, the facts would compare with those in our case, but we think the holding in the Anderson case would then have been different.

[4] It has been the consistent policy of the state, as reflected in the various definitions of "security," to subject to regulation all schemes for investment, regardless of the forms of procedure employed which are designed to lead investors into enterprises where the earnings and profits of business or speculative ventures must come through the management, control, and operations of others and which, regardless of form, have the characteristics of operations by corporations, trusts or similar business structures. The plan of operations followed by defendants comes within this classification.

Before leaving this phase of the case it may be worthwhile to again mention that the case before us is one in which plaintiff has chosen to disaffirm all of her transactions with the defendants and to renounce all claim of interest in or to rights accruing to her under the conveyances and has elected to demand the return of her money. The decision naturally is not determinative of the rights of other investors who have received similar deeds and who have elected or may elect to retain such interests as may have passed to them under their respective conveyances.

The court found as to certain of the sales of mineral rights that the same had been made in violation of a "permit" of the Real Estate Commissioner and found as a conclusion of law that they were made in violation of law. The record fails to show that any order was made by the Real Estate Commissioner prohibiting the sale of any of the mineral rights which plaintiff purchased, under section 20e of the California Real Estate Act, Stats.1919, p. 1252, as amended, Deering's Gen.Laws, 1937, Act 112, although it does appear that the report of the department contained a recital that the subdivider, Stella, agreed not to sell certain acreage, including that now under discussion, until a survey had been made and a map placed of record. The findings establish these facts and the further facts that the survey was not made and the map was not recorded. We find it unnecessary to consider the bearing, if any, which these facts would have upon the validity of the transfers, as the judgment finds support in the other facts found.

[5] In one of the transactions plaintiff received an agreement for the sale of the mineral rights involved in the seventh cause of action, which was signed, "E. F. Stella by Dallas M. Steele" and the "assignment" that followed was signed "Stella-Harold Development Company by E. F. Stella, President." This is the cause of action upon which the Stella-Harold Development Company was held jointly liable with Stella and it is contended that there is no evidence of liability on the part of the corporation. There is no merit in this contention. In plaintiff's opening brief it is said, "In proximity to the development work that he was doing he [Stella] acquired, by mineral deed, considerable acreage, taken in the name of Stella-Harold Development Company, giving him the right to explore, for oil or gas, with right of ingress and egress to the property. * * * Appellant Stella divided this acreage in parcels of two and a half acres each and sold the same to the public, giving an assignment of all his right, title and interest in and to the mineral rights in and to the said property."

The evidence fully supports this statement of the relationship between Stella and the corporation. Whether the corporation was a principal in the transaction and profited thereby or acted only as the agent of Stella, it participated in the illegal sale and issuance of the security and was properly held to a joint liability with Stella. The court found that the corporation was the alter ego of Stella but it is not necessary to review the evidence upon which that finding rests. The finding was not necessary to establish liability on the part of the corporation.

The absence of findings on the eighth cause of action does not weaken the judgment; the all-inclusive findings on the thirteenth cause of action are sufficient.

Under proceedings for attachment a writ was issued against all of the defendants and was executed by levy upon property of Stella and Stella-Harold Development Company. All of the defendants joined in a motion to discharge the attachment upon the ground, among others, that plaintiff held security that was not without value, consisting of the properties which she had purchased; their motion was denied; they gave notice of appeal but their attempted appeal was dismissed because of their failure to perfect it. In deciding the motion to dissolve the attachment, after an extended hearing the court made findings of fact and conclusions of law upon substantially all of the facts in issue, finding particularly that the mineral deeds and stocks were securities, that they were sold without any permit or broker's license, that the stock was sold with intent to violate and evade the provisions of the Corporate Securities Act, and that the debts for which plaintiff sued were not secured. Upon the trial plaintiff contended that the findings and conclusions upon the motion constituted a final determination of the facts in issue in the case under the doctrine of res judicata; the finding of the court was contrary to this contention and it is now put forward again as an independent ground for affirmance of the judgment.

In view of our conclusion that the judgment should be affirmed on the merits it is unnecessary to decide the point now urged by respondent, in further support of the judgment, namely, that findings and conclusions upon all of the issues in the case, made in plaintiff's favor upon a ruling by the trial court denying defendants' motion to discharge an attachment, which ruling became final upon dismissal of defendants' attempted appeal therefrom, constituted a final adjudication in plaintiff's favor upon all of the facts and points of law decided upon the motion, under the doctrine of res judicata.

The issues which involved sales of stock to plaintiff in three corporations were also correctly decided. The purchases were of stock of Fortuna Holding Corporation, K. B. P. Holding Corporation, and Summit Holding Corporation. The first named was originally the R. B. Knitting Mills, Inc. The second had been named Montroy Electric Co. Stella acquired the outstanding stock of these corporations which had been issued under permit of the Corporation Department. After acquiring the stock he caused the names of two of the corporations to be changed and altered their corporate structures, in one case increasing the authorized number of capital shares and in the other case decreasing them. He surrendered the old shares of stock and caused to be issued shares under the changed capital structures; no permit was obtained for these issuances of stock. In some fashion or other defendant Dallas M. Steele acquired from Stella shares in each of the corporations and she made the sales to plaintiff from stock which stood in her name. All of the sums she received were immediately paid over to Stella and they were credited by the latter upon alleged purchases by Mrs. Steele from Stella of the same type of mineral rights as those sold to plaintiff. Both Mrs. Steele and Stella testified that Mrs. Steele owned the stock and that she had acquired some of it for a cash consideration, some of it in exchange for interests which she held in the El Claro Oil and Gas Company and other shares as bonuses in connection with the promotional enterprises in which she was engaged with Stella. The inquiry into the transactions between Mrs. Steele and Stella relating to her alleged purchases of mineral rights and her acquisition of the stocks was exhaustive but as an effort to learn the truth of the situation, was far from fruitful. The testimony of both defendants on these subjects was contradictory, evasive in the extreme, and disclosed an intention to conceal important facts. Mrs. Steele was utterly unable to tell when she had purchased mineral rights, how many parcels she had purchased, what acreage was embraced in the purchases, how much she had ever owned at any one time, how much she owned at the time of trial, how much she ever agreed to pay Stella for the conveyances, how much she had paid him, or how much she owed him, if anything. Defendant Stella produced some cards which purported to record purchases of mineral rights by Mrs. Steele, but the latter had no knowledge of these records and no records of her own. Equally unsatisfactory was the testimony of these witnesses with reference to the shares of stock supposedly acquired by Mrs. Steele, portions of which were later sold to plaintiff. No records of these transactions were kept by either party, there was no tangible or satisfactory evidence that Mrs. Steele had acquired any of the stock in bona fide business transactions, and the trial court was fully justified in concluding that the shares standing in the name of Mrs. Steele were held for defendant Stella and were to be disposed of for his benefit. It was reasonably to be inferred that the stock was actually sold to plaintiff for the benefit of defendant Stella and that the alleged sales of mineral rights by the latter to Mrs. Steele were but a device set up to justify the payment to Stella of the proceeds from the stock sales. The three corporations whose stock was sold to plaintiff held mineral rights or leases or interests in production under oil leases and part of the stock of some of the corporations was owned by the other corporations. Stella was financing the drilling of oil wells on lands and under leases in which the three corporations were interested and in the returns from which they would share in the event of successful development. He was using the money derived from the sale of mineral rights to finance these oil drilling operations and, as we have seen, he realized cash from the sales of stock made by Mrs. Steele through the medium of transfers to her of mineral rights. The corporations appear to have been merely instrumentalities used by Stella to raise money for the purpose of acquiring mineral rights in land and for the purpose of drilling oil wells as a part of one comprehensive promotional scheme. It was largely for the use and benefit of the three corporations that defendant Stella was financing and drilling the several oil wells. It was only through the oil development program that the corporations could hope to profit, for they were engaged in no business or operations of their own and were possessed of no assets other than their oil interests which were intermingled with those of the defendants. One of the alluring inducements held out to investors was the fact that Stella was drilling the oil wells at his own expense. This was an important part of the scheme and the evidence was quite sufficient to warrant the trial court in believing that the sales of stock in the corporations by Stella for the purpose of raising money to be used in drilling the wells was also a part of the promotional scheme. The trial court also was justified in drawing an inference that the stock transactions between Stella and Steele and the later sales made to plaintiff were none of them bona fide deals in personally owned stock but were mere devices for financing the scheme; that they were made indirectly for the use and benefit of the corporations whose stock was sold, which benefit was received through the use of the proceeds from stock sales to finance the oil drilling operations on behalf and in the interests of the corporations.

The plan of the defendants in the larger view was to carry on oil development to attract purchasers of the mineral rights, and to use the money received on sales of mineral rights to carry on the development work and for the purchase of additional mineral rights. By devious means defendants sought to accomplish the same purposes that would have been accomplished in a lawful and legitimate manner by the authorized sale of stock of a corporation holding title to the mineral rights and engaged in developing them with the proceeds of stock sold to investors and for the benefit of stockholders. In other words, defendants had a purpose which may have been entirely lawful but which, for reasons which we do not know and which are unimportant, they chose to accomplish in an illegal manner.

[6] It is insisted by appellants that although the stocks were securities they were lawfully sold as securities which were exempted from the provisions of section 2 (c) 3 of the Corporate Securities Act, which provides that the act is not applicable to "The sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this act." In view of the purposes of defendants Stella and Steele in making the stock sales it is apparent that they were not disposing of their own property for their own account as bona fide owners of the securities, which would have been permissible

under the foregoing provisions, but were making sales for the benefit of the issuing corporations and in the promotion of the scheme or enterprise of the defendants and, as found by the trial court, with the intent of violating and evading the provisions of the act, all of which rendered such sales unlawful when made without a permit.

There is likewise no merit in the criticism of the joint judgment against defendants Stella and Steele in the stock transactions. Upon the facts found Stella was equally liable with Mrs. Steele.

[7] The point is made that plaintiff is not entitled to the return of the sums she invested with defendants except on condition that she restore to them the interests in real property and the stock which she received in the transactions which she has rescinded. This point seems to be well taken. While in a technical sense no title passed to plaintiff, her mineral deeds were placed of record and constitute a cloud upon titles of her grantors, and presumably she is still in possession of the certificates of stock. Accordingly, the judgment is modified by adding thereto a provision reading as follows:

"That plaintiff, or if she fails to do so, the clerk of the court in her name, shall transfer all of plaintiff's right, title, and interest in stocks of Fortuna Holding Corporation, K. B. P. Holding Corporation, and Summit Holding Corporation, described in plaintiff's complaint, to Dallas M. Steele upon payment of plaintiff's costs of suit and the share of the judgment representing the sums (including interest thereon) paid by plaintiff for said stocks, and shall transfer by quitclaim deed to either E. F. Stella or Stella-Harold Development Company, respectively (whichever one may have been the grantor), the mineral rights as described in their respective conveyances that have heretofore been delivered to plaintiff, upon payment of her costs of suit (if the same shall not already have been paid) and the share or shares of the judgment representing the sums (including interest thereon) paid by plaintiff to defendant Stella for the several deeds to mineral rights as set forth in the findings of fact herein."

As so modified, the judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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53 Cal.App.2d 18

PEOPLE v. COLEMAN.

Cr. 2202.

District Court of Appeal, First District, Division 1, California.

June 26, 1942.

Hearing Denied July 24, 1942.

1. **Criminal law** ⚷1159(1)

It is not the province of an appellate court to retry a criminal case and to draw inferences from the facts proved.

2. **Criminal law** ⚷1159(2)

The province of an appellate court is to decide only whether on the face of the evidence it can be held that sufficient facts would not have been found to warrant inference of guilt.

3. **Criminal law** ⚷1159(2)

To warrant reversal of a conviction on ground of insufficiency of the evidence, it must be found that on no hypothesis is there sufficient evidence to support the jury's conclusion.

4. **Criminal law** ⚷1159(2)

Unless an appellate court can say that testimony is so inherently improbable as to leave the court no recourse without self-stultification, except to reverse conviction, the court should not interfere with the verdict and the trial court's judgment on that ground.

5. **Criminal law** ⚷1159(2)

In considering the question of the sufficiency of evidence to sustain a conviction, all intendments favor upholding the judgment and the trial court's action, and the evidence is to be viewed in the light most favorable to the prosecution.

6. **Sodomy** ⚷6

Evidence sustained conviction for sex perversion. Pen.Code, § 288a.

7. **Rape** ⚷51(1)

Evidence sustained conviction for rape.

8. **Robbery** ⚷24(1)

Evidence sustained conviction for first degree robbery.

9. **Rape** ⚷7

The crime of rape was complete the moment that penetration of prosecutrix' private parts by defendant's private parts occurred.

10. Rape ⚿51(4)

In rape prosecution, testimony of prosecutrix that the reason that she did not offer greater resistance to defendant was that she believed that toy pistol which defendant had was a real pistol, and that she was afraid of being shot, was sufficient to establish the element of "violence".

See Words and Phrases, Permanent Edition, for all other definitions of "Violence".

11. Criminal law ⚿824(3)

In rape prosecution, wherein defendant denied positively any assault or attempt to rape, trial court's failure to instruct jury on attempted rape was not error, in absence of a request by defendant for such an instruction.

12. Sodomy ⚿1

The crime of "sex perversion," as denounced by the statute declaring the act of copulating the mouth of one person with the sexual organ of another constitutes the crime, can be committed by two persons of the opposite sex. Pen.Code, § 288a.

See Words and Phrases, Permanent Edition, for all other definitions of "Sex Perversion".

13. Sodomy ⚿6

In prosecution for violation of statute denouncing the act of copulating the mouth of one person with the sexual organ of another, there is no requirement that the testimony of a complaining party should be corroborated, except where the complaining party is an "accomplice," that is, one liable for prosecution for the identical offense charged against the defendant. Pen.Code, §§ 288a, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

14. Criminal law ⚿507(7)

In prosecution of negro for sex perversion committed on white woman, evidence was insufficient to establish that the woman was an "accomplice" and did not require corroboration of her testimony, where the evidence showed that she submitted under threats and menace, and under belief that toy pistol was a real pistol, and that negro stated that he had confederates lurking in shrubbery. Pen.Code, §§ 26, 288a, 1111.

15. Criminal law ⚿511(1)

In prosecution for sex perversion, evidence was sufficient to corroborate defendant's alleged accomplice. Pen.Code, § 288a.

16. Robbery ⚿6

The fact that one accused of robbery was unarmed, or, being armed, made no use of the weapon, does not establish that personalty was not taken from the person of another without the use of force or fear. Pen. Code, § 211.

17. Robbery ⚿11

In robbery prosecution, proof that defendant was armed is required only to fix the degree of the crime.

18. Robbery ⚿11

To fix robbery as "robbery of the first degree" it is not necessary that weapon used should be a deadly weapon, if, in fact, it is a dangerous weapon. Pen.Code, § 211a.

See Words and Phrases, Permanent Edition, for all other definitions of "Robbery in the First Degree."

19. Robbery ⚿11

Robbery committed with an unloaded pistol may be "robbery in the first degree," since the pistol need not be used or be intended to be used as a firearm, and if it is capable of use as a club or an instrument to produce bodily harm, it may be classified as a "dangerous weapon." Pen.Code, § 211a.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Weapon".

20. Robbery ⚿26

In first degree robbery prosecution, whether toy pistol, which resembled in size, shape and general appearance a real pistol, was a "dangerous weapon" was a fact question to be decided by the jury. Pen.Code, §§ 1126, 1127, 1439.

21. Witnesses ⚿282¾

A trial judge is authorized on cross-examination of a defendant to call defendant's attention to apparently conflicting statements which the defendant has made, so as to give the defendant an opportunity to explain or reconcile them if possible.

22. Criminal law ⚿1166½(12)

Questions propounded by trial judge to defendant were not prejudicial to defendant, where questions propounded were judicial in purpose, related to matters on which defendant had been interrogated by his counsel, and were questions that would have been proper if asked by either defendant's counsel or the district attorney.

23. Criminal law 🔑1166½(12)

Trial court's remark to army officer who testified for the prosecution, that officer might go on his trip in the military service, and that the court wished that the officer should have good luck, was not prejudicial to defendant's rights.

24. Witnesses 🔑277(1)

Assistant district attorney, while cross-examining defendant, was entitled to use a statement, notes, or memoranda.

25. Criminal law 🔑1165(1)

In the determination of the guilt or innocence of an accused, it is not the question whether technical privileges have been accorded one side or the other in the trial of the case, but rather, whether accused has been afforded a fair trial.

26. Criminal law 🔑1171(1)

Where defendant denied that he went home and changed his boots prior to commission of the crime, conduct of assistant district attorney, when defendant's attorney asked what paper assistant district attorney had in his hand, in replying that the paper was a statement of defendant's wife that when he came home before commission of the crime he took off his boots, was not reversible error, where credibility of defendant as a witness had been and was thereafter in a large measure impeached.

27. Amicus curiae 🔑3

Generally, it is not within the province of those specially permitted to appear as amicus curiae to raise new objections.

28. Criminal law 🔑562

Evidence which seems unusual is not necessarily "improbable" and insufficient to sustain conviction.

See Words and Phrases, Permanent Edition, for all other definitions of "Improbable".

29. Criminal law 🔑1159(2)

In reviewing facts, an appellate court is limited to a determination of the question whether there is substantial evidence to support conviction.

30. Criminal law 🔑737(1), 742(1)

Discrepancies in testimony, the uncertainty of witnesses in giving the result of their observations or their recollections of oral statements, and the nature and character of an exhibit introduced in evidence, are questions solely for the jury's determination.

31. Criminal law 🔑723(5)

District attorney's reference to the fact that only when mask came off of defendant's face during scuffle was it discovered that defendant was a negro, did not establish that prejudice existed by reason of defendant's color, where that was the only instance in which the district attorney referred to the defendant's color.

PETERS, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Festus L. Coleman was convicted of sex perversion, rape, and first degree robbery, and he appeals.

Convictions affirmed.

Andersen & Resner, of San Francisco, for appellant.

Albert M. Herzig, Thelma S. Herzig, George Olshausen, and Harold M. Sawyer, all of San Francisco, amici curiae, for appellant.

Earl Warren, Atty. Gen., and Chas. W. Johnson, Deputy Atty. Gen., for respondent.

WARD, Justice.

The defendant, Festus L. Coleman, was found guilty by a jury in the Superior Court in and for the City and County of San Francisco of the following crimes: sex perversion (Pen.Code, § 288a), rape, and first degree robbery; and he has appealed from the judgments of conviction and the orders denying his motions for new trial. The grounds urged for reversal are insufficiency of the evidence to sustain the convictions; that the trial court and the district attorney committed misconduct prejudicial to defendant's rights; and failure to instruct the jury on attempted rape.

The evidence presented shows that the sex crimes were committed on a high school student (hereinafter referred to as Miss C) and that the victim of the robbery was a young army lieutenant (hereinafter referred to as Lieutenant A), attached to the United States Air Corps and stationed at Hamilton Field. It was mainly on their testimony defendant was convicted. Miss C's home was in central California. She came to San Francisco with a girl friend and the latter's parents to spend the Easter vacation at the home of the girl's aunt. She had become acquainted with Lieutenant A some time previously while he was training at the army air field near her home. The crimes were committed on Friday night, April 11, 1941, between 11:30 and 12 o'clock near the 43rd Avenue-Fulton Street entrance to Golden Gate Park, a few blocks distant from the home where Miss C was visiting. The defendant, who is a negro, testifying in his own behalf, admitted being at the scene of the crimes at the time they were alleged to have been committed and that he had engaged in a fight with Lieutenant A, but he denied having molested the girl in any manner or having attempted to rob Lieutenant A.

[1-8] On this appeal one of the points urged against the sufficiency of the evidence is that the testimony given by the prosecution's witnesses concerning the commission of the crimes is inherently improbable and therefore that it should be disbelieved. It is not the province of an appellate court, however, to retry a case and to draw inferences from the facts proved. That is the function of the jury. The province of the appellate court is to decide only whether upon the face of the evidence it can be held that sufficient facts would not have been found to warrant the inference of guilt. To warrant a reversal on the ground of insufficiency of the evidence it must be found that upon no hypothesis is there sufficient evidence to support the conclusion reached by the jury. People v. Kabakoff, 45 Cal.App.2d 170, 113 P.2d 760. In other words, unless the appellate court can say that the testimony is so inherently improbable as to leave the court no recourse without self-stultification except to reverse the judgment, the reviewing court should not interfere with the verdict and the judgment of the trial court on that ground. People v. Moreno, 26 Cal.App.2d 334, 79 P.2d 390; People v. Antunez, 28 Cal.App. 740, 153 P. 963; People v. Becker, 140 Cal.App. 162, 35 P.2d 196. Furthermore, in considering the question of the sufficiency of the evidence, all intendments favor upholding the judgment and the action of the trial court, and the evidence is to be viewed in the light most favorable to the prosecution. People v. Dukes, 90 Cal.App. 657, 266 P. 558. The record in the present case discloses an abundance of evidence to sustain the jury's finding upon the question of defendant's guilt. The following are among the facts established thereby: Earlier on the evening of the commission of the crimes Lieutenant A and another young army lieutenant, stationed also at Hamilton Field (hereinafter referred to as Lieutenant B), called at the home where Miss C was visiting, to spend the evening with her and her girl companion, and later all drove down to the ocean beach nearby and spent some time patronizing the amusement enterprises. While riding in a boat in the "chute the chutes" concession Lieutenant B and his girl companion were splashed with water, so the party returned to the home of the girls to change and dry their clothes, after which they drove back to the amusement center at the beach, remained there for some time and then started to drive back through the park. It was a warm, bright moonlight night, and when they reached a point near the 43rd Avenue-Fulton Street entrance they stopped, listened to the radio for a while, and then Lieutenant A and Miss C said they wanted to talk alone; they took a robe, walked about a hundred feet from the roadway and sat down. They had been there but a few minutes when they heard and saw a man (the defendant) prowling about the shrubs close to them. Becoming alarmed, they got up at once, intending to return to the automobile, but as they arose the defendant suddenly emerged through the shrubs, wearing a paper mask, with his hat pulled down over his eyes, and carrying a pistol. Lieutenant A said to him: "What can I do for you, fellow?" and the defendant, pointing the pistol at Lieutenant A said, "This is a stick-up. Don't say a word." "I don't want any funny business or I'll blow you to pieces." He then ordered Lieutenant A to turn around, and placing the muzzle of the pistol at his back said, "I want your money. Where is it?" The lieutenant replied that it was in his back pocket. Thereupon the defendant removed the lieutenant's wallet from his pocket and also some loose change and a bunch of keys from another pocket. He offered the keys to the girl, saying, "Here, sister, you can have the keys as a souvenir of your boy friend"; but when she started to take the keys he said, "No, I think

I'll keep them." He then ordered the lieutenant to walk about five feet into the bushes, and to kneel down and keep facing the bushes, saying that "there were some other fellows waiting around the bushes for him and that they would get him if either of us tried to make a move." He then ordered the girl to take off her pants and lie down. Lieutenant A spoke up, saying: "What are you going to do?," and the defendant replied that "he was going to French my girl friend." The lieutenant asked him "what it meant," and he replied, "I am going to kiss her between the legs." The lieutenant pleaded with him to let the girl alone, and he replied that "that was all he was going to do," and defendant told the girl not to be afraid. After he had forced the girl to lie down he told her to put her blouse over her head. She testified that he then put his mouth against her private parts and kept his mouth there for five or ten minutes, following which he began raping her. Before defendant started raping the girl Lieutenant A several times attempted to turn around and say something, but each time defendant threatened him with the pistol and warned him to keep facing the bushes. But when defendant began raping the girl she cried out and the lieutenant immediately sprang upon the defendant as he lay on top of the girl, and a desperate struggle ensued, during which the lieutenant's hand was badly cut in several places, partially disabling him. As the struggle began the mask fell from the defendant's face, and the girl and her companion then observed for the first time that he was a negro. Being freed from the defendant the girl ran screaming for Lieutenant B and the two young men finally subdued the defendant and started to walk him to the police station; but after proceeding a short distance defendant put up a fight in an attempt to escape, whereupon Lieutenant B returned for the automobile, and placing appellant between them in the front seat and the two girls in the back seat they drove defendant to the police station and turned him over to the police. Thereupon a police officer accompanied the two young men back to the scene of the crimes and there they found defendant's hat, the pistol, the paper mask, and Lieutenant A's wallet; also a piece of glass smeared with moist blood, with which Lieutenant A's hand evidently had been cut. Several times during the struggle defendant warned that he had a knife, but no knife was found. Upon finding the articles mentioned the police returned to the police station and about 2:30 a. m. that morning the defendant was questioned concerning the crimes of which he was accused and he did not deny having committed them. Two police officers so testified. His response was that he did not remember—that he had been drinking. The conversation had with him at that time, as repeated by Inspector McMahon in his testimony was as follows: "I asked him—that was a preliminary question—I asked him when he was brought in to identify his hat, which had been brought in separately. It wasn't on the defendant. And he identified it as his hat. I asked him what he had been doing out there, and he told me that he had been out there walking through the park. And I asked him what his reason for walking through the park was. And he said that he had no particular reason. I asked him how it was that he happened to hold up this soldier and had raped this girl and committed the other acts that have been testified to here. And he said 'If I done anything like that, I don't remember, I must have been drunk.' I asked him 'If you don't remember holding up this man, what were you doing out there with a gun?' And he said 'I just carried that gun, I bought it Wednesday night.' And I said 'Where?' He said 'At Woolworth's on Fillmore street.' I asked him what his reason was for packing it out there. And he stated he could give no reason for having it there. I asked him why he bought the gun, and he said he bought the gun for his babies, that they usually celebrated the Easter holidays on a Saturday, and he was going to give the gun to his babies." It was ascertained afterwards that his two children were aged respectively about eight months and a year and a half. The defendant refused to give a written statement.

At the trial, however, defendant denied ownership or any knowledge of the pistol, and denied having made the above statements to the police. He claimed that the first time he ever saw the pistol was at his hearing before the municipal court; furthermore, as stated, he denied having committed any of the criminal acts about which the girl and Lieutenant A had testified. His version in substance was as follows: He stated that he lived on Webster Street and for about two years had worked on WPA jobs as tree topper in the Presidio. On the day in question he quit work at 4 o'clock in the afternoon, went home, got $10 and started drinking. After visiting several drinking places around Fillmore Street he bought a half pint of liquor and went to the Uptown Theater on the corner of Sutter and Steiner Streets; and after the show he bought and drank another half pint of liquor. He then went on to say that he was "feeling kind of bad" and took a street car to the beach; that he walked around for awhile and then sat down at a place near the tunnel; that after smoking a few cigarettes he decided to take a walk through the tunnel. He was wearing two pairs of pants, laced boots and rubbers. Continuing his testimony, he stated that after going through the tunnel he proceeded along a bridle trail and across a football field, then decided to walk "up the trail to go over to 43rd, to walk over to Geary Street and take a car"; that while walking along that trail he ran across Lieutenant A and Miss C engaged in an act of sexual intercourse; that Lieutenant A jumped up, began berating him and attempted to strike him; that he knocked the officer down several times, whereupon the officer summoned Lieutenant B, and that after the two had given him a severe beating, they took him to the police station.

On cross-examination he was asked when for the first time he ever told this story about having found this couple in a compromising position and he answered "In this court. * * * To-day," and the cross-examination on that point continued as follows:

"Q. You never told anyone before? A. No.

"Q. Never? A. No.

"Q. You didn't tell your attorney? A. Anymore than my attorney.

"Q. Then you did tell somebody before to-day? A. Previous to that.

"Q. When? A. When he came up to see me.

"Q. When? A. I don't remember the date, when he came up to see me, I told him then.

"Q. When? A. I don't remember the date.

"Q. You have no idea? A. When he came to see me.

"Q. A week ago or a month ago or what? A. I imagine it was a couple of weeks ago.

"Q. Well, did you talk to Inspector McMahon on that following Saturday and tell him about it? A. I didn't talk to him."

Furthermore, in contradiction of other portions of his story, Inspector McMahon testified that there were no trails or paths of any kind within a radius of 100 feet or more of the spot where the defendant claimed he came upon the couple; and testimony was given that on the night in question there was no odor of "alcohol or anything like that" on his breath. From the foregoing narration it will be seen that the record contains an overwhelming amount of substantial evidence establishing defendant's guilt.

The defendant contends, however, that in any event none of the particular acts he is accused of having committed upon the person of the girl constituted rape or the crime of sex perversion as denounced by section 288a of the Penal Code. There is no merit in the contention.

[9-11] As to the crime of rape the girl testified that she felt his private parts in her private parts. The crime was complete, therefore, the moment penetration occurred. 22 Cal.Jur. 361, § 6. As to the element of violence, the girl, testified in effect that the reason she did not offer greater resistance was that she believed he had a "real gun"; that she was afraid, and fearful of being shot, which was sufficient to establish the element of violence (People v. Bouquet, 30 Cal.App.2d 264, 86 P.2d 145); and in view of the positive denial of defendant of any assault or attempted rape, the failure to instruct the jury on attempted rape, a lesser offense, in the absence of a request by the defendant for such an instruction, was not error. People v. Louviere, 34 Cal.App.2d 62, 93 P.2d 179; People v. Welsh, 7 Cal.2d 209, 60 P.2d 124; People v. Dozier, 35 Cal.App.2d 49, 94 P.2d 598.

Regarding the crime of sex perversion, the provisions of said section 288a declare that "* * * the act of copulating the mouth of one person with the sexual organ of another * * *" constitutes the crime. In thus defining the crime it was obviously the intention of the Legislature to include therein loathsome sexual acts of the kind here committed. Defendant argues, and in the brief of amicus curiae (which was filed herein after oral argument and subsequent to the original submission of the cause) it is contended, that in view of the decision rendered in People v. Angier, 44 Cal.App.2d

417, 112 P.2d 659, the crime of sex perversion as defined by said section 288a was not here committed. A mere glance at the facts of that case clearly shows, however, that there is no comparison whatever between the single act there committed on the seven-year-old girl, and the continuous act committed on the young lady here assaulted, for while the defendant in this case said he was merely going "to kiss" the girl between the legs he went far beyond doing so. As stated, he placed his mouth against her sexual organ and kept it there for five or ten minutes. Therefore the jury was fully justified in finding therefrom, as a fact, that the crime of sex perversion as defined by the Code section had been committed. Furthermore one of the two determining factors in the Angier case upon which the reversal therein was based was the absence of evidence to establish that the defendant's mouth touched "the sexual organ" of the child, while here there is positive evidence that such was the case.

[12] Defendant seems to contend also that the crime of sex perversion as denounced by said section 288a cannot be committed by two persons of the opposite sex. The following decisions answer this contention: People v. Briley, 9 Cal.App. 2d 84, 48 P.2d 734; People v. Roveano, 130 Cal.App. 222, 19 P.2d 506; People v. Miller, 27 Cal.App.2d 722, 81 P.2d 567; People v. Avanzi, 25 Cal.App.2d 301, 77 P.2d 237; People v. Ralls, 21 Cal.App.2d 674, 70 P.2d 265. These cases do not relate the details in the manner outlined in People v. Angier, supra, but the Angier case did not suggest that the crime could not be committed between a male and a female. The court there said, 44 Cal.App.2d page 419, 112 P.2d page 660: "* * * the legislature, in framing section 288a of the Penal Code, must have intended to punish only those who participate in an act whereby they are *united* or joined by the perverted act of one's holding in his mouth the sexual organ of another for the purpose of gratifying their sexual desires." Without analyzing all that was said in People v. Angier, supra, we have concluded that, assuming the correctness of the decision, the facts are so dissimilar as to be of no assistance to appellant. In People v. Avanzi, supra, 25 Cal.App.2d page 302, 77 P.2d page 238, the court said: "It is clear that no particular purpose, motive, or intent is a necessary element of the crime described."

[13-15] In a prosecution for violation of section 288a, there is no requirement that the testimony of a complaining party should be corroborated except where the complainant is an accomplice; that is, one liable for prosecution for the identical offense charged against the defendant. Pen. Code, § 1111. The evidence in the present case does not even suggest that the young woman was an accomplice. There is evidence to show that she submitted to defendant's acts under threats and menace; that she had reasonable cause to and did believe that her life would be endangered if she resisted. Under such circumstances she was not a participant in the crime. Pen.Code, § 26; People v. Solano, 48 Cal. App.2d 126, 119 P.2d 381. There is evidence showing not only fear of the defendant, but of possible confederates, as the defendant warned, lurking in the shrubbery. Assuming the testimony of the young woman required corroboration, it appears in the testimony of Lieutenant A heretofore given.

[16-19] On the charge of robbery, the facts that the perpetrator was unarmed, or, being armed, made no use of the weapon, do not necessarily establish that personal property was taken from the person of another without the use of force or fear. Pen.Code, § 211. The evidence in the present case is amply sufficient to uphold a conviction of robbery. Proof that a defendant was armed is required only to fix the degree of the crime. To fix it as of the first degree, it is not necessary that the weapon should be a deadly weapon, if, in fact, it is a "dangerous" weapon. Pen.Code, § 211 a. Robbery committed with an unloaded pistol may be robbery of the first degree. The pistol need not be used or intended to be used as a firearm. If it is capable of use as a club or as an instrument to produce bodily harm it may be classified as a "dangerous" weapon. In People v. Egan, 77 Cal.App. 279, 284, 246 P. 337, 338, the court said: "Appellant urges also that the evidence is insufficient to sustain a conviction of first degree robbery because it did not appear that the revolver used in the perpetration of the crime was loaded. In support of this point appellant cites the case of People v. Sylva, 143 Cal. 62, 76 P. 814. That case is not in point, however, because it involved the construction of the term 'deadly weapon' as used in the Code section defining the crime of assault with a deadly weapon (Pen.Code, § 245), which

is a different term from the one employed in the Code section defining first degree robbery. The latter section declares that: 'All robbery * * * perpetrated * * * by a person being armed with a *dangerous* or deadly weapon is robbery in the first degree.' Pen.Code § 211a. (Italics ours.) It is a matter of common knowledge that in committing robbery pistols are frequently used as bludgeons rather than as firearms. The fact, therefore, that a person perpetrating such crime is armed with a pistol is enough to justify the conclusion that the pistol used by him is a 'dangerous' weapon within the meaning of said section 211a of the Penal Code, even though it be not loaded." It is immaterial whether such weapon is actually used. People v. Raleigh, 128 Cal.App. 105, 16 P.2d 752; People v. Hall, 105 Cal.App. 359, 287 P. 533.

[20] The pistol was introduced in evidence and exhibited to the jury. The officer who found it referred to it as "a nickel plated revolver"; and in asking Lieutenant A to identify it at the trial the prosecutor's question was: "Now, I will call your attention here to what I will refer to as an automatic pistol, that is to say I believe it is referred to as a toy pistol, it is marked 'Army 45,' and I ask you if that resembles in size, shape and general appearance the gun that this man who came toward you had upon that particular night?" and the witness replied: "It does." If it was capable of being used as a deadly weapon "and it may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a 'dangerous or deadly weapon' may be thus established, at least for the purposes of that occasion." People v. Raleigh, supra, 128 Cal.App. pages 108, 109, 16 P.2d page 753. Whether or not the pistol was a dangerous weapon is a question of fact to be decided exclusively by the jury. Pen.Code, §§ 1126, 1127, 1439; People v. Raleigh, supra. In People v. Cook, 15 Cal.2d 507, at page 517, 102 P.2d 752, 757, in discussing a certain weapon instrument "a piece of two-by-four about 2 feet long," the court said: "Therefore, under all the facts and circumstances of the instant case the questions of the nature of the weapon and the manner of its use in their relation to the crime committed were for the determination of the jury."

[21, 22] Appellant specifies several instances wherein he claims the trial judge questioned him to his prejudice. These instances occurred during either the direct or cross-examination of the defendant and related primarily to the latter's explanation of his admitted presence here and there in the park, wandering around for several hours preceding the occurrences herein, wearing rubbers and a pair of jeans over his trousers, when, as stated in his opening brief, after walking along the beach he decided to go home by taking "a short cut through the park to the street car." In one instance the trial judge used the word "sneaking," but upon objection struck the word from the record and reframed the question. All questions propounded were judicial in purpose (People v. Patubo, 9 Cal. 2d 537, 71 P.2d 270, 113 A.L.R. 1303) and related to matters upon which defendant had been interrogated by his counsel; they were questions that would have been proper if asked by either defendant's counsel or the district attorney. People v. Ramos, 3 Cal.2d 269, 44 P.2d 301. "A trial judge certainly is authorized on cross-examination of a defendant to call his attention to apparent conflicting statements which he has made so as to give him an opportunity to explain or reconcile them if possible." People v. Butterfield, 40 Cal.App.2d 725, 731, 105 P.2d 628, 631.

[23] Lieutenant B was called out of order by stipulation because he was "due to fly to-morrow." Upon completion of his testimony the court said: "Yes, he may go on his trip and good luck to you." The conduct of the court is not comparable to that related in People v. Mahoney, 201 Cal. 618, 258 P. 607 and other cases cited by appellant. The conduct of the court in propounding questions or in his remark to the army officer was not prejudicial to the rights of the defendant. People v. Briley, supra. Moreover, at no time during the course of the trial did defendant assign as misconduct any question propounded or statement made by the court.

The second specification of misconduct is directed against the district attorney and grows out of the following incident, which took place shortly after beginning the defendant's cross-examination:

"Mr. Skillin [assistant district attorney]: Q. Now, you are quite certain you didn't have on when you came home from work that afternoon, an old rusty looking pair of boots?

"Mr. Young: If the court please, I am going to object to the manner of examining this witness, holding a paper up in front of the jury. If he is going to do that, let's find out what the paper is.

"Mr. Skillin: Of course you know as well as I do I can't call his wife as a witness against him.

"Mr. Young: I don't know anything about that. I didn't even know you had a statement from the wife.

"Mr. Skillin: I have got a statement from the wife, where she said he had an old rusty pair of boots on that laced up the front, when he came home, and he took them off and put * * *

"Mr. Young: Just a moment. I object to that and I assign it as prejudicial misconduct on the part of the district attorney. He knows that he can't prove indirectly what he can't do directly."

[24, 25] It is suggested in one of the briefs that the district attorney was "waving" the paper in front of the jury. From the above-quoted statement of defendant's counsel the record shows that the district attorney was "holding" the paper. It is proper to use a statement, notes or memoranda while examining a witness and, under the circumstances of this case, the district attorney would have been justified in refusing to show or to accede to defendant's counsel's request: "* * * let's find out what the paper is." People v. Bermijo, 2 Cal.2d 270, 40 P.2d 823; People v. Singh, 136 Cal.App. 233, 28 P.2d 416. The reply of the district attorney was invited and to that extent justifiable, but in the determination of the guilt or innocence of an accused it is not the technical privileges accorded one side or the other in the trial of the case, but rather, whether an accused has been afforded a fair trial. The statement of the district attorney related to the clothing worn by defendant at the time he returned home from work in the late afternoon preceding the evening during which the crime was committed. It was not vital to the establishment of the guilt of the defendant to show any particular pair of shoes he wore at the time of the commission of the offense. There is no question here of a case of mistaken identity. On the contrary, the defendant admits his presence at the scene and his meeting with Lieutenant A and the girl, Miss C. Whether he wore new or old boots is of no consequence in view of the uncontroverted testimony that he wore rubbers. There is no denial that he wore extra trousers, which would act as a protection to inner garments in passing through the shrubbery, and rubbers, which would tend to conceal his approach. It is true that defendant explained he was a "tree topper" and that the clothes were those usually worn by one of his calling, but the use of the clothing was nevertheless a settled matter. The "jeans" and the "black rubbers" were admittedly worn by defendant. Any inference that might be drawn from the fact of the appearance of a "tree topper" just before midnight in this particular spot in the park under all the circumstances of this case was a matter entirely within the province of the jury. The changing of the boots, if it did occur, would play little if any part in the determination of the guilt or innocence of the defendant. The effect of the remark of the district attorney, considered in the aspect most favorable to defendant, would simply be that defendant's wife at some time, after the occurrences of the evening in question, had stated, not under oath, that the defendant had changed his shoes in the early part of the evening. The jury was instructed: "* * * that you and you alone determine the facts of the case, and determine the facts from the testimony of the witnesses here on the witness stand * * *" "* * * please bear in mind that statements of counsel in this case are not evidence in the case."

The suggestion is made by amicus curiae that the incident mentioned operated to defendant's prejudice in that the statement of defendant's wife to which the prosecutor referred was one tending to impeach the defendant's testimony. However, as pointed out in the brief filed by respondent in reply to amicus curiae, the credibility of the defendant as a witness already had been and was thereafter in a large measure impeached by much competent evidence including his own cross-examination and the testimony of at least four other witnesses on material points. Such being the case, and keeping in mind that it was quite immaterial so far as the question of defendant's guilt was concerned whether he was wearing old or new boots, there can be no force whatever in the contention that had it not been for the disclosure by the prosecutor of the contents of said paper the jury might not have found the defendant guilty.

[26] Throughout this appeal respondent has contended that the incident above mentioned did not constitute prejudicial misconduct. At the time of oral argument in response to questions propounded to him, counsel for respondent stated in effect that although counsel for defendant had invited the prosecutor to divulge the contents of the paper he was then holding, it was improper for the prosecutor so to do because the paper was not in evidence. However, respondent has consistently maintained that the incident complained of falls far short of calling for a reversal of the judgment of conviction; and we are in complete accord with that view.

[27] Some questions not suggested by appellant relative to other instructions is raised by amicus curiae. Ignoring the general rule that it is not within the province of those specially permitted to appear to raise new objections, in the interest of justice the instructions have been examined and it is sufficient to say that when read together they stated the law correctly and, as applied to the facts of this case, contained no statement that was legally unjust or unfair.

Appellant's contention that the evidence of the state is "inherently improbable" is not based upon the fact that the designated crimes could not have been committed at the time and place alleged, but that the witnesses for the People have been guilty of a complete fabrication. Appellant does not stop at the suggestion of a "seduction," but boldly states that there was a "voluntary intercourse" between Lieutenant A and Miss C. All the evidence is directly to the contrary. Lieutenant A testified that he did not have, nor did he attempt to have, sexual intercourse with the young girl at the time in question. It was stipulated that Miss C if called would testify to the same effect. In this connection, there is, as already mentioned, testimony by the appellant that he never made such an accusation against the young couple following his arrest; that he told it for the first time "when he [his attorney] came to see me." Appellant's opinion as expressed in one of his briefs of the "usual * * * occurrence when a young army officer * * * and a comely young lady" are together in "a secluded spot. If the intercourse did not follow, that would be improbable" is a forced argument that might perhaps mislead a jury but not a reviewing court. Appellant proceeds further and argues, that Lieutenant A was guilty of a statutory rape and that to protect his reputation the witnesses concocted the story related under oath. We need not return to the unsavory and nauseating story of the evening's events, but simply call attention to the articles found at the scene of the crime by the civil authorities, and the statement of the defendant on the day following the commission of the offense, when accused of the crimes: "If I done anything like that, I don't remember, I must have been drunk." People v. Russell, 34 Cal.App.2d 665, 94 P.2d 400. It is noteworthy that the record does not disclose that defendant ever emphatically denied the commission of these offenses until after he had talked with his attorney.

Nowhere throughout the case is there any evidence even suggesting that these young people could have been actuated by some wrongful, hidden motive in accusing a man they had never seen before, of loathsome, heinous crimes he did not commit. Certainly there was nothing to be gained by their so doing; and it is utterly unbelievable that, if the defendant were innocent, they would think of subjecting this young lady, not yet out of high school and against whose character not a word of disparaging testimony was offered, to the humiliating ordeal of a public trial as the victim of sex crimes of a perverted nature, and of perjuring themselves to obtain a conviction.

[28-30] Evidence which seems unusual is not necessarily improbable. People v. Headlee, 18 Cal.2d 266, 115 P.2d 427. In reviewing facts an appellate court is limited to the determination of the question —is there substantial evidence to support the judgment? People v. Braun, 14 Cal. 2d 1, 92 P.2d 402. Discrepancies in testimony, if any there be, the uncertainty of witnesses in giving the result of their observations or their recollection of oral statements, and the nature and character of an exhibit introduced in evidence are questions solely for the determination of the jury. People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Mitchell, 61 Cal.App. 569, 215 P. 117; People v. Collier, 111 Cal.App. 215, 295 P. 898; People v. Raleigh, supra; People v. Cook, supra.

[31] One further contention should be mentioned. Throughout the briefs the fact that appellant is a negro is stressed. In only one instance did the district at-

torney refer to the color of the defendant and that in reference to the exact period when it was discovered during the events of the evening that appellant was a colored man. The record does not disclose that any prejudice existed by reason of defendant's color. All citizens should be treated equally, but the briefs filed by appellant indicate a claim that by reason of his color appellant should receive more favorable consideration than should a white person. The colored race—as a body, however, seeks only a fair and impartial trial for any accused, and this was in fact accorded appellant.

The judgments and the orders denying the motions for a new trial in the three convictions are and each of them is affirmed.

KNIGHT, J., concurred.

PETERS, Presiding Justice (dissenting).

I dissent. This is a case where defendant was charged and convicted, on evidence properly described in the majority opinion, as "unsavory and nauseating," of three most serious crimes. It is also a case in which the attorney general at the time of oral argument, and in a brief filed since, very properly concedes that the prosecuting attorney committed error in summarizing in the presence of the jury the contents of a statement supposedly given by defendant's wife. The attorney general argues, and the majority opinion holds, that such error was not prejudicial. With this conclusion I cannot agree.

Before directly stating my reasons for believing that the admitted error was prejudicial, a brief reference to the state of the evidence should be made. The evidence of the prosecutrix, while not as clear as might be desired, and which, in some respects, is contradictory on whether penetration occurred, is legally sufficient, in my opinion, to support the conviction of rape. I also believe that her testimony, and that of her companion, is legally sufficient to sustain the conviction of first degree robbery. The majority opinion, however, fails to properly state appellant's main contention as to this charge. He contends that the evidence shows that he was armed with a "toy pistol," and contends that such a weapon is neither "deadly" nor "dangerous" as those terms are used in section 211a of the Penal Code in defining first degree robbery. It will be noted that no description of the "toy pistol" is set forth in the majority opinion, it being there held that "whether or not the pistol was a dangerous weapon is a question of fact to be decided exclusively by the jury." That is not the law. Certainly the appellate court may, and should, in reference to that or any other implied finding of the jury, determine whether that implied finding is supported by the evidence. In the present case, no description of the "toy pistol" appears in the evidence, although the weapon was introduced into evidence. The attorney general, prior to oral argument, secured an order requiring the exhibit to be delivered to this court, and on the oral argument asked the members of this court to examine the weapon to determine whether the implied finding of the jury that it is a "dangerous" weapon is supported. My associates have refused to examine the exhibit on the ground that it was "exclusively" a jury question as to whether the instrument was dangerous, and take the position that the appellate court has no power to examine the exhibit. Thus, in this respect, my associates contend that the sufficiency of the evidence cannot be passed on by the appellate court. To state the contention is to refute it. I have examined the exhibit. It is a metal toy pistol intended to shoot caps, has bakelite hand grips, and weights a little over one pound. It is 6¼ inches long, and from the bottom of the hand grips to the top of the barrel is 4¼ inches. The exterior dimensions of the barrel are 1⅜ inches by ¾ inch. In raised letters along each side of the barrel over the trigger appears "Army 45." From this brief description it is apparent that the weapon in size, weight and appearance approximates that of a real automatic pistol. If an unloaded pistol can be considered a "dangerous" weapon, because it could be used as a bludgeon, and that is the law—People v. Egan, 77 Cal.App. 279, 246 P. 337; People v. Shaffer, 81 Cal.App. 752, 254 P. 666; People v. Freeman, 86 Cal.App. 374, 260 P. 826; People v. Hall, 87 Cal.App. 634, 262 P. 50; People v. Seaman, 101 Cal.App. 302, 281 P. 660; People v. Raleigh, 128 Cal. App. 105, 16 P.2d 752—obviously this "toy" pistol of the same size and weight could likewise be so used. Where reasonable minds can differ on whether the instrument used is "dangerous," the question is one of fact for the jury. The jury having viewed the weapon, its determination, under these circumstances, but only under these circumstances, is conclusive.

In reference to the charge of violation of section 288a of the Penal Code, it is also my opinion that the evidence is sufficient to support the judgment of conviction, although this conclusion is clearly contrary to the law announced in People v. Angier, 44 Cal.App.2d 417, 112 P.2d 659. The majority opinion attempts to distinguish the Angier case on its facts. Quite significantly the majority opinion is silent as to the law stated in that opinion. If section 288a requires copulation as defined in the Angier case, there is no evidence of such copulation as thus defined in the instant case. While I disagree with the holding and reasoning in the Angier case, I think, in fairness to defendant, it should be noted that the Supreme Court less than a year ago denied a hearing in that case and that the law stated in the majority opinion, and in this dissent, on this issue, is clearly contrary to the holding in the Angier case.

From the foregoing it is apparent that it is my view that the evidence is legally sufficient to sustain all three convictions, although I recognize that as to the charge involving the alleged violation of section 288a, this conclusion (as well as the identical conclusion in the majority opinion), is contrary to the holding in the Angier case, supra. The conclusion that the evidence is sufficient, however, does not necessarily mean that the judgments should be affirmed. It is my view that it is the function and duty of an appellate court, after having determined that the evidence is legally sufficient, to then determine two other problems—viz., was error committed, and, if so, was such error prejudicial? As to the first of these questions—i.e., was error committed—it is conceded by the attorney general that error was committed. This concession undoubtedly is in accordance with the fact. The prosecuting attorney, while cross-examining the defendant, read from a document in his hand. When the attorney for defendant fell into the trap, and demanded to know what the document was, the prosecuting attorney stated that the document was a statement given by the wife of defendant. When the defendant's counsel stated that he did not know such a statement existed the prosecuting attorney not only declared that such a statement existed but gratuitously added that in that statement the wife had declared that defendant had come home from work and changed his clothes to those he was wearing when arrested. Although the statement was objected to and assigned as prejudicial misconduct, the court made no ruling on the objection or assignment. The majority opinion holds that such error was not prejudicial because the question of "how" the defendant was dressed was immaterial. While it is true that "how" the defendant was dressed had no relevancy on the issue of identity, inasmuch as the defendant admitted he was present at the scene of the crime, that evidence was introduced for an entirely different purpose. The prosecuting attorney was trying to show that defendant came home from work with an old pair of boots on, changed them and put on rubbers over the boots, and went out and committed these crimes. If this were true, in view of the type of clothing he was wearing when arrested, it would go far in proving that defendant had started out that evening with a deliberate and premeditated criminal purpose. The prosecuting attorney asked all the witnesses produced by him how the defendant was dressed at the time of the crime. These witnesses testified as to the wearing by defendant of boots and rubbers. On direct examination of defendant his counsel also asked questions concerning how defendant was dressed the day and night of the crime. He testified that when he came home from work that day he had on the boots that had been introduced into evidence by the prosecution and which the witnesses had identified as the boots he wore later that night when arrested. He also testified that he worked as a tree topper on the day in question and while doing such work was dressed as he was when arrested. On cross-examination the prosecuting attorney immediately challenged defendant's testimony in reference to the matter of dress. Almost the first question he asked defendant was: "When you came home that day you didn't have these boots on at all, did you (indicating)?" Defendant answered: "Oh yes I did." The testimony continued as follows:

"Q. Oh no you didn't, did you? A. I certainly did.

"Q. As a matter of fact you had on another pair of boots that were old and rusty looking, laced clear up to the top of the boots, which almost reached your knees, didn't you? A. No, I did not.

"Q. When you came home you changed from the old rusty looking boots to these here (indicating), didn't you? A. No, I did not.

"Q. You are quite sure about that? A. I am positive."

A few questions on another subject were then asked and then the prosecuting attorney renewed his interrogation concerning the boots, asking: "Q. Now, you are quite certain you didn't have on when you came home from work that afternoon, an old rusty looking pair of boots?" There then followed the occurrence quoted in the majority opinion culminating in the statement that the wife had told the district attorney that when defendant came home from work he had an old pair of rusty boots on that laced up the front. Immediately thereafter the trial judge interrogated the defendant at length about how he was dressed, sarcastically referring to defendant's testimony as to how he was dressed and as to what he was doing at that time of night in the park.

A reading of the record demonstrates that what the prosecutor was attempting to show was that defendant had come home from work and changed his clothes for the express purpose of going out and committing some crime. The defendant was vigorously contending that the costume he was wearing when arrested was the same costume worn by him that day at work and the same type of costume worn by all tree toppers. That was an important issue, because, if defendant's testimony as to how he was dressed was believed, it supported the balance of his story as to what he was doing that night. If he did come home and change his clothes, and if the costume he was wearing when arrested was not his regular work costume, then great weight was given to the prosecution theory that defendant had deliberately started out to rob "petting parties." The prosecution was unable to prove that defendant had changed his clothes after coming home from work. Under such circumstances, for the prosecuting attorney to "testify" that defendant's wife had told him defendant had changed his clothes, was to attack, improperly, the whole basis of defendant's defense. It is no answer to say, as does the majority opinion, that the defendant's counsel invited the error. While defendant's counsel demanded to know the nature of the paper the prosecutor was using in his cross-examination, that query was completely answered by the prosecutor's reply that it was a statement of defendant's wife. But for the prosecutor to then add what that statement purportedly contained, was clearly error of a most serious nature.

There is still another reason why the admitted error was prejudicial. The jury was called upon to determine whether the prosecutrix and her supporting witnesses were telling the truth, or whether defendant was telling the truth. The prosecutrix and her escort had told a story about riding out to the park late at night with another couple, and getting out of the car with a blanket and sitting down in the bushes to talk. That portion of their story is characterized as "inherently improbable" by appellant. It can at least be said that it is a reasonable argument to make that this portion of their story was open to doubt. The whole case turned upon the credibility of the respective witnesses. If defendant's story was believed, he was innocent. He was the only witness in his own behalf. For the prosecutor to tell the jury that, according to defendant's own wife, defendant was lying about how he was dressed, was to attack defendant's credibility in a most improper fashion. The obvious reaction would be that if defendant was lying as to that fact, his whole story was false. That was error of a most prejudicial character.

After reading the record I cannot say that the jury would have reached the same conclusions it did had the error not been committed. For that reason article VI, section 4½ of the Constitution, cannot operate to cure the error. It may be that defendant is guilty. If so, he has committed several crimes of a particularly abhorrent character. But the fact that the prosecuting attorney may have honestly believed defendant guilty does not excuse the means adopted by him to secure a conviction. The doctrine that the end justifies the means has no application to the trial of one accused of crime. As important as it is to society to see that those guilty of criminal activity should be punished, it is far more important to society as a whole that the fundamental principle that every defendant is entitled to a fair trial should be preserved. The law prescribes the methods to be used in a criminal case. If defendant is guilty, should this case be reversed and remanded for a new trial, then no doubt the prosecution can prove that fact in a proper manner. If it cannot secure a conviction without resort to illegal means, then defendant should not be convicted.

53 Cal.App.2d 88

CITY OF LOS ANGELES et al. v. GREVE.

Civ. 13558.

District Court of Appeal, Second District, Division 1, California.

June 29, 1942.

As Modified July 15, 1942.

1. Appeal and error ⚷1078(1)

Where contention challenging trial court's findings was not developed in briefs, reviewing court was required to assume that contention was "abandoned".

See Words and Phrases, Permanent Edition, for all other definitions of "Abandon".

2. Municipal corporations ⚷516

In action to quiet title to land sold on foreclosure of unpaid street improvement assessment bond, trial court properly sustained objections to questions asking defendant property owner whether street was not widened for general public purpose of creating a major highway for industrial traffic instead of for benefit of property owners assessed, where it appeared that those questions were determined by city council in street widening proceedings as provided by statutes. St.1903, p. 376, as amended; St. 1911, p. 730, as amended, and p. 1192; St. 1927, p. 387, § 4.

3. Constitutional law ⚷290(3)
Municipal corporations ⚷407(1)

The statutes making provision for the filing of objections and protests in street widening proceedings, for hearing thereon, and determination thereof before the city council afford "due process of law". St.1903, p. 376, as amended; St.1911, p. 730, as amended, and p. 1192; St.1927, p. 387, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action to quiet title by the City of Los Angeles and others against Katherina Greve, wherein defendant filed a counterclaim. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Charles A. Sunderlin, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Robert J. Stahl, Deputy City Atty., both of Los Angeles, for respondents.

DORAN, Justice.

This is an action to quiet title. Plaintiffs obtained judgment and defendant appeals.

The facts briefly are as follows: On the 31st day of March, 1925, the council of the city of Los Angeles adopted an ordinance declaring its intention to widen Washington Boulevard in the city of Los Angeles between Alameda and Figueroa Streets, under and according to the Street Opening Act of 1903, St.1903, p. 376, as amended. Bonds were issued to represent unpaid assessments levied pursuant to the proceedings under the Street Opening Bond Act of 1911 (Improvement Bond Law of 1911, St.1911, c. 630, p. 1192, Act 855, Deerings General Laws). The bond representing the unpaid assessments against the property of defendant was foreclosed by the owner of said bond, to-wit, the Board of Pension Commissioners of the city of Los Angeles, the property sold and a treasurer's deed issued on the 27th day of May, 1937. The bond was in the principal sum of $3,119.96. The balance due at the time of sale was $2,807.96.

The complaint set up all of the proceedings had and taken by the several officers, agents and employees of the city council for the widening of Washington Boulevard from the time of the adoption of the ordinance of intention to the issuance of a treasurer's deed upon the foreclosure of the bond issued to represent the assessment as aforesaid. The defendant property owner by way of "answer and counterclaim" alleged that the city council, in adopting the ordinance of intention, wrongfully, unlawfully and illegally determined that the public interest, etc., required the improvement, and wrongfully, unlawfully and illegally fixed the boundaries of the assessment district. It was further alleged that the improvement did not benefit the parcels of land in the district, but was primarily for the benefit of other lands, etc.; that the council created the district for the purpose of making Washington Boulevard a major street artery and not for the benefit of the property owners within the district.

The questions involved in the within appeal, quoting from appellant's brief, are as follows: "1. Is the 'Improvement Act of 1911', Act 8199, Deering's Gen. Laws, conclusive as to the matters which are essential to due process of law? 2. Has a special assessment taxpayer, under the 'Improvement Act of 1911' recourse to the courts for the purpose of raising fundamental questions involving the purposes of the so-called improvement and the character of its benefits? 3. Has the taxpayer a right to prove that it was a plain abuse of discretion, as a matter of law, in effect, a fraud upon the taxpayer, for the city council to create the special assessment district and issue the bonds?"

As pointed out by respondent, however, the first two questions may be disregarded, as the "Improvement Act of 1911", St.1911, p. 730, as amended, is not involved. The proceedings for the widening of the street in question were, as the complaint alleges, taken under the Street Opening Act of 1903 and the bonds were issued under the Improvement Bond Law of 1911.

[1] It is contended by appellant that the trial court erred in refusing to permit the defendant property owner to reply to the following questions: "Were you living on this property at the time of this tax, Mrs. Greve? Were you familiar with conditions as they existed on the boulevard at the time of this assessment? Did this tax assessment benefit your property in any way? What was the reasonable value of your property at the time of this assessment? Is it not a fact, Mrs. Greve, that the widening of the boulevard was simply for the development of a major industrial traffic boulevard through the city of Los Angeles, out on East Washington? As a matter of fact, was there not a detriment to your property by the widening of the boulevard? Did the widening of this boulevard by reason of this special assessment, in fact, make of East Washington Boulevard a truck highway? How did the creation of this assessment district and the widening of the boulevard affect rental values in that section?" It is also contended that the court erred in refusing to permit the witness to testify that the widening of the boulevard in question was not for the benefit of the individual taxpayers who were assessed with the tax, but was for the general public purpose of the creation of a major highway for industrial traffic through the city of Los Angeles, that the widening project converted the street into a truck highway through what theretofore had been a residential district. The findings also are challenged, but inasmuch as this contention is not developed in the brief it must be assumed that it is abandoned.

The Street Opening Act of 1903 contains full provision for the filing of objections and the settlement of such disputes as the foregoing questions at the trial of the within action sought to revive. It is noteworthy, also, that the Street Opening Bond Act of 1911, as amended, provides that: "Improvement bonds issued hereunder shall by their issuance be conclusive evidence of the regularity and validity of all proceedings thereto." Stats.1911, ch. 630, p. 1192, Act 855, Deering's General Laws.

The complaint herein alleges that on August 27, 1929, the city council proceeded to and did then and there and thereafter until the 26th day of November, 1929, hear and pass upon all objections filed, and at the conclusion of said hearing, to-wit, the 26th day of November, 1929, after considering and examining said assessments, confirmed and adopted the same. It should be noted that at the time the foregoing proceedings were adopted and the bond in question was issued, the statute provided that the election by the property owner to pay the assessments in installments and to have an improvement bond issued should be made in writing filed with the superintendent of streets accompanied by an affidavit that "he or his principal, as the case may be, is the owner of the lot or parcel of land in question," etc., and also "by filing with such officer a written agreement upon the form hereinafter provided, waiving all objections of whatsoever kind or nature against the assessment and all proceedings thereto and undertaking to pay the amount of such assessment in either ten, twenty or thirty installments." Stats. 1927, p. 387.

[2, 3] That the ruling of the trial court in sustaining the objections to the questions asked was proper, there can be no question. In the action to quiet title they were immaterial. The statutes of 1903, heretofore referred to, make ample provision for the filing of objections and protests, for hearings thereon and the determination thereof before the city council. In the street widening proceedings the city council was the proper and the legal tribunal to determine such questions; and the complaint herein in fact alleges that such questions were so determined. Moreover, it is well settled that such procedure complies with the due process clause of the Constitution. With regard to this principle of law the Supreme Court has declared in Duncan v. Ramish, 142 Cal. 686, at page 690, 76 P. 661, at page 662:

"The plaintiffs, in this action in equity to enjoin the execution of the deed, claim the right to impeach the validity of the assessment by evidence to the effect that the part of the costs of the improvement apportioned and assessed against their lots exceeds the benefits to those lots arising from the improvement. Stated in different language, the contention is that the validity of such an exercise of the taxing power of the state is not settled by compliance with the constitutional proceedings prescribed by law, but may be questioned by a jury, or court, in any subsequent collateral attack, upon the inquiry whether or not the land of the particular individual who sees fit to attack its validity was benefited to the extent of the costs apportioned against his land by the assessment. The statement of the proposition is almost sufficient to refute any argument in favor of it. It is manifest that, if the taxing power is subject to review in this collateral manner any exercise of it would generally be declared invalid." Also in Beale v. City of Santa Barbara, 32 Cal. App. 235, at page 242, 162 P. 657, at page 660, appears the following: "Of course, the theory upon which the district is established, upon which the cost of the work shall be apportioned, is that it will derive special benefits from the improvement. But someone must determine that question, and, as stated, the Legislature has seen fit to delegate such power to the city council. From this conclusion it follows that the allegations of the complaint to the effect that plaintiffs' property will not be benefited by the proposed improvement, cannot be considered in aid of the statement of a cause of action, since as to such question no evidence in support thereof would be admissible upon the trial. Cake v. City of Los Angeles, 164 Cal. 705, 130 P. 723; Duncan v. Ramish, supra [142 Cal. 686, 76 P. 661]." And in Rutledge v. City of Eureka, 195 Cal. 404, at pages 425, 426, 234 P. 82, at page 91, with regard to a similar situation the Supreme Court made the following observation. "Evidence was tendered by the appellants as to the assessed value of certain of their properties and properties in the business district claimed to have been favored, for the declared purpose of proving inequality and discrimination in the assessments. In so far as such evidence might have a bearing on the question of benefits, the determination of the council was conclusive. Duncan v. Ramish, 142 Cal. 686, 76 P. 661; Cutting v. Vaughn [182 Cal. 151, 187 P. 19], supra. In so far as it related to the charge of constructive fraud, the conditions shown by the record or coming within judicial knowledge must furnish the basis of interference by the courts. Spring Street Co. v. City of Los Angeles [170 Cal. 24, 31, 148 P. 217, L.R.A.1918E, 197], supra; Larsen v. San Francisco, 182 Cal. 1, 186 P. 757; Swall v. County of Los Angeles, 42 Cal.App. 758, 184 P. 406. There was no error in sustaining the objections to the proffered evidence."

The judgment quieting title in plaintiffs is sustained by the record, and for the foregoing reasons it is affirmed.

YORK, P. J., and WHITE, J., concurred.

20 Cal.2d 503

SKERNSWELL v. SCHONFELD, Judge et al.

S. F. 16673.

Supreme Court of California.

July 2, 1942.

1. Exceptions, bill of 🔑53(4)

If trial court improperly refuses to settle a bill of exceptions, mandamus is an appropriate remedy. Code Civ.Proc. §§ 650, 651, 953d.

2. Exceptions, bill of 🔑41(5)

A bill of exceptions must be presented within 20 days after written notice of entry of the judgment or order appealed from and notice of a judgment or order does not constitute notice of entry of judgment or order. Code Civ.Proc. §§ 650, 651, 953d.

3. Exceptions, bill of 🔑41(5)

Under statutes requiring a bill of exceptions to be presented within 20 days after service of written notice of entry of orders appealed from, where orders appealed from had been signed July 28, and no notice of entry thereof had been served, proposed bill was timely presented on September 20. Code Civ.Proc. §§ 650, 651, 953d.

4. Exceptions, bill of 🔑51

Trial court was not justified in refusing to settle a proposed bill of exceptions on ground that orders with which bill was concerned were not appealable. Code Civ. Proc. §§ 649–651.

5. Exceptions, bill of 🔑51

It is not the trial court's function to pass upon appealability of an order in settling a bill of exceptions, but it is trial court's duty to prepare a record accurately indicating what happened in the trial court and if the particular order is not appealable, the bill may be used upon appeal from some later judgment or order when correctness of the order in question will be reviewed. Code Civ.Proc. §§ 649–651.

6. Appeal and error 🔑775

If an appeal is taken from a particular order, question of appealability should be presented to the appellate court by motion to dismiss after the record has been completed and placed before that court.

7. Exceptions, bill of 🔑45

Where respondent made no showing of fraud or lack of good faith by petitioner in presenting a proposed bill of exceptions, and draft of proposed bill was incomplete only as referring to documents which were to be copied at length into the final engrossed bill, which is established procedure, trial court was not justified in refusing to settle proposed bill as incomplete. Code Civ.Proc. §§ 649–651.

◆

In Bank.

Original petition for a writ of mandate by Joseph Skernswell against George W. Schonfeld, as Judge etc., and others to compel respondent as judge of the Superior Court of the City and County of San Francisco to settle and certify a bill of exceptions.

Writ issued.

Marcel E. Cerf, Robinson & Leland and Henry Robinson, all of San Francisco, for petitioner.

Joseph A. Brown, of San Francisco, for respondents.

TRAYNOR, Justice.

This case raises a problem of procedure upon which the parties have presented a stipulation of facts. In March, 1940, Julius Neustadt brought an action in the superior court against Joseph Skernswell, and on May 26, 1941, that court gave judgment in favor of Neustadt. On May 29th findings of fact, conclusions of law, and the judgment were filed with the county clerk. On July 10th a motion for a new trial was denied, and on July 18th defendant filed notice of appeal. The appeal is now pending in this court. On July 28th the trial judge, at plaintiff's request, signed an order setting time of hearing the accounting by the referee, an order directing the referee to take possession of real property and to collect all rents and income, and an order directing the referee in partition to sell real property. Copies of the orders were served on defendant's attorney the same day but the orders were not filed with the clerk of the court until the following day. On August 1st the trial judge, at plaintiff's request, signed a written order requiring a bond on appeal. This order was filed with the clerk of the court on the same day after a copy had been served on defendant's attorney. None of the copies served on defendant's attorney contained any statement indicating that the orders had been filed with the clerk. The parties agree that no written notice of the filing or entry of any of these orders was given defendant before the filing of the bill of exceptions. On September 10th defendant filed notice of appeal from these orders, and on September 19th served and on September 20th filed a proposed bill of exceptions to be used on the appeal. Plaintiff moved to strike the bill of exceptions from the record, and after a hearing the trial court made an order granting the motion. Defendant has petitioned this court for a writ of mandate ordering the trial court to settle and certify the bill of exceptions.

[1-3] If a trial court improperly refuses to settle a bill of exceptions, mandamus is an appropriate remedy. See cases cited in 2 Cal.Jur. 567. A bill of exceptions must be presented within twenty days after written notice of entry of the judgment or order from which the appeal is taken. Code Civ.Proc., §§ 650, 651, 953d. Notice of a judgment or order does not constitute notice of entry of the judgment or order. Leach v. Pierce, 93 Cal. 614, 621, 29 P. 235; Tobin Grocery Co. v. Spry, 201 Cal. 152, 255 P. 791. Since petitioner received no notice of the entry of the orders before the filing of the proposed bill of exceptions, the latter was presented in time.

[4-6] Respondents contend that the trial court was justified in refusing to settle the proposed bill of exceptions, on the ground that the orders with which it is concerned are not appealable. Sections 649, 650, and 651 of the Code of Civil Procedure, however, contain no requirement that an order must be appealable before a bill of exceptions can be settled with respect to it. It is not the function of the trial court to pass upon the appealability of an order in settling a bill of exceptions. Gutierrez v. Hebbard, 106 Cal. 167, 170, 39 P. 529, 935; Foley v. Foley, 120 Cal. 33, 38, 52 P. 122, 65 Am.St.Rep. 147. It is the trial court's duty to prepare a record that accurately indicates what happened in that court. If the particular order is not appealable, the bill of exceptions may be used upon appeal from some later judgment or order when the correctness of the order in question will be reviewed. Foley v. Foley, supra. If an appeal is taken from the particular order, the question of appealability should be presented to the appellate court by a motion to dismiss after the record has been completed and placed before that court. Gutierrez v. Hebbard, supra.

[7] Respondents contend finally that the proposed bill of exceptions is a skeleton bill, so incomplete as to justify the trial court in refusing to settle it. Respondents, however, make no showing of fraud or lack of good faith on the part of petitioner in presenting the bill. See Dainty Pretzel Co. v. Superior Court, 7 Cal.App.2d 437, 45 P.2d 817; Nichols v. Smith, 25 Cal.App.2d 94, 76 P.2d 525; Ambrose v. American Toll Bridge Co., 12 Cal.2d 276, 279, 83 P.2d 499; Walkerley v. Greene, 104 Cal. 208, 212, 37 P. 890. It appears that the draft of the bill is incomplete only to the extent that it merely makes reference to certain documents that are to be copied at length into the final engrossed bill. This is an established procedure. St. Clair v. Bullock, 12 Cal.2d 450, 454, 85 P.2d 867; Lake Shore Cattle Co. v. Modoc Land & L. Co., 127 Cal. 37, 39, 59 P. 206; Houghton v. Superior Court, 128 Cal. 352, 354, 60 P. 972; Reclamation District v. Hamilton, 112 Cal. 603, 44 P. 1074.

Let a peremptory writ of mandate issue as prayed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

20 Cal.2d 523

WHITLOW v. DURST.

CENTRAL & SOUTHERN PAC. R. R. EMPLOYES' MUT. BEN ASS'N v. DURST et al.

Sac. 5433.

Supreme Court of California.

July 9, 1942.

Rehearing Denied Aug. 6, 1942.

1. Evidence 🔑269(2)

Where intent is a material element of a disputed fact, declarations of a deceased made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the "hearsay rule" and it is immaterial that such declarations are self-serving.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay Rule".

2. Evidence ⚷269(2)

In consolidated actions involving question of whether insured's executrix or insured's wife was entitled to proceeds of life policies, where wife claimed that subsequent to separation of parties and execution of property settlement agreement under which she assigned policies to insured, there had been a reconciliation and that insured had made a gift of policies to her, declarations made by insured before alleged date of reconciliation were admissible as bearing on his state of mind and probability of such reconciliation and declarations made by him a few days after alleged reconciliation had taken place were also admissible.

◆

In Bank.

Appeal from Superior Court, Siskiyou County; Herbert S. Gans, Judge.

Action by Mrs. Ben Whitlow, as executrix of the estate of Charles Durst, deceased, against Carrie E. Durst to recover proceeds of a life policy, and an action in interpleader by the Central & Southern Pacific Railroad Employes' Mutual Benefit Association against Carrie E. Durst and Mrs. Ben Whitlow, as executrix of the estate of Charles Durst, deceased. From judgment in favor of Mrs. Ben Whitlow as executrix, Carrie E. Durst appeals.

Affirmed.

Prior opinion, 121 P.2d 810.

Rehearing denied; CARTER, J., not participating.

J. Everett Barr, Tebbe & Correia, Samuel Friedman, and J. P. Correia, all of Yreka, for appellant.

Carter, Barrett & Carlton, Oliver J. Carter, and Daniel S. Carlton, all of Redding, for respondent.

TRAYNOR, Justice.

In July, 1938, Charles and Carrie Durst separated and executed a property settlement under which she transferred to him her interest in two insurance policies upon his life. He died a month later leaving a will bequeathing the proceeds of the policies to his sister and executrix in trust for his mother.

Two actions were brought on the policies. In the first the executrix seeks to recover from Mrs. Durst the proceeds of one policy paid to her by the insurer. The second is brought by the other insurer in interpleader, who paid the amount of the policy into court. In both actions the executrix claims the proceeds under the property settlement and decedent's will. Mrs. Durst claims that the agreement was revoked by a reconciliation with her husband on July 16, 1938, and that decedent made a gift of the policies to her. While several witnesses corroborated her testimony that there had been a reconciliation, several other witnesses gave testimony indicating that there had been no reconciliation, and her testimony was the only evidence of a gift. The trial court resolved the conflict in the evidence and found that there had been no gift or reconciliation and entered judgment for the executrix. Mrs. Durst appeals.

There is ample evidence to support the findings of the trial court, but appellant urges that the court erroneously admitted testimony that shortly after the alleged reconciliation decedent declared that he and his wife were still separated and would never be reconciled. It is argued that these statements were hearsay, self-serving because they were made after the alleged reconciliation, and therefor incompetent as evidence, and that their admission constituted prejudicial error.

[1] When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving. Thus, in cases involving the delivery of deeds, declarations of the alleged grantor made before and after the making of the deed are admissible upon the issue of delivery, and it is immaterial that such declarations are in the interest of the party producing them. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; Donahue v. Sweeney, 171 Cal. 388, 153 P. 708; DeCou v. Howell, 190 Cal. 741, 214 P. 444; see 19 Calif.L.Rev. 231, 251. Likewise, in gift cases declarations made by the grantor before, contemporaneously, and subsequent to the alleged gift are admissible though the statements be self-serving. Sprague v. Walton, 145 Cal. 228, 78 P. 645. In alienation of affections cases declarations of an alienated spouse subsequent to the defendant's alleged tortious acts are admissible as evidence of the spouse's state of mind. Adkins v. Brett, 184 Cal. 252, 193 P. 251; Cripe v. Cripe, 170 Cal. 91, 148 P. 520.

[2] The intention of the parties is a material element in determining whether there has been a reconciliation between husband and wife. Estate of Boeson, 201 Cal. 36, 255 P. 800; Estate of Clover, 179 Cal. 313, 176 P. 452; Ruggles v. Bailey, 15 Cal.App.2d 555, 59 P.2d 837; Gump v. Gump, 42 Cal.App.2d 64, 108 P.2d 21. Declarations made by a husband before an alleged date of reconciliation are admissible as bearing upon his state of mind and the probability of such reconciliation. Estate of Clover, supra. In accordance with the principles set forth in the foregoing cases, declarations made by him a few days after the alleged reconciliation has taken place are likewise admissible.

The case of Carter v. Younger, 123 Ark. 266, 185 S.W. 435, which is contrary to the position here taken, was not approved in Estate of Clover, supra, as appellant contends. The Clover case involved declarations made before and not after an alleged date of reconciliation and the Carter case was simply distinguished on that ground.

The judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, and EDMONDS, JJ., and WARD, J., pro tem., concurred.

CARTER, J., did not participate herein.

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20 Cal.2d 494

JACKS v. MONTEREY COUNTY TRUST & SAVINGS BANK.

S. F. 16431.

Supreme Court of California.

July 2, 1942.

1. Trusts 🔑280, 281

The statute providing that legacies for maintenance bear interest from testator's death, and that annuities commence at testator's death, applies only to testamentary provisions, and hence is not applicable to inter vivos trust. Probate Code, § 162.

2. Trusts 🔑112

The intention of a trustor, as expressed in a declaration of trust, governs.

3. Trusts 🔑281

An inter vivos trust instrument which required trustee on death of trustor to liquidate trust estate, convert all of estate into cash, as soon as practicable in trustee's absolute discretion, and set aside a trust fund of $25,000 from which trustee was to pay $500 per month to trustor's brother, who had not been dependent on trustor, and which contained elaborate spendthrift trust provisions, provided for an "annuity", and did not entitle the brother to monthly payments commencing as of the date of trustor's death, but only from date of setting aside of trust fund of $25,000.

See Words and Phrases, Permanent Edition, for all other definitions of "Annuity".

4. Trusts 🔑281

Provision of inter vivos trust instrument authorizing trustee to pay beneficiary sums greater than $500 per month during periods of beneficiary's illness, want, or necessity, was not of controlling importance in determining whether payments commenced at date of trustor's death or at time when trust fund was set aside, where instrument provided that greater payments should be in trustee's discretion.

5. Trusts 🔑280

The word "withhold" within inter vivos spendthrift trust instrument providing that if attempt was made to subject income or property to payment of any of beneficiary's debts, trustee in its sole discretion might withhold any further payments to beneficiary, connoted a permanent retention or refraining from making payments, notwithstanding that the word "withhold" may be used to connote a mere temporary holding back, and hence trustee could withhold payments even after lifting of distraint warrants issued by the United States to enforce beneficiary's debt for unpaid income taxes.

See Words and Phrases, Permanent Edition, for all other definitions of "Withhold".

* * *

In Bank.

Appeal from Superior Court, Monterey County; James L. Atteridge, Judge.

Action by Romie C. Jacks against the Monterey County Trust and Savings Bank, as trustee, etc., to recover certain sums claimed to have become due to plaintiff as beneficiary under the trust created by plaintiff's brother. From a judgment in favor of the plaintiff, defendant appeals.

Judgment reversed.

For prior opinion, see 119 P.2d 781.

Rosendale, Thomas & Muller and Edson G. Thomas, all of Salinas, for appellant.

Wyckoff, Gardner & Parker and J. E. Gardner, all of Watsonville, and Heller, Ehrman, White & McAuliffe and Lloyd W. Dinkelspiel, all of San Francisco, for respondent.

PER CURIAM.

A petition for hearing after decision of the District Court of Appeal, First District, Division Two, was granted for the purpose of giving further consideration to the question of the application to trust created inter vivos of the rule applicable to testamentary trusts. See section 160–163 Probate Code. After further consideration we have arrived at the conclusion that the District Court of Appeal correctly disposed of the questions presented. We therefore adopt as our opinion the following portions of the opinion of said court, prepared by Mr. Justice Spence, with additional observations.

"Plaintiff, who was a brother of Will Jacks, deceased, and a beneficiary under a trust created by the latter during his lifetime, brought this action against the defendant, as trustee, to recover certain sums claimed to have become due to said beneficiary under the terms of said trust. Plaintiff had judgment and defendant appeals.

"In 1935, Will Jacks, as trustor, conveyed to defendant in trust a large amount of real and personal property having an approximate value of $500,000. The instrument provided for the payment of the income from the trust estate to Will Jacks during his lifetime and contained further provisions for the subsequent disposition of the trust estate. It was provided that 'Upon the death of the Trustor the Trustee shall proceed to liquidate this trust estate, converting all of said trust estate into cash, as soon as practicable and advantageous in the absolute discretion of the Trustee, and upon such liquidation the Trustee shall distribute whatever there remains of the trust estate in the following manner:' Then followed directions to distribute specific sums totaling about $75,000 to the persons therein named and directions to distribute the residue to the Shrine for the benefit of the Shriners' Hospital for Crippled Children in San Francisco. All of the directions for distribution of specific sums provided for distribution directly to the intended beneficiaries except those creating the trust under consideration here. The last-mentioned provisions read as follows:

" 'To Monterey County Trust & Savings Bank in trust for Romie C. Jacks the sum of Twenty Five Thousand Dollars ($25,000.00), which said Trustee is hereby directed to set aside as a fund to be known as the "Romie C. Jacks' Trust Fund," which fund shall be within the management and control of said Trustee, with the same powers, duties, terms, conditions, and subject to the payment of the same costs, charges, fees, and compensation, that the other portions of the trust property of Trustor is held by Trustee under the provisions hereof.

" 'Said Trustee is directed to pay to said Romie C. Jacks out of said fund the sum of Five Hundred Dollars ($500.00) per month, which said sum shall be paid for the remainder of the lifetime of said Romie C. Jacks or until said fund is exhausted.

" 'It is herein expressly declared and provided that no interest of whatsoever nature, given to Romie C. Jacks shall be subject to or subject to be taken for the payment of any debts whatsoever contracted by said Romie C. Jacks either before or after the date of this instrument, and for any purpose whatsoever, and that Romie C. Jacks shall have no power or capacity to make any disposition whatsoever of any of said income, by his assignment or by his order, voluntary or involuntary, and whether made by the order or direction of any court or courts, whether of bankruptcy or otherwise; nor shall said interest be subject to any process of attachment issued against said Romie C. Jacks or to be taken in execution under any form of legal process directed against him or against any one connected with the trust estate, the income thereof, or any part of said income. Any interest of Romie C. Jacks in this trust is subject to the condition that he shall be without power to anticipate said income, to assign, convey, pledge, or otherwise encumber or transfer any part of said income, or any interest in said trust, and in the event of his doing any of these inhibited things, or in the event that an attempt is made to subject said income or property, or any part thereof, to the payment of any of his debts or obligations, the trustee in its sole discretion may withhold any further payment or payments to said Romie C. Jacks.

" 'Upon and at the time of the demise of said Romie C. Jacks said Romie C. Jacks trust shall ipso facto cease and determine, and the balance remaining in said Romie C. Jacks' Trust Fund shall go and be, by said Trustee, conveyed, transferred, and delivered to the Imperial Council of the Ancient Arabic Order of the Nobles of the Mystic Shrine for North America, to be used for the use and benefit of the Shriners' Hospital for crippled children in San Francisco, California.

" 'If in the absolute and uncontrolled discretion of said Trustee the monthly payment of Five Hundred Dollars ($500.00) shall not be sufficient to provide for the reasonable needs and comforts of my said brother Romie C. Jacks during any period or periods of his illness, or other want or necessity, said Trustee may, and it is hereby authorized and empowered, but it shall in no event be required so to do, and as often as it shall deem necessary, pay to, or use, apply or expend, for the use and the benefit of said Romie C. Jacks such portions of the principal of the trust fund created for the benefit of Romie C. Jacks up to and including the whole thereof, as said Trustee in its absolute discretion may determine to be adequate to provide for Romie C. Jacks, for the purposes aforesaid.'

"Will Jacks, the trustor, died on January 28, 1937, and the defendant, as trustee, thereafter proceeded to liquidate the trust estate. It does not appear when the liquidation of the entire trust estate was completed but the trial court found that the period from January 28, 1937, to December 20, 1937, was a reasonable time within which defendant could accomplish liquidation. This matter becomes immaterial for the reason that on May 29, 1937, defendant created the 'Romie C. Jacks' Trust Fund' by depositing $500 therein; that in October, 1937, the balance, amounting to $24,500, was deposited therein; and the undisputed evidence shows that said sums were deposited as soon as the money was available and prior to the time found by the trial court to have been a reasonable time. Following the deposit in the trust fund of the abovementioned $500 on May 29, 1937, defendant immediately paid that sum over to plaintiff.

"Prior to that time, the United States Board of Tax Appeals had determined that plaintiff had become indebted to the United States of America in the total sum of approximately $34,000 for unpaid income taxes and said determination had become final and conclusive. On June 5, 1937, being about seven days after the making of the above-mentioned first payment of $500 to plaintiff under the terms of said trust, there were served upon defendant a notice of levy and a distraint warrant and a similar notice was thereafter duly recorded in the office of the county recorder. Again on March 9, 1938, a similar notice of levy and distraint warrant were so served on defendant. It was stipulated and the trial court found that said acts constituted an attempt on the part of the United States of America to subject the trust fund and the interest of plaintiff therein to the payment of plaintiff's debt for unpaid income taxes and that the United States of America claimed a lien upon said fund and said interest at all times from June 5, 1937, to and including June 27, 1938.

"Defendant made no payments to plaintiff during the period last mentioned and on April 22, 1938, and prior to the expiration of said period, plaintiff commenced this action after making demand upon defendant. The United States of America thereupon filed its complaint in intervention asserting its claim of lien. On or about said June 27, 1938, plaintiff paid or caused to be paid to the United States the entire sum due from plaintiff, said payment having been made from funds other than the abovementioned trust fund. The complaint in intervention was thereupon dismissed. Since the time of said payment and dismissal, defendant has regularly made monthly payments to plaintiff in the sum of $500 each.

"This cause proceeded to trial, plaintiff claiming that he was entitled to judgment for all unpaid payments, commencing from the time of the trustor's death, together with interest thereon. The trial court entered its judgment in favor of plaintiff and against defendant in the sum of $8,000, together with interest on the sum of $1,500 from December 20, 1937, at the rate of 4 per cent per annum and with interest on the sum of $6,500 from June 27, 1938, at the rate of 4 per cent per annum. It was provided in the judgment that such interest should be payable from the 'individual funds and property' of defendant and not from the trust fund. It thus appears that the trial court sustained plaintiff's claim (1) that plaintiff was 'entitled to receive monthly payments from the trust commencing as of the date of the death of the trustor' and (2) that plaintiff was further 'entitled to the prescribed monthly payments maturing between the date of the levy of the distraint warrant and the time of its release.'

"It is defendant's main contention on this appeal that the trial court erred in awarding any judgment to plaintiff and our review of the record leads us to the conclusion that this contention must be sustained. A consideration of this contention divides itself logically into a discussion of the two claims of plaintiff as set forth above.

"With respect to the time of commencement, plaintiff argues that the trust instrument created a trust for the maintenance of plaintiff and provided for an annuity. Plaintiff therefore concludes that plaintiff was entitled to monthly payments from the time of the death of the trustor. The trial court so found and concluded.

[1, 2] "The search of able counsel has disclosed no authority directly in point on the subject under discussion. The decided cases which deal with alleged provisions for maintenance and for annuities and which might throw light upon the subject deal exclusively with testamentary provisions rather than with provisions found in instruments creating inter vivos trusts. It is apparently conceded that section 162 of the Probate Code applies only to testamentary provisions and we believe there can be no doubt of its inapplicability here. Not only is that section found in the division of the Probate Code entitled 'Wills' and under the chapter of that division entitled 'Legacies and Interest,' but the very wording of the section shows that its application is limited to testamentary provisions." Whatever may be the rule with reference to the commencement of payments to the beneficiary under a testamentary trust, that rule has no application to a trust inter vivos. The intention of the trustor as expressed in the declaration of trust is of paramount importance.

[3] "Turning to the trust instrument before us, we find that it provided for what may be termed a primary trust and also provided for what may be termed a secondary trust. The primary trust was to terminate following distribution of the trust estate, which distribution was to follow the liquidation of the entire trust estate. The trustor directed that the trust estate be liquidated as soon as 'practicable and advantageous' after his death but left the exact time for liquidation to the 'absolute discretion' of the trustee. The secondary trust did not become effective until after distribution following liquidation of the trust estate in the primary trust and the trustee of the secondary trust was directed to set aside a trust fund with the money so distributed to it as trustee of the secondary trust. Out of said secondary trust fund so set aside the trustee was directed to make the payments of $500 per month to plaintiff as therein provided 'during the lifetime of said Romie C. Jacks or until said fund is exhausted.' The total sum to be so set aside was $25,000 and payments of $500 per month from said fund would normally exhaust the fund in approximately four years and two months from the time of the first payment. * * *

"The trust instrument is entirely devoid of any provision as to the time for the commencement of the payments to plaintiff but the only reasonable construction to be placed upon the language used by the trustor is that he intended such payments to commence after the secondary trust had become effective by the distribution of the secondary trust fund to the trustee of the secondary trust.

"The provisions of the trust agreement above referred to are followed by elaborate spendthrift trust provisions and we believe that the intention of the trustor is made clear by these provisions. It shows that his real intention in creating the secondary trust and providing for payments of $500 each rather than in directing the distribution of the entire $25,000 to plaintiff himself was to protect the gift to plaintiff from the acts of plaintiff's creditors and from the acts of plaintiff himself. To this end the trustor gave broad powers to the trustee in withholding payments but provided for normal monthly payments in the sum of $500 each, which would result in plaintiff's normally receiving the entire gift within a comparatively short period of time but in comparatively small amounts. The intention to protect the gift in this manner was obviously the dominant intention of the trustor in creating the secondary trust.

[4] "Plaintiff calls our attention to the paragraph of the trust instrument which shows that the trustee was authorized to pay over to plaintiff sums greater than $500 per month during periods of illness, want or necessity. We do not believe that said paragraph is of controlling importance. It was expressly provided that this should be

in the 'absolute and uncontrolled discretion of the trustee' and that the trustee 'shall in no event be required so to do.' The making of such larger payments would have further shortened the comparatively short time required to exhaust the trust fund. * * *

"While it may be conceded that the trust instrument provided for an 'annuity,' within the broad definition of that term (3 Cyc., p. 200), it does not follow that plaintiff was entitled to monthly payments commencing as of the date of the trustor's death. * * * The time for the commencement of payments upon an annuity created by an instrument setting up an inter vivos trust is ordinarily at the time when such inter vivos trust becomes effective. * * * We believe that the only reasonable construction to place upon the trust instrument here is that the trustor intended that payments should not commence until distribution of the secondary trust fund had been made to the trustee of the secondary trust.

[5] "We turn now to a consideration of the question of whether plaintiff was entitled to judgment for the payments withheld by defendant between the time of the levy of the distraint warrant and the time of the release thereof. The discussion of this subject is simplified by plaintiff's statement that he 'does not dispute the power of the trustee to exercise its discretion to withhold payments during such time as the federal distraint warrants were in effect.' But plaintiff claims that he was entitled as a matter of right to said withheld payments after 'the distraint warrants were lifted.' We are of the opinion that this claim cannot be sustained.

"The trust instrument provided that in the event of the plaintiff's 'doing any of these inhibited things, or in the event that an attempt is made to subject said income or property, or any part thereof, to the payment of any of his debts or obligations, the trustee in its sole discretion may withhold any further payment or payments to said Romie C. Jack.' This language appears to be clear and unambiguous. It was obviously the trustor's intention to protect the gift from either attempts by plaintiff to anticipate the payments or attempts by plaintiff's creditors to subject such payments to the satisfaction of their claims. To that end, the trustor gave to the trustee the sole discretion 'to withhold any further payment or payments' in the event any such attempt might be made. It was stipulated that such an attempt was made.

"While the word 'withhold' may sometimes be used to connote a mere temporary holding back as contended by plaintiff, it is probably more frequently used to connote a permanent retention or refraining 'from granting, giving, allowing, or the like.' See Webster's New Inter. Dict., 2d Ed. A consideration of all of the terms creating the trust here compels the conclusion that the trustor intended to use the word 'withhold' in the latter sense. We are dealing here with a typical spendthrift trust and the obvious purpose of the trustor in creating such a trust would be defeated by a construction which would permit the accumulation of the prescribed payments and the distribution of a large lump sum to the beneficiary at any one time.

"In view of the conclusions which we have reached, it becomes unnecessary to discuss the question of the right of plaintiff to interest as that right, if any would have existed, was dependent upon his right to judgment for some of the payments claimed by him."

The judgment is reversed.

EDMONDS, J., did not participate herein.

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20 Cal.2d 479

VOYCE et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

S. F. 16721.

Supreme Court of California.

June 30, 1942.

1. Wills 🔑432

If a will is found valid or invalid in response to grounds of attack that it is invalid on ground of unsoundness of testatrix' mind, lack of due execution, undue influence, and fraud, it is so in toto, and all interested persons will be affected, either beneficially or adversely, regardless of whether they participate in the contest, excepting those persons who fall within disability class mentioned in statute. Probate Code, §§ 380, 384.

2. Wills 🔑427

If a will is contested within six months on grounds of unsoundness of mind, lack of due execution, undue influence and fraud, the probate of the will is not conclusive. Probate Code, §§ 380, 382, 384.

3. Wills 🔑222

A will contest is in the nature of a "proceeding in rem" although it has some of the aspects of a "proceeding inter partes".

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding in Rem" and "Proceeding Inter Partes".

4. Wills 🔑432

If superior court did not lose jurisdiction of will contest by reason of dismissal of the petition to revoke probate of the will, the superior court could proceed under the petition to determine the validity of the will, and any judgment rendered would be binding on defendants and all other persons interested who were properly notified thereof, even though they did not actually participate therein.

5. Wills 🔑256

Where testatrix' cousin filed a petition to revoke probate of will within six months' statutory period after admission of will to probate, and within six months two of the defendants filed an answer to the petition adopting allegations of the petition, and prayed that probate of will be revoked on the same grounds as those named in petition, and after expiration of six months' period such defendants filed a petition in intervention attacking will on same grounds as those alleged in petition, dismissal of petition by testatrix' cousin did not divest court of jurisdiction to hear the contest. Probate Code, §§ 380–382, 384, 1233; Code Civ.Proc. §§ 387, 581.

6. Wills 🔑307

Section of the Code of Civil Procedure dealing with dismissals and nonsuits is applicable to will contests, in view of provision of the Probate Code stating that provisions of Part 2 of the Code of Civil Procedure constitute rules of practice in probate proceedings, in regard to matters of procedure not otherwise covered by the Probate Code. Probate Code, § 1233; Code Civ. Proc. § 581.

7. Wills 🔑264

The section of the Probate Code authorizing a pleading to a will contest is sufficiently comprehensive to authorize a pleading which adopts the position as taken by the contestant and attacks the validity of a will. Probate Code, § 381.

8. Wills 🔑264

An interested person mentioned in the section of the Probate Code providing that any interested person, with certain exceptions, may contest the validity of a will at any time within six months after the will is admitted to probate, may intervene in a will contest initiated by another interested person within six months after probate, even though the intervention is filed after expiration of the six months' period. Probate Code, § 380.

9. Wills 🔑264

The provisions of the Code of Civil Procedure dealing with intervention are applicable to will contests. Code Civ.Proc. § 387; Probate Code, § 1233.

10. Wills 🔑264

Testatrix' cousin who contested will within six months after admission of will to probate was an "interested person" within meaning of the section of the Probate Code providing that any interested person may contest the validity of the will at any time within six months after the will is admitted to probate. Probate Code, § 380.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested Person".

11. Wills 🔑264

Where defendants, within six months' statutory period after admission of will to probate, filed answer to petition to revoke probate of will, adopting allegations of petition, right of such defendants to file a petition in intervention seeking revocation of probate of will on the same grounds as those contained in the petition was not barred because it was not filed within six months after probate. Probate Code, §§ 380, 382, 384.

12. Wills 🔑256

When once the jurisdiction of a court to determine the validity of a will attaches by the filing of a contest within six months from time of admitting the will to probate, the court does not lose jurisdiction of the proceeding at the end of six months until disposition is made of the matter, in view of the fact that a proceeding to contest the will is in the nature of a "proceeding in rem," the "res" being the subject matter of the action, which is the validity of the will. Probate Code, §§ 380, 382, 384.

See Words and Phrases, Permanent Edition, for all other definitions of "Res".

In Bank.

Original prohibition proceeding by Alfred Voyce, as executor of the will of Elizabeth M. Cox, deceased, and others, petitioners, against the Superior Court of the City and County of San Francisco, to prohibit respondent from proceeding with the trial of a will contest.

Alternative writ of prohibition discharged, and petition for peremptory writ of prohibition denied.

John L. McNab and Jackson Maddux, both of San Francisco, for petitioners.

Devine & Devine and Preston Devine, all of San Francisco, for respondent.

CARTER, Justice.

Petitioners seek to have respondent superior court prohibited from proceeding with the trial of a will contest.

Elizabeth M. Cox died testate on February 8, 1940. Her will was admitted to probate by respondent superior court, on March 1, 1940, petitioner Voyce being named executor. On August 24, 1940, six days before the expiration of the six months' period in which a contest could be initiated, Iris Taylor, a cousin of the deceased, filed a petition to revoke the probate of the will charging therein unsoundness of mind, lack of due execution, undue influence and fraud. She named as defendants therein executor Voyce, Charles R. Lamb, Arvilla Coons, Rosamond Nelson and several other persons. Defendants Charles R. Lamb, Coons, and others, but not Nelson, filed their answer to Taylor's petition on August 30, 1940, within the six months' period, in which they admitted all of the allegations of the petition, alleged that they were cousins of the deceased, adopted the allegations of the petition, and prayed that the probate of the will be revoked. Defendant Voyce, petitioner herein, filed his answer on March 19, 1941, denying the allegations of the petition. Franklin Chester and other legatees under the will likewise denied the allegations of the petition by their answer filed in December, 1940.

On May 3, 1941, Charles R. Lamb, upon obtaining leave of court therefor, filed a petition in intervention and had a citation issued thereon in the contest proceedings, praying for the revocation of the probate of the will; the petition in intervention attacked the will on the same grounds as alleged in contestant Taylor's petition, and in fact was identical therewith. On May 5, 1941, Taylor filed in the proceedings a voluntary dismissal of her contest. On July 1, 1941, Coons and Nelson, with leave of court, filed a petition in intervention in aid of the intervention of Charles R. Lamb. A motion by Chester made on July 17, 1941, to have Lamb's petition in intervention dismissed was denied by the court.

The trial court has threatened to proceed with the trial of the contest which petitioners assert it is without jurisdiction to do because the petitions in intervention were filed after the expiration of the six months' period since the admission of the will to probate (Prob.Code, §§ 380, 384), and contestant Taylor's contest which was the only one filed in time, has been dismissed.

[1] While petitioners seek to have restrained the trial of the proceeding embraced in the intervention of Lamb, Coons and Nelson, there is no material distinction between that proceeding and the contest of the will filed by Taylor. It is alleged in the petition for prohibition, and not denied, that the grounds of contest set forth in the petitions in intervention are identical with those set forth in Taylor's petition, in fact, that the former are copies of the latter. As heretofore seen, Lamb and Coons in their answer to Taylor's petition which was filed within six months after the admission of the will to probate, admitted the allegations of Taylor's petition, and adopted them, and prayed that the admission of the will to probate be revoked. Therefore, it cannot be said as to those two persons, that they were not active participants in the contest within the six months' period. Their answer having raised the same issues which were raised by Taylor's petition and by their later petitions in intervention, it would appear that these latter petitions added nothing to the subject matter over which the court had already acquired jurisdiction, namely, the validity of the will tested in the light of the specified grounds of attack. If Taylor's purported dismissal did not divest the court of jurisdiction to hear the contest on the grounds specified, then there can be no doubt that the hearing may proceed on those grounds, and, in the ultimate result, it is of small consequence whether such a proceeding would be technically considered as under the petitions in intervention or under the affirmative claims made in the answer. The essential issue for determination in either case is whether or not the will is vulnerable to the attack upon it. If it is found valid or invalid in response to the grounds of at-

tack here advanced, it is so in toto, and all interested persons will be affected either beneficially or adversely as the case may be, regardless of whether they participate in the contest, excepting of course those persons who fall within the disability class.

[2] The foregoing conclusion follows from the statutory provisions on the subject and the nature of the proceeding itself. Section 380 of the Probate Code provides that any interested person (with certain exceptions) may contest the validity of the will at any time within six months after the will is admitted to probate. Under section 382 of that code if a will is found invalid the probate must be revoked and the powers of the executor cease. Section 384 of the Probate Code provides:

"If *no person* contests the validity of a will or of the probate thereof *within the time specified in this article, the probate of the will is conclusive,* saving to infants and persons of unsound mind who were not made parties to the proceeding in like period of six months after their respective disabilities are removed." (Italics added.) As to any person failing to contest the will within six months, the "probate of the will is conclusive" (except as to certain persons), then conversely if the will is contested within six months upon the grounds here involved, the probate of the will is not conclusive, and if the probate is revoked it is revoked as to everyone.

[3, 4] A will contest is in the nature of a proceeding in rem although it has some of the aspects of a proceeding inter partes. In re Estate of Golden, 9 Cal.2d 647, 72 P.2d 113; In re Estate of Baker, 170 Cal. 578, 150 P. 989; In re Estate of Relph, 192 Cal. 451, 221 P. 361; In re Estate of Sankey, 199 Cal. 391, 249 P. 517. Hence the determination in a will contest on the grounds here involved, that the will is invalid, where the contest has been filed within six months after the admission of the will to probate, and due notice has been given, has the effect of invalidating the will in toto and as to everyone interested therein, regardless of whether they actively participated in the contest. Estate of Freud, 73 Cal. 555, 15 P. 135; Scott v. Superior Court, 125 Cal.App. 513, 14 P.2d 99; In re Estate of Golden, supra; Security T. & S. Bk. v. Superior Court, 21 Cal.App.2d 551, 553, 69 P.2d 921; Clements et al. v. McGinn et al., 4 Cal.Unrep. 163, 33 P. 920; see, also, Fletcher v. Superior Court, 79 Cal.App. 468, 476, 250 P. 195. We are not here concerned with the rights of persons under disability to contest a will after the six months' period, nor the effect of such a contest by them upon the rights of persons under no disability where no contest was initiated within six months. See Samson v. Samson, 64 Cal. 327, 30 P. 979; Security T. & S. Bk. v. Superior Court, supra; and In re Estate of Golden, supra. Thus it appears that, independent of the petitions in intervention, if the court did not lose jurisdiction of the contest by reason of the dismissal, it could proceed under the contest initiated by Taylor to determine the validity of the will, and any judgment rendered would be binding upon Lamb, Coons and Nelson and all the other persons interested who were properly notified thereof, even though they did not actually participate therein. Although as far as appears, Nelson did not answer Taylor's petition as was done by Lamb and Coons, she would nevertheless benefit along with the other heirs if the will were declared invalid.

[5] Turning then to the question of whether the dismissal by Taylor of her petition terminated the contest and divested the court of jurisdiction to hear it, but still considering only the contest as initiated by her and the answer of Lamb and Coons thereto separate from the petitions in intervention, we believe that the dismissal did not accomplish that result.

[6] It is clear that section 581 of the Code of Civil Procedure, providing for dismissals, is applicable to will contests. See In re Estate of Cook, 205 Cal. 581, 271 P. 1083; In re Estate of Knauft, 59 Cal.App. 536, 211 P. 29; In re Estate of Gurnsey, 61 Cal.App. 178, 214 P. 487; In re Estate of Matthiessen, 10 Cal.App.2d 323, 52 P.2d 248. That rule follows from the provisions of section 1233 of the Probate Code stating that the provisions of part II of the Code of Civil Procedure constitute the rules of practice in probate proceedings in regard to matters of procedure not otherwise covered by the Probate Code. Section 581 of the Code of Civil Procedure is in part II thereof. It has recently been held by this court that section 581 is applicable to proceedings to determine heirship, whose nature is quite similar to a will contest. O'Day v. Superior Court, 18 Cal.2d 540, 116 P.2d 621.

[7] The attempted dismissal by Taylor of her contest was under the first subdivision of section 581 which authorizes a plaintiff to dismiss at any time before trial by

filing a written request with the clerk "provided that a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant." Lamb and Coons asked for affirmative relief in their answer. They adopted the allegations of contestant Taylor's petition for revocation of probate and asked that the probate be revoked. Section 381 of the Probate Code authorizes a pleading to the contest stating that the citation in the contest must be directed to the executor, devisees, legatees and heirs "directing them to plead to the contest within thirty days after service of the citation." The authority to plead to the contest is sufficiently comprehensive to authorize a pleading which adopts and agrees with the position taken by the contestant, and attacks the validity of the will. It is contemplated by the Probate Code that those authorized to plead to the contest may be either plaintiffs or defendants.

Therefore, in the instant case Lamb and Coons by their pleading to the contest may be considered either as joining themselves as plaintiffs by answer inasmuch as they aligned themselves on the side of contestant Taylor, or as parties seeking affirmative relief as to the subject matter, the validity of the will, and the rights in the property of the estate as affected thereby, which affirmative relief is in nature similar to that mentioned in section 581, subd. 1, of the Code of Civil Procedure. In either event the contestant plaintiff cannot deprive them of the right to be heard on those issues by a voluntary dismissal of her contest under section 581, subd. 1. If their pleading is considered a request for affirmative relief under that section the very terms thereof prevent that result. If by their pleading they became joint contestants with Taylor, then they are in a position analogous to that where several plaintiffs join in an action. One of several plaintiffs joined in an action may not dismiss it to the prejudice of his coplaintiffs.

[8] We believe that it is equally clear that an interested person as mentioned in section 380 of the Probate Code may intervene in a will contest initiated by another interested person within six months after probate, even though the intervention is filed after the expiration of the six months' period.

[9] Section 387 of the Code of Civil Procedure provides in part: "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant * * *." That section is a part of part II of the Code of Civil Procedure, and under Section 1233 of the Probate Code, is a matter of procedure applicable to will contests. (See cases cited supra, with respect to the applicability of section 581 of the Code of Civil Procedure.) No valid reason has been advanced why the provisions for intervention should not be applicable to will contests. Reasons of policy dictate that they should. Justice may always be better served by the presence before the court of all of the interested parties. It has been held that section 385 of the Code of Civil Procedure (appearing in part II, title 3, thereof under the title "Parties to Actions," the same title in which section 387 appears) which deals with abatement of actions and substitution of parties, is applicable to will contests (In re Estate of Baker, 170 Cal. 578, 150 P. 989); and that section 389 of the Code of Civil Procedure dealing with the bringing in of new parties, appearing in the same part and title of that Code is applicable to will contests. San Francisco Protestant Orphan Asylum v. Superior Court, 116 Cal. 443, 48 P. 379.

[10-12] The right to file a petition in intervention under the circumstances present here was not barred by reason of the fact that it was not filed within six months after probate; there was a will contest pending, which was filed in time and no attempt was made to raise new grounds of contest. The contest which was filed within the six months' period inured to the benefit of persons who did not join therein as contestants. In re Estate of Butzow, 21 Cal.App.2d 96, 68 P.2d 374; Weichold v. Day, 118 Kan. 598, 236 P. 649; Buchanan v. Davis, Tex. Civ.App., 43 S.W.2d 279; Maurer v. Miller, 77 Kan. 92, 93 P. 596, 127 Am.St.Rep. 408, 15 Ann.Cas. 663, 28 R.C.L. 390, 394. Petitioners vigorously criticize the Butzow case and assert it cites authorities from other jurisdictions which are not in point. But as will be apparent from the discussion herein, we are convinced that the rule there laid down is sound. They also intimate that

it is questioned in Security T. & S. Bk. v. Superior Court, supra, but on the contrary the court in that case approves the rule stating at page 553 of 21 Cal.App.2d, at page 922 of 69 P.2d:

"These sections of the Probate Code [sections 380, 382 and 384] not only provide for a contest, but clearly provide that *the probate of a will is not conclusive until six months has expired after the order* was entered, and then *only if no person has filed a contest. If a contest filed within that time before the probate has become conclusive results in the will being declared invalid, it clearly follows that it is invalid for all purposes.* The petitioners cite as controlling here the recent case of In re Estate of Butzow, [21 Cal.App.2d 96], 68 P.2d 374. That case *illustrates the point we are now making.* A contest was there filed within the six months' period provided by the statute, *the order admitting the will to probate never became conclusive,* any judgment that might be entered setting aside the will would apply to it *in its entirety, and the statute of limitations,* by its own terms, *had not run* against *any* heir." (Italics ours.) This follows from the statutory provisions. Section 380 of the Probate Code provides that any person (with certain exceptions) may within six months after probate contest the validity of the will. Section 384 provides that if "no person" contests the validity of the will within six months the probate of the will is conclusive except as to certain persons under disability. In the instant case an interested person has contested the will within time, namely, contestant Taylor. It is urged that the six months' period is a limitation on the court's jurisdiction to entertain the contest rather than a statute of limitation (In re Estate of Smith, 214 Cal. 50, 3 P.2d 921; Scott v. Superior Court, supra); but as we have seen, a proceeding to contest a will is in the nature of a proceeding in rem, and when once the jurisdiction of the court to determine the validity of the will attaches by the filing of a contest in time, it does not lose jurisdiction thereof until disposition has been made of the matter, or, stating it another way, the order admitting the will to probate does not become final within six months if a contest is filed.

The filing by contestant Taylor of a request for the dismissal of her contest did not oust the court of jurisdiction under the circumstances here presented. Prior to that dismissal the court had jurisdiction of the subject matter; that is, a contest of the will on the grounds stated in the contest, and the intervention was filed prior to the dismissal, claiming the identical relief involved in the contest then before the court. While a will contest may be in some respects adversary as contended by petitioners, it is fundamentally a proceeding in rem. The jurisdiction of the court attaches to the res, the subject matter of the action, to wit, the validity of the will. It is similar to the addition of new parties plaintiffs who seek the identical relief as the original plaintiff. It has been held that additional plaintiffs, heirs of the deceased, may be brought into an action for wrongful death by amendment to the complaint because no new issues are raised or a new cause of action stated. Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077; Lopez v. Pacific Electric Ry. Co., 93 Cal.App. 196, 269 P. 685. In the case at bar no new issues, that is, grounds of contest have been raised, and no prejudice has been suffered by petitioners. The case is not like Tubbs v. Delillo, 19 Cal.App. 612, 127 P. 514, or Mars v. McKay, 14 Cal. 127, where the court was considering in an action for the foreclosure a mechanic's lien, the addition of parties with mechanic's liens on the same property. There each lien holder's right was dependent upon his personal lien, and the addition of other parties, each with his independent lien, would require the pleading of new causes of action, as new and distinct issues would be raised. In the case at bar no new issues are raised, the issues are identical, that is, the validity of the will with reference to the specified grounds of attack. It is not the purpose of the contest to determine heirship, or the rights as between the contestants to the assets of the estate, but the validity of the will is the only issue.

Although Taylor could withdraw as a contestant, she could not by a dismissal of her contest deprive the interveners of their right to have the contest heard and determined.

The alternative writ of prohibition is discharged. The petition for a peremptory writ of prohibition is denied.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

20 Cal.2d 506

MAGILL BROS., Inc., v. BUILDING SERVICE EMPLOYEES' INTERNATIONAL UNION et al.

L.A. 17903.

Supreme Court of California.
July 2, 1942.

Rehearing Denied July 30, 1942.

1. **Torts** ⚷10

The picketing of an employer must be honest and truthful, and untruthful picketing is "unlawful picketing".

See Words and Phrases, Permanent Edition, for all other definitions of "Unlawful Picketing".

2. **Injunction** ⚷101(1)

Collective labor activity such as picketing is permissible only when conducted according to the requirements imposed by law, and, if picketing is conducted in violation of such requirements, it is subject under ordinary circumstances to the restraint of a court of equity.

3. **Torts** ⚷2

The standard imposed for determining whether picketing is lawful and permissible or unlawful and enjoinable are "questions of state law".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of State Law".

4. **Injunction** ⚷189

The scope of an injunction will be limited to the wrongful act sought to be prevented.

5. **Constitutional law** ⚷90

The policy of the state which characterizes the use of false or fraudulent statements in picketing as unlawful is within the permissible limits which a state may impose on industrial combatants without impairing "freedom of speech".

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Speech".

6. **Constitutional law** ⚷90

Where banners and signs carried by pickets conveyed false and untrue information to general public so far as employees of the picketed employer were concerned, the employer was entitled to decree restraining the pickets from using false or untruthful statements in the exercise of their right to picket, notwithstanding the constitutional guaranty of "freedom of speech".

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Magill Brothers, Incorporated, against Building Service Employees' International Union, an unincorporated association, and others, for an injunction and for damages. From a judgment for defendants, plaintiff appeals.

Reversed.

Rehearing denied; CARTER, J., dissenting.

Pierson & Block and R. K. Pierson, all of Compton, for appellant.

Ben Koenig, of Hollywood, and Aaron B. Rosenthal, of Los Angeles, for respondents.

GIBSON, Chief Justice.

The plaintiff corporation, which is engaged in operating two bowling alleys in the city of Los Angeles, brought this action against the defendant unions and the officers and members thereof. Plaintiff sought to enjoin defendants from maintaining pickets in front of plaintiff's places of business and to recover damages for the allegedly unlawful picketing previously carried on by defendants. The action was tried without a jury and, by stipulation, was tried solely with reference to the alley located at 1953 S. Vermont Avenue in Los Angeles. The trial court found that prior to the filing of the complaint in this action none of plaintiff's employees was engaged in a labor dispute with his employer and that there was no strike of any nature against plaintiff. It found that Local 214 sought to unionize all of plaintiff's employees who were not members of any union and that Local 214 urged plaintiff to sign a contract providing that it would employ only union members. After repeated refusals on the part of plaintiff to sign such a contract (on the theory that it would not force its employees to become union members), defendants stationed pickets outside the bowling alley who carried signs stating: "This house on strike. A. F. L." At that time, according to the findings of the trial court, none of plaintiff's employees was on strike and no labor dispute existed between employer and employees. Immediately after the establishment of the picket line, however, certain of plaintiff's employees left and remained away from their work. The court found that prior to the establishment of the picket line a ballot was conducted by defendants among those of plaintiff's employees who belonged to the union. The question voted upon was whether a strike should be called against plaintiff but not a single employee (with one possible exception) voted for such a strike. It was found that the sole purpose of the picketing was to compel plaintiff to sign the closed shop agreement and that "the banners and signs carried by said pickets conveyed false and untrue information to the general public insofar as the employees of plaintiff are concerned." The trial court found that the allegations of the complaint charging that the pickets had engaged in acts of force, violence or physical intimidation were untrue. It also found that the allegations of damage in the sum of $25,000 were untrue.

Upon the basis of these findings the trial court rendered a so-called "memorandum for judgment" in which it ordered that the injunction be granted on the ground that picketing was unlawful in the absence of a labor dispute between the employer and its employees. Following the decision of this court in McKay v. Retail Auto S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373, and companion cases, defendants moved to vacate the order previously made by the trial court. This motion was granted and thereafter judgment was entered for defendants denying the permanent injunction and dissolving the preliminary injunction theretofore granted. Plaintiff brings this appeal from the judgment for defendants.

The question for decision is whether, under the facts found by the trial court, it was error to deny plaintiff's request for injunctive relief. Plaintiff concedes that under controlling decisions no injunction could have been granted based upon the absence of a dispute between the employer and his employees (McKay v. Retail Auto. S. L. Union No. 1067, supra, 16 Cal.2d at p. 324, 106 P.2d 373; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 394, 106 P.2d 414; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L. Ed. 855; Bakery and Pastry Drivers and Helpers, etc., v. Wohl, 62 S.Ct. 816, 86 L.Ed. 1178), or upon the ground that the picketing was being conducted to secure a closed shop contract. McKay v. Retail S. L. Union No. 1067, supra, 16 Cal.2d at pages 322, 323, 106 P.2d 373; Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 106 P.2d 403. The sole issue, therefore, is whether the trial court erred in denying injunctive relief in a case where it found that the banners and signs carried by the pickets conveyed false and untrue information to the general public.

[1] There can be no doubt that untruthful picketing is unlawful picketing. Cases involving the right of labor to picket peacefully have consistently held that the picketing must also be honest and truthful. McKay v. Retail Auto. S. L. Union No. 1067, supra, 16 Cal.2d at page 319, 320, 106 P.2d 373; Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 682, 683, 123 P.2d 20; Euclid Candy Co. v. International Longshoremen, 49 Cal.App.2d 137, 143, 121 P.2d 91; cf. Davitt v. American Bakers' Union, 124 Cal. 99, 56 P. 775; Weist v. Dirks, 215 Ind. 568, 20 N.E.2d 969, 971; Wilner v. Bless, 243 N.Y. 544, 154 N.E. 598; Olympia Operating Co. v. Costello, 278 Mass. 125, 179 N. E. 804; 1 Teller, Labor Disputes and Collective Bargaining (1940), §§ 126–128, pp. 388, et seq. In certain cases it has been difficult to determine whether the particular signs used in picketing were actually false (cf. Teller, op. cit. supra; (1941) 29 Cal.L.Rev. 366, 370, n. 12), but since there is no challenge to the trial court's finding upon this point it is unnecessary in the present case to consider the question. Conceding, in effect, that the picketing in the present case conveyed false information to the public, defendants contend that the action of the trial court should be sustained upon the ground that equity will not enjoin picketing under such circumstances because it is so closely identified with the constitutional right of free speech. In support of this proposition defendants rely upon cases which set forth the principle that equity will not grant injunctive relief against the publication of what might be, after publication, a libel or slander. Dailey v. Superior Court, 112 Cal. 94, 44 P. 458, 32 L.R.A. 273, 53 Am.St.Rep. 160; In re Wood, 194 Cal. 49, 60, 227 P. 908; cf. People v. Armentrout, 118 Cal.App.Supp. 761, 769, 1 P.2d 556; Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 434, 86 P. 806, 8 L.R.A.,N.S. 460, 117 Am.St. Rep. 145, 9 Ann.Cas. 1219. Defendants' position in this regard cannot be sustained. If defendants had remained at home and had uttered false statements concerning

plaintiff, the rule cited might have been relied upon. Not so in the present case, however, for assuming that the rule is correct, here is not the utterance of false statements which is sought to be enjoined, but the conduct of picketing in an unlawful manner. The rule in this regard is analogous to the principle that while equity will not ordinarily enjoin activity which is criminal in nature, neither will it refuse to act where an independent ground for relief is presented merely because the acts sought to be enjoined are also criminal. See 5 Pomeroy, Equity Jurisprudence, Equitable Remedies, 2d Ed., § 2050, p. 4630. Despite theoretical criticism (see 1 Teller, op. cit. supra, p. 404; (1941) 29 Cal.L.Rev. 366, 377, 378) and despite the fact that the publication of false statements alone will not justify equitable relief, it is the nearly unanimous rule throughout the country that equity will intervene where false or fraudulent statements are combined with picketing and where, under local policy, this renders the picketing illegal. Cf. McKay v. Retail Auto. S. L. Union No. 1067, supra; J. H. & S. Theatres v. Fay, 260 N.Y. 315, 183 N.E. 509, 512; Wilner v. Bless, supra; Wiest v. Dirks, supra; Olympia Operating Co. v. Costello, supra; 1 Teller, op. cit. supra, p. 388, et seq.; (1941) 90 U. of Pa.L.Rev. 201, 211-212; (1941) 41 Columb.L.Rev. 89, 101, n. 79-80; 116 A.L.R. 484, 497; 27 A.L.R. 651, 653.

[2, 3] The basis for equity's intervention in cases such as this rests upon the fact that picketing is one of the forms of collective labor activity which seeks to exert economic pressure upon an employer. See Restatement, Torts, § 796 et seq. As was said in a recent opinion of the United States Supreme Court, "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." Bakery and Pastry Drivers and Helpers, etc., v. Wohl, supra, 62 S.Ct. at page 819, Douglas, J. concurring. Such collective labor activity is permissible only when conducted according to the requirements imposed by law, and if in violation of such requirements, picketing is subject under ordinary circumstances to the restraint of a court of equity. 1 Teller, op. cit. supra, chap. 8, pp. 319, et seq. The standards imposed for determining whether picketing is lawful and permissible, or unlawful and enjoinable, are matters of state law which have varied from time to time and from jurisdiction to jurisdiction. See (1940) 39 Mich.L.Rev. 110, 111; (1941) 26 Corn.L.Q. 470, 471-472. Thus, at various times in the past picketing has been enjoined on the theory that it is unlawful per se (Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; 1 Teller, op. cit. supra, § 112), or on the theory that it is unlawful in the absence of a dispute between employer and employee. See 1 Teller, op. cit. supra, § 117, et seq. Neither of these criteria for determining the legality of picketing has application in California today, but violent picketing and untruthful picketing remain unlawful. See McKay v. Retail Auto. S. L. Union No. 1067, supra. Unless there is a statutory or constitutional restriction on the power of a court of equity under the circumstances here presented, therefore, it seems clear that plaintiff is entitled to a decree enjoining defendants from picketing falsely and untruthfully. See J. H. & S. Theatres v. Fay, supra; Olympia Operating Co. v. Costello, supra; 1 Teller, op. cit. supra, p. 388, et seq.

[4-6] There is no anti-injunction statute which places a restraint upon the power of courts of equity in this state where labor disputes are involved. Defendants suggest, however, that the constitutional guarantee of freedom of speech constitutes a bar to the intervention of equity where untruthful picketing is involved. There is no suggestion in our cases that the provisions of the California Constitution should be so interpreted, but defendants cite certain recent decisions of the United States Supreme Court. These cases, it is true, have held that where individual states set up standards which define picketing as lawful or unlawful and where such standards are sought to be enforced by the power of equity, the state policy is subordinate to the constitutional guarantee of free speech. American Federation of Labor v. Swing, supra; Bakery and Pastry Drivers and Helpers, etc., v. Wohl, supra; see (1941) 90 U. of Pa.L.Rev. 201, 202; (1941) 29 Cal.L.Rev. 366, et seq. Thus, where the state of Illinois sought to enjoin picketing as unlawful because there was no controversy between the employer and his employees, the state policy was overruled because it was held to constitute an unwarranted infringement of the guarantee of free speech. Swing v. American Federa-

tion of Labor, 372 Ill. 91, 22 N.E.2d 857, reversed in American Federation of Labor v. Swing, supra; cf. Miller's, Inc., v. Journeymen Tailors Union Local No. 195, N.J. Ch., 15 A.2d 822, reversed in Journeymen Tailors Union Local No. 195 v. Miller's, Inc., 312 U.S. 658, 61 S.Ct. 732, 85 L.Ed. 1106. Similarly where the state of New York sought to enjoin picketing as unlawful in the absence of any labor dispute the state policy was reversed. Wohl v. Bakery & Pastry Drivers & Helpers, etc., 259 App.Div. 868, 19 N.Y.S.2d 811, affirmed 284 N.Y. 788, 31 N.E.2d 765, reversed in Bakery and Pastry Drivers and Helpers, etc., v. Wohl, supra. In the Wohl case, supra, the court made it perfectly clear that the picketing involved was truthful in nature and in the Swing case, supra, where it was charged in the trial court that the placards were false, the Supreme Court specifically indicated that it was forced to reverse the judgment of the highest state court because that court apparently rested the injunction solely upon the absence of a dispute between the employer and his employees. We find no suggestion in these cases, therefore, that a state policy characterizing untruthful picketing as unlawful and enjoinable is in violation of the constitutional provision. Cf. (1940) 39 Mich. L.Rev. 110, 118; (1941) 90 U. of Pa. L. Rev. 201, 211-212. The right to restrain the use of false or untruthful statements made in connection with picketing does not restrict the right to picket peacefully and honestly. It is a familiar doctrine of equity that the scope of the injunction will be limited to the wrongful act sought to be prevented. The effect of the decree is to protect every legitimate right of the defendants and at the same time prevent unlawful interference with the rights of plaintiffs. The policy of this state which characterizes the use of false or fraudulent statements in picketing as unlawful is within the permissible limits which a state may impose upon industrial combatants without impairing the right of free speech. See Thornhill v. Alabama, 310 U.S. 88, 104, 105, 60 S.Ct. 736, 84 L.Ed. 1093. Under the facts set forth in this case, therefore, plaintiffs are entitled to a decree restraining defendants from the use of false or untruthful statements in the exercise of their right to picket.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. I do not agree with the proposition that picketing in connection with a labor controversy may be enjoined if any false or untruthful statements are made or displayed on a banner used in connection with such picketing. There is no sound basis for a distinction between the publication by a newspaper of false and untrue statements, and the dissemination of such statements orally or by banners in the process of picketing. If an injunction will not lie in one case it should not in the other. If picketing may be enjoined because false statements are made, then the publication of a newspaper should be for similar reasons enjoined.

It is conceded in the majority opinion that equity will not grant injunctive relief against the publication of libel or slander. The attempted distinction between such a case and false statements in picketing cases begs the question and pursues a course of specious reasoning. It is said in the majority opinion: "Defendants' position in this regard cannot be sustained if defendants had remained at home and had uttered false statements concerning plaintiff, the rule cited [that libel may not be enjoined] might have been relied upon. Not so in the present case, however, for assuming that the rule [no injunction in libel and slander cases] is correct, here *is not the utterance of false statements which is sought to be enjoined, but the conduct of picketing in an unlawful manner.*" It then proceeds to announce that the use of false statements in picketing makes the picketing unlawful, and that unlawful picketing may be enjoined. That argument is tantamount to asserting that the unlawful act of the publication of false statements, standing alone, will not be restrained, but when that act is combined with the performance of *admittedly lawful acts,* namely, picketing, the latter will be restrained. In other words, the more inexcusable the acts of the wrongdoer, the less the punishment or restraint. If *all* of his conduct is unlawful, he goes blithely on his way immune from interference by equity, but if he combines proper and improper conduct he is amenable to the equitable processes and his lawful conduct may be restrained as well as his unlawful conduct. Furthermore, returning again to the analogy of the publication of libel by a newspaper, it might be reasoned that, under the rule stated it is not the printing of the libelous matter that may be enjoined, but the publication of a newspaper containing such matter is an unlawful business and may be enjoined. An attempt was made by the Minnesota Legislature upon that precise reasoning by the enactment of a statute authorizing the restraint of one engaging in the business of publishing a malicious, scandalous and defamatory newspaper. And although it was conceded that the newspaper was within the terms of the statute, the Supreme Court of the United States struck the statute down in no uncertain terms in Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 628, 75 L.Ed. 1357. The court would not brook any such preventive measures against the freedom of the press. Freedom of speech is no less sacred than freedom of the press and there is no reason why a newspaper should have special privileges that are not accorded to labor organizations or any other persons. An injunction is as much a preventive measure as a statute. The reasoning in the Near case is particularly applicable to the case at bar. The court there said: " 'The statute,' said the state court, 'is *not directed at threatened libel* but at *an existing business* which, generally speaking, involves more than libel'." (Emphasis added.) Then again at page 713 of 283 U.S., at page 630 of 51 S.Ct., 75 L.Ed. 1357:

"If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. *This is of the essence of censorship.* [Emphasis added.]

"The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.' 4 Bl.Com. 151, 152; see Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said, 'the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the executive, as in Great Britain, but from legislative restraint also.' Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543. This Court said, in Patterson v. Colorado, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879, 10 Ann.Cas. 689: 'In the first place, the main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. Commonwealth v. Blanding, 3 Pick.(Mass.) 304, 313, 314 (15 Am.Dec. 214); Respublica v. Oswald, 1 Dall. 319, 325, 1 L.Ed. 155, 158 [1 Am.Dec. 246]. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. Commonwealth v. Blanding, ubi supra; 4 Bl.Com. 150.'

"The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by State and Federal Constitutions. The point of criticism has been 'that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions,' and that 'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.' 2 Cooley, Const.Lim. (8th Ed.) p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common-law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our Constitutions. Id. pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. Patterson v. Colorado, supra; Toledo Newspaper Co. v. United States, 247 U.S. 402, 419, 38 S.Ct. 560, 62 L.Ed. 1186. In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the state appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction,—that is, for restraint upon publication.

"The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. *But the limitation has been recognized only in exceptional cases.* 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 249, 63 L.Ed. 470. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force. * * *'" (Emphasis added.)

And again at page 720 of 283 U.S., at page 632 of 51 S.Ct., 75 L.Ed. 1357:

"*In attempted justification of the statute, it is said that it deals not with publication per se, but with the 'business' of publishing defamation.* If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. *He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition.* If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. *Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint.* Similarly, it does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

"Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established." (Emphasis added.) In the case at bar the answer to the reasoning that the making of the false statements is not restrained but rather the picketing by false statements and also the reasoning that picketing when accompanied by false bannering is unlawful picketing and unlawful picketing may be enjoined, it may be said paraphrasing the language of the Supreme Court: "Characterizing the publication [the bannering of false statements] as a business [as the combination of the false bannering and picketing], and the business as a nuisance [the picketing as being enjoinable because unlawful], does not permit an invasion of the constitutional immunity against restraint."

No basis is given for the conclusion that the use of banners containing false statements makes picketing unlawful. It is merely a bald assertion of a policy which is antagonistic to picketing generally and which finds an easy method of preventing all picketing along with its correlative rights of freedom of speech, press and assembly when these rights are asserted in connection with labor disputes. If the same antagonism existed against newspapers, the same result would be reached and freedom of the press would be lost. Can it be said that under the Near case the United States Supreme Court would countenance a restraint on the distribution or sale of a libelous newspaper or its display for sale by vendors parading before a place of business? Certainly not. Any one injured may have recourse in an action at law for damages, and the public has its penal statutes against libel. It has never been contemplated that the equity courts should act as censor bureaus with all the multitude of difficult questions arising therefrom. There is no suggestion that the unlawful utterance of false statements in picketing tends to incite breach of the peace, violence, riots and the like. And there is no reason to suppose that such tendency would be any more apt to be present in the case of picketing than in the publication and distribution of a newspaper. In either case adequate civil and criminal penalties exist. If it were proper to restrain picketing where false bannering is used, a necessary requisite would be the occurrence of acts of violence in addition to the false bannering. Under no circumstances could false bannering alone make the picketing unlawful and subject to restraint without infringing upon the right of freedom of speech. As was said by the New York Court of Appeals in Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690, 694, 73 A.L.R. 669: "Equity does not intervene to restrain the publication of words on a mere showing of their falsity. Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163, 59 L.R.A. 310. It intervenes in those cases where restraint becomes essential to the preservation of a business or of other property interests threatened with *impairment by illegal combinations or by other tortious acts, the publication of the words being merely an instrument and incident.* Beck v. Railway Teamsters' Protective Union, supra [118 Mich. 497, 77 N.W. 13, 42 L.R.A. 407, 74 Am.St.Rep. 421]; Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 431, 31 S.Ct. 492, 55 L. Ed. 797, 34 L.R.A.,N.S., 874; Steinert & Sons Co. v. Tagen, 207 Mass. 394, 397, 93 N.E. 584, 32 L.R.A.,N.S., 1013; Hotel & Railroad News Co. v. Clark, 243 Mass, 317, 323, 137 N.E. 534; Allen Mfg. Co. v. Smith, 224 App.Div. 187, 191, 229 N.Y. S. 692; Pound, Equitable Relief against Defamation, 29 Harv.L.R. 640, 666; Chafee, Cases on Equitable Relief against Defamation (2d Ed.) 1930, collating the authorities." (Emphasis added.)

It is conceded in the majority opinion that peaceful picketing is a lawful and not a tortious act. In the case at bar there was no tortious conduct of any kind, the picketing being peaceful and orderly. Therefore, there was no business or property "threatened with impairment by illegal combinations or other tortious acts."

The reasons for which equity has refused to enjoin libel and slander are stated in 1 Teller, Labor Disputes & Collective Bargaining, p. 402: "Two reasons have been advanced for equity's refusal to extend injunctive relief to defamation cases. The first proceeds upon the ground that libel and slander affect a personal and not a property right, and are consequently beyond the scope of equity's jurisdiction as historically understood. The second objection is *found in the principle of constitutional law guaranteeing the right to free speech. 'Principles of free govern-*

ment,' says Dean Pound, 'require that preventive justice be in abeyance where the wrongs complained of involve printing, publishing or writing . . . Equity has no jurisdiction as a censor of publications.' The matter has been well expressed in Marx [& Haas] Jeans Clothing [Co.] v. Watson [Infra, 168 Mo. 133, 67 S.W. 393, 56 L.R.A. 951, 90 Am.St.Rep. 440] 'The two ideas—the one of absolute freedom "to say, write or publish whatever he will on any subject," coupled with responsibility therefor, and the other idea of preventing such free speech, free writing, or free publication—cannot coexist'." (Emphasis added.)

The right to picket, (publicize a labor dispute) is now squarely based upon the right of freedom of speech. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L. Ed. 1093. It necessarily follows therefore that the preventive measures such as injunctions, are not available where the false statements are made in the course of the picketing. All of the cases cited in the majority opinion authorizing injunctive relief were decided before the right to picket was squarely based on that constitutional guarantee or failed to consider the effect thereof. On the other hand respectable authority has held that an injunction against picketing is not proper even though false statements are made. See Truax v. Bisbee Local No. 380, Cooks' & Waiters' Union, 19 Ariz. 379, 171 P. 121; Marx & Haas Jeans Clothing Co. v. Watson, 168 Mo. 133, 67 S.W. 391, 56 L.R.A. 951, 90 Am.St.Rep. 440; Ex parte Tucker, 110 Tex. 335, 220 S.W. 75. This court recognized even at a time that all picketing could be enjoined, that the making of false statements while picketing could not be restrained. It is said in Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429, 434, 86 P. 806, 808, 8 L.R.A.,N.S., 460, 117 Am.St.Rep. 145, 9 Ann.Cas. 1219: "Some parts of the judgment seem to enjoin appellants from the mere expression of an opinion at any time or place as to plaintiff and its business, which would, at the worst, consist only of slander, *which could not be reached in this form of action* and seem to restrain them from doing other things which do not appear to be connected with or incidental to the main acts and threatened acts done at and in front of plaintiff's said places of business as above stated." (Emphasis added.)

It is absurd to say that equity will intervene where false bannering is used in picketing because property damage, as distinguished from personal damage, is suffered. The days have long since passed when the rights of property are more sacred than personal rights. The injury suffered by a person subjected to libel or slander is in most instances far more serious and less susceptible of being repaired by monetary damages than an injury to property. If freedom of speech compels that injunction be not issued in libel and slander cases when the injury suffered is personal, then for even more forceful reasons it should not be enjoined when merely a property right is invaded.

It is stated in the majority opinion that the trial court "found that the allegations of damage in the sum of $25,000 were untrue." If that is the case, then plaintiff has suffered no injury. If it has suffered no injury that alone is a sufficient basis for affirmance of the judgment denying the injunction. Certainly picketing by false statements may not be restrained where there is no showing that injury has resulted from it. Suppose the picket carried a placard upon which was inscribed "My name is John Doe" when in fact his name was Henry Jones. Although such statement would be false, it surely would not be grounds for an injunction restraining such conduct.

The record in the case at bar shows that in paragraph XV of the complaint it was alleged: "That by reason of *all* the acts and conduct of the defendants, as hereinabove set forth, committed by them in pursuance of said illegal combination, plan, scheme and conspiracy, and as the direct and proximate result thereof, *plaintiff has suffered, and will continue to suffer, great and irreparable injury, and damage to its business and to the good will thereof,* and the right to carry on its said business and to the business and contractual relationships existing between plaintiff and its customers and between plaintiff and its employees. That by reason of the above mentioned conduct of the defendants, the property right of plaintiff to carry on its business unmolested and the good will of plaintiff's business has been so greatly injured that plaintiff has been damaged in the sum of Twenty-five Thousand ($25,000.00) Dollars." (Emphasis added.) The court found all of those allegations untrue in the following language: "That paragraph XV of said complaint is untrue in the absence of evidence thereunder." It is beyond question therefore that plaintiff did not suffer injury.

If no injury was or will be suffered from the false bannering then there can be no occasion for an injunction. It is stated in Baker v. Retail Clerks' I. Protective Ass'n, etc., 313 Ill.App. 432, 40 N.E.2d 571, 574, involving an injunction in a picketing case: "An injunction will not lie merely to prevent the commission of a tort or crime without a showing of probable irreparable injury from a continuation of the wrongful act or acts sought to be enjoined." A person may not be awarded relief without injury. The judgment of the court for defendants should be affirmed on that ground alone, even if it be assumed that as a general proposition false statements employed in picketing make it unlawful.

No sound reason is given for adopting for the first time as the rule in this state, that the right of the publisher of a newspaper to freedom of the press is more sacred than that of a labor organization to publicize its views concerning a labor dispute. But that is the effect of the majority decision.

The only possible basis for holding that picketing by untruthful bannering is unlawful, is the doctrine of fraud and deceit or libel and slander. It cannot be predicated on the former because the persons relying upon the false representations rather than the person picketed would have to be the ones to complain. If it is based on the latter, then actual damage must be proved before such statements are unlawful unless they were libelous per se.

Turning again to the authorities relied upon by the majority opinion for the proposition that untruthful picketing is unlawful picketing and may be restrained, I find that none of them gave consideration to the basic right upon which picketing rests or gave any sound reason why it was unlawful; or the statements therein are merely dictum. The statement in the cases of McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; and Steiner v. Long Beach Local No. 128, 19 Cal.2d 676, 123 P.2d 20, that pickets must act honestly is dictum, and no consideration is given therein to the effect of such statement on the right of freedom of speech in relation thereto. The same is true of Euclid Candy Co. v. International Longshoreman, 49 Cal.App.2d 137, 121 P.2d 91; Davitt v. American Bakers' Union, 124 Cal. 99, 56 P. 775. The same bald statement alone is made in Weist v. Dirks, 215 Ind. 568, 20 N.E.2d 969; Wilner v. Bless, 243 N.Y. 544, 154 N.E. 598; Olympia Operating Co. v. Costello, 278 Mass. 125, 179 N.E. 804; and no discussion appears with reference to freedom of speech in any of these cases.

Because of my strong conviction that the preservation of the fundamental civil liberties of free speech, free press and free assembly is essential to the perpetuation of our democratic institutions, I view with alarm every encroachment against the exercise of these rights, whether such encroachment is directed against organized labor or other minority groups. If these rights can be abridged under the guise that what is said or published is false, it will just be a matter of time until freedom of expression will be curtailed in accordance with the will of the dominant group, who by providing the standard as to what constitutes truth or falsity can control publications of any character whether they be by word of mouth, placard, banner or what we now designate as a newspaper.

Furthermore, I am positively and unalterably against any form of discrimination in permitting the exercise of the fundamental personal rights guaranteed by our federal and state Constitutions. These rights are not only guaranteed to those who have sufficient power and influence to enforce their recognition, but like the air and the sunshine their beneficient attributes should be shared and enjoyed by the weak and humble and those who are struggling for their very existence.

I can see no reason whatever why publication of a false statement by a labor organization concerning the facts of a labor dispute should be subject to abatement by an injunction while a newspaper is privileged to publish false statements and be subject only to the redress afforded to those who claim that they have been libeled by such publication, namely, an action at law for damages.

In my opinion, the judgment in the case at bar should be affirmed.

53 Cal.App.2d 322

JORGENSEN et al. v. DAHLSTROM et al.

Civ. 6688.

District Court of Appeal, Third District, California.

July 8, 1942.

1. Gifts 🔑**49(2)**

In administrators' suit to quiet title to a joint tenancy savings bank account held by decedent and her daughter and to irrigation and improvement district warrants which decedent had given to daughter, evidence warranted judgment for daughter on ground that decedent was of sound mind and free from undue influence or fraud when account was created and warrants were given to daughter. Gen.Laws 1937, Act 652, § 15a.

2. Pleading 🔑**36(3)**
Trial 🔑**396(7)**

An unqualified admission in an answer of a clear and unambiguous allegation of a complaint is conclusive of the facts conceded and a contrary finding should be disregarded.

3. Pleading 🔑**127(2)**

In suit to quiet title to a joint tenancy savings bank account held by decedent and her daughter, an allegation in answer admitting that prior to her death decedent was owner of account was not an "admission" that decedent was sole owner of account at time of death in view of other allegations of answer.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission".

4. Pleading 🔑**34(1)**

Language of an answer should be construed as a whole to determine intention of pleader.

5. Pleading 🔑**259**

In suit to quiet title to a joint tenancy savings bank account, permitting defendants to amend answer by adding the word "tenancy" to statement that a "joint account" was created by written agreement of parties was proper, where addition of "tenancy" merely clarified intended statement of pleader and was proper. Code Civ.Proc. § 473.

6. Pleading 🔑**229, 230**

Reasonable amendments to pleadings should, in the interest of justice, be granted, and the statute concerning amendments to pleadings should be liberally construed to accomplish that purpose. Code Civ.Proc. § 473.

7. Evidence 🔑**397(3)**
Joint Tenancy 🔑**6**

In absence of fraud, unsound mind, or undue influence, the deposit or transfer of a fund in a bank as a joint tenancy account, payable to either or survivor of parties to agreement, vests title thereto immediately in each of them, and after the death of one of such depositors the fund becomes the absolute property of survivor, and under such circumstances, when written agreement creating joint tenancy account is clear, oral evidence in conflict therewith is incompetent. Gen.Laws 1937, Act 652, § 15a.

8. Joint tenancy 🔑**14**

In absence of fraud, unsound mind, or undue influence, the deposit of a fund in a bank as a joint tenancy account, payable to either or survivor of parties to agreement, becomes conclusive evidence, in an action in which the bank or survivor is a party, of intention of the owner to vest title in survivor. Gen.Laws 1937, Act 652, § 15a.

9. Gifts 🔑**38**

A conveyance from a parent to child is not void merely because of the confidential relationship which exists between them, and the relationship of parent and child, in and of itself, does not create an inference of imposition, undue influence, or fraud.

10. Gifts 🔑**47(3)**

Mere proof that a parent and child relationship exists between parties to a conveyance will not shift burden upon grantee to affirmatively prove that conveyance was voluntarily executed and was free from fraud or undue influence.

11. Gifts 🔑**49(2)**

Proof of a confidential relationship between parties to a conveyance coupled with activity by grantee in procuring execution of conveyance constitutes merely a "prima facie showing" of undue influence, which requires adequate evidence to rebut the presumption.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Showing".

12. Appeal and error 🔑1056(1)

In administrators' suit to quiet title to a joint tenancy savings bank account held by decedent and her daughter, sustaining daughter's objection to a question addressed to daughter on cross-examination inquiring whether daughter knew that her brother still acknowledged his debt to estate notwithstanding that decedent told him that she intended to cancel his indebtedness to her was not prejudicial, as against contention that evidence of acknowledgment would have been competent to show unreasonableness of assumption that decedent intended to give savings fund to daughter.

13. Evidence 🔑502, 558(1)

A broad scope of examination of witnesses is allowed with respect to the question of mental competency of a donor.

14. Joint tenancy 🔑14

In administrators' suit to quiet title to a joint tenancy savings bank account held by decedent and her daughter where case was tried on theory that decedent was of unsound mind and that account was created by decedent as result of undue influence exercised by daughter, testimony of decedent's business adviser that decedent had followed his advice in creating account was competent to show that account was voluntarily created by decedent, upon independent advice.

15. Gifts 🔑48
Wills 🔑54(1)

When mental condition of a donor or a testator is involved in a conveyance or a will, declarations of a decedent with relation thereto are competent, whether they are made before or after the transaction is completed, provided they are not too remote.

16. Evidence 🔑474(4)

Assistant manager of bank where decedent kept her accounts was competent to testify that bank considered decedent as one of very alert mind where witness testified that he knew decedent and had seen her once or twice a month for five years before decedent's death and that decedent was accustomed to talking with witness concerning decedent's business affairs. Code Civ. Proc., § 1870, subd. 10.

17. Evidence 🔑474(4)

A nonexpert witness may testify to an individual's characteristics of alertness of mind and manner in business transactions, without first qualifying as an intimate acquaintance under statutory provisions. Code Civ.Proc. § 1870, subd. 10.

18. Appeal and error 🔑533(1), 717

Ordinarily, an opinion of a trial court is no part of the "record" on appeal and may not be considered by a reviewing court, but where a written document which is referred to in the minute order and filed by the trial court specifically determines a motion to strike out evidence, the document becomes a part of the court's order and may be considered in determining what the court decided.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

19. Appeal and error 🔑926(5)

Where that portion of trial court's ruling admitting evidence for certain purposes was not before district court of appeal, the latter court was bound to assume, in support of judgment, that the ruling specifically limited application of evidence to purposes for which it was competent.

20. Evidence 🔑474(4)

Evidence that decedent's business adviser had known decedent for 12 years and that decedent was accustomed to consult with adviser frequently regarding decedent's family affairs and property interests warranted conclusion that adviser was an "intimate acquaintance" of decedent within contemplation of statute and that adviser was qualified to give an opinion regarding decedent's mental condition. Code Civ.Proc. § 1870, subd. 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Intimate Acquaintance".

21. Appeal and error 🔑971(2)
Evidence 🔑498½

Whether a witness has been shown to be an "intimate acquaintance" within the statute of one whose mental soundness is challenged is addressed to sound discretion of the trial judge, and, except for an abuse of that discretion, a reviewing court may not interfere with trial judge's determination in that regard. Code Civ.Proc. § 1870, subd. 10.

22. Evidence 🔑474(4)

Where case was tried on theory that decedent was of unsound mind, testimony of decedent's business adviser that decedent was a shrewd investor and that her mental condition was good was competent, where adviser was an intimate acquaintance of decedent. Code Civ.Proc. § 1870, subd. 10.

23. Joint tenancy ⚷14

Where case was tried on theory that account was created by decedent as result of undue influence exercised by daughter, evidence consisting of statements of decedent's bank accounts and notes executed to decedent by one of the administrators, who was decedent's son, and his deceased brother for loans previously secured by them from decedent was competent on issue of undue influence.

24. Evidence ⚷448, 474(14)

In administrators' suit to quiet title to a joint tenancy savings bank account held by decedent and her daughter, testimony of assistant manager of bank where decedent had kept her accounts respecting the accounts and genuineness of decedent's signature on joint tenancy agreement and other documents was competent, where such testimony did not vary terms of written instruments, but was merely explanatory thereof.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Suit by A. C. Jorgensen and another, as administrators of the estate of Maren K. Jorgensen, deceased, against Alma C. Dahlstrom and others, to quiet title to a bank account and to irrigation and improvement district warrants. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Harold L. Hjelm and Donald B. Fowler, both of Turlock, and C. Ray Robinson and Willard Treadwell, both of Merced, for appellants.

Frank C. Damrell and Thomas C. Boone, both of Modesto, for respondents.

THOMPSON, Justice.

The plaintiffs, as administrators of the estate of their mother, Maren K. Jorgensen, deceased, have appealed from a judgment quieting title in their married sister Alma C. Dahlstrom, to a $10,000 joint tenancy bank account and to irrigation and improvement district warrants of the face value of $6,411.20, which were given to her by her mother, but which were alleged to belong to the estate. The complaint fails to allege that the deceased was of unsound mind or that the property was procured by means of undue influence exercised by the daughter, but the cause was tried on the theory that those issues were involved. The court adopted findings favorable to the defendants in every respect. Judgment was rendered accordingly. A motion for new trial was denied. From that judgment this appeal was perfected.

The appellants contend that the findings do not uphold the judgment; that the judgment is not supported by the evidence, chiefly because the defendant, Mrs. Dahlstrom, failed to sustain the burden imposed upon her on account of the confidential relationship existing between herself and her mother, to prove that the property was not procured by means of undue influence. It is also asserted the court erred in granting defendants' motion to amend their answer, and also erred in receiving and rejecting evidence at the trial, and in denying plaintiffs' motion for a new trial.

Maren K. Jorgensen was a widow sixty-eight years of age. Her husband had been dead several years. The plaintiffs are her sons. Alma C. Dahlstrom is her daughter. The children are married and live in their separate homes in or near Turlock. Until a short time before her death Mrs. Jorgensen lived by herself in her own home in that city. She was possessed of real and personal property of considerable value. Her home was worth $3,850. She owned the irrigation and improvement district bonds previously mentioned, which were of uncertain value. She had a savings account in the Bank of America in the sum of $10,000, together with an open bank account, household goods, several promissory notes and other collateral securities. She was apparently on the best of terms with all of her children. She was liberal in aiding them financially in times of need. Over a period of several years she had loaned her son Ansell $3,700, for which she held his unpaid notes, one of which was secured by a chattel mortgage.

Mrs. Jorgensen was an intelligent, active woman who was mentally and physically capable of looking after her own business affairs. After the death of her husband, she was accustomed to consult with Mr. A. C. McPheeters, a prominent local broker, and with the officers of her bank regarding important business transactions. A year and a half before her death she told Mr. McPheeters she intended to convert her $10,000 savings account into a joint tenancy account to the credit of herself and her daughter Alma. July 6, 1937, on the occasion of the birthday of her daughter, she voluntarily gave to her the irrigation ditch and improvement district warrants, saying, "Here, Alma * * * here is a happy birthday to you." Mrs. Jorgensen then said, "There is some there in the package that are defaulted, * * * Whatever you get out of them" is your property. Mrs. Jorgensen held the note of her son, Ansell, for the aggregate sum of $3,700. Sometime prior to her death she gave these notes to him, saying, "Here, Ansell here is all your papers * * * you go out in the kitchen and burn them." He accepted the notes and complied with her request by burning them. She then said to him, "I treat my children the way they treat me." There appears to have been no plan, activity or previous knowledge on the part of any of the children of her intention to give them the property.

Mrs. Jorgensen developed a serious ailment a few months prior to her death. The daughter, Alma, drove her to Modesto daily for six weeks prior to her death, so that she might secure medical treatment. On January 3, 1938, after having advised with Mr. McPheeters and with an officer in her bank, regarding the transfer of funds, Mrs. Jorgensen obtained from the bank a printed form of agreement for the purpose of creating a joint tenancy account of her $10,000 savings fund, with her daughter Alma. The daughter was not present in the bank when she discussed that transaction and procured the form for the agreement; nor had the mother previously discussed that matter with her daughter. That document contains the following significant language:

"* * * * * *

"(2) That all funds now to the credit of or which may hereafter be placed to the credit of this account are and shall be the property of the undersigned JOINT TENANTS to be withdrawn as follows:

"Upon the signature(s) of either of us, *or our survivor(s).*

"(3) That in the event of the death of either of us, the survivor(s) will notify the bank at once."

[1] This agreement was taken home and signed by Mrs. Jorgensen. She then handed it to her daughter and told her she intended to create a joint tenancy in that fund, in favor of both of them, and asked the daughter to sign the document and return it to the bank. She said, "Alma * * * I am turning the Bank of America account over to you. * * * There is enough there for both you and Dolores, and I do hope that you see that Dolores goes on with her music." Dolores is the daughter of Alma C. Dahlstrom. The joint tenancy card was not at once signed by Mrs. Dahlstrom. Two or three days later her mother asked her if she had attended to that matter. When she replied that she had not, Mrs. Jorgensen asked her if she did not want that money. The daughter replied, "Why, yes, mother." Mrs. Jorgensen then told her she had better attend to signing and returning the card to the bank at once. Thereupon Mrs. Dahlstrom signed the card and returned it to the bank on January 7, 1938. There is an abundance of evidence indicating that this joint tenancy account was created by Mrs. Jorgensen voluntarily, after consulting with her business advisers, and without any activity or inducement therefor on the part of her daughter. The evidence satisfactorily shows that the mother was of sound mind and free from undue influence.

January 5, 1938, Doctor Eric Julien, of Turlock, diagnosed Mrs. Jorgensen's ailment as arteriosclerosis, or hardening of the arteries, causing chronic heart disease. The doctor visited her daily from that time until her death which occurred on January 27, 1938. He testified that she was clear headed, mentally sound, and capable of transacting business affairs to the date of her death.

Upon application therefor, her two living sons, Charles H. and A. C. Jorgensen, were duly appointed administrators of the estate of Mrs. Jorgensen, deceased. This suit to quiet title to the $10,000 bank account and to the irrigation ditch and improvement district warrants was instituted. The complaint fails to charge the defendant, Alma C. Dahlstrom, with securing possession of the property in question by means of fraud or undue influence. The pleading does not intimate that the deceased was of unsound mind. The answer denies that the estate has any right, title or interest in the property, and upon the contrary alleged that the warrants were voluntarily given to Alma C. Dahlstrom by her mother, and that Mrs. Jorgensen created in herself and her daughter, Alma, a "joint account" in said bank fund, by a written agreement signed by both parties and delivered to the Bank of America on January 7, 1938, which fund, upon the death of Mrs. Jorgensen, which occurred January 27, 1938, became the absolute property of the defendant, Mrs. Dahlstrom.

Upon notice and motion of the defendants, under section 473 of the Code of Civil Procedure, the court duly authorized an amendment of the answer alleging that the bank account was, by the written agreement of the deceased and her daughter, Alma, converted into their "joint *tenancy* account" on said 7th day of January, 1938, and that sole title thereto passed to the daughter upon the death of her mother.

The court adopted findings favorable to the defendant Alma C. Dahlstrom, in every respect. It was determined that the property in question was formerly owned by the deceased, Maren K. Jorgensen; that she gave to her daughter, Alma, the irrigation ditch and improvement district warrants described in the complaint, as a gift, on July 6, 1937; that the daughter thereupon became and now is the owner thereof, and that the estate has no right, title or interest in said warrants; that on January 7, 1938, the deceased voluntarily transferred her $10,000 bank account into a joint tenancy account for herself and her daughter, by their written agreement signed, dated and filed with the Bank of America at Turlock on said last-mentioned date, and that, upon the death of the mother that fund became the absolute property of the surviving daughter; that Maren K. Jorgensen was free from the exercise of fraud, deception, coercion or undue influence on the part of her daughter, Alma, which affected the conveyance of said property, and, on the contrary, that the mother relied on independent advice in doing so; that the defendant Alma C. Dahlstrom is the sole owner of said fund of $10,000, and that the estate of said deceased has no right, title or interest therein. Judgment was thereupon rendered quieting title to the property in question in the defendant, Alma C. Dahlstrom. A motion for new trial was denied. From that judgment this appeal was perfected.

[2-4] We are of the opinion the judgment is supported by the findings. It is contended that language in the fifth paragraph of the answer constitutes an admission on the part of the defendants that until the time of her death Maren K. Jorgensen was sole owner of the bank account, which is inconsistent with the finding that she created a joint tenancy account therein in favor of her daughter; that the admission of the pleading is conclusive of that fact, and that the judgment is therefore not supported by the findings in that regard. No authority is cited upon that point. We realize that an unqualified admission in an answer, of a clear and unambiguous allegation of a complaint is deemed to be conclusive of the fact conceded and that a contrary finding should be disregarded. White v. Douglass, 71 Cal. 115, 119, 11 P. 860; In re Doyle's Estate, 73 Cal. 564, 571, 15 P. 125; Stoneman v. Fritz, 34 Cal.App.2d 26, 92 P.2d 1035; 2 Cal.Jur. 818, § 481. In the present case, however, the answer specifically denies every allegation of the complaint to the effect that the estate was the owner or entitled to possession of the bank fund in question. The answer does admit that "*prior* to the death Maren K. Jorgensen *was* the owner and entitled to the possession of the sum of $10,000." But, following immediately after that statement in the same paragraph, the answer, as amended, specifically alleges that, "On or about the 7th day of January, 1938, the said money was transferred into a joint tenancy account standing in the names of Maren K. Jorgensen and defendant Alma C. Dahlstrom." The answer elsewhere also specifically alleges the creation of the joint tenancy account and asserts that the sole title thereto vested in the daughter at the time of the death of her mother, and that the estate has no right, title or interest therein. The clear language of the answer, even before it was amended, refutes the appellants' claim that the defendants admitted that the deceased was the sole owner of the bank fund *at the time of her death*. The answer may be reasonably construed to mean that the defendants conceded that *sometime prior to her death* the mother was the exclusive owner of that bank account, but that, upon her death it vested absolutely in her daughter, Alma. The language of the answer should be construed as a whole to determine the intention of the pleader. No demurrer to the answer was filed on the ground of uncertainty or otherwise. The judgment is fully supported by the findings in that regard.

[5, 6] The court properly granted defendants' motion to amend the answer, under section 473 of the Code of Civil Procedure, by adding the word "tenancy" to the statement that a "joint account" was created by the written agreement of the

parties. That allegation now reads that the said money was transferred into "a joint *tenancy* account." The addition of that word did not change the substance of the allegations of that paragraph construed in its entirety. It merely clarified the intended statement of the pleader. It has been uniformly held that reasonable amendments to pleadings should, in the interest of justice, be granted, and that section 473, supra, should be liberally construed to accomplish that purpose. County of Los Angeles v. Lewis, 179 Cal. 398, 177 P. 154; Weck v. Sucher, 96 Cal.App. 422, 274 P. 579; 21 Cal.Jur. 183, § 127.

[7, 8] In the absence of fraud, unsound mind or undue influence, the deposit or transfer of a fund in a bank as a joint tenancy account, payable to either or the survivor of the parties to the agreement, vests the title thereto immediately in each of them and after the death of one of such depositors the fund becomes the absolute property of the survivor. California Bank Act St.1909, p. 87, § 15a, as amended, Stats.1921, p. 1367, 1 Deering's Gen. Laws of 1937, p. 221, Act 652. Under such circumstances, when the written agreement creating the joint tenancy account is clear and unambiguous, oral evidence in conflict therewith is incompetent. In re Kellogg, 41 Cal.App.2d 833, 843, 107 P.2d 964. Moreover, under such circumstances, the deposit becomes conclusive evidence, in an action in which the bank or the survivor is a party, of the intention of the owner to vest the title in the survivor. In the last paragraph of section 15a of the Bank Act, it is said: "The making of the deposit in such form shall, in the absence of fraud or undue influence, *be conclusive evidence,* in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors." (Italics added.)

With respect to the admissibility of oral evidence tending to show an intention of the parties to a joint tenancy account, at variance with the written agreement, a different rule from the one previously announced prevails in an action between the joint tenants during the lifetime of both parties. Hill v. Badeljy, 107 Cal.App. 598, 604, 290 P. 637; Spear v. Farwell, 5 Cal.App.2d 111, 113, 42 P.2d 391; In re Kellogg, supra.

It follows that if the court in this case properly found that Mrs. Jorgensen was of sound mind and free from undue influence, her written agreement created a joint tenancy account which is *conclusive evidence* of her intention to vest the title thereto in her daughter, absolutely, at the time of the mother's death.

The findings and judgment are adequately supported by the evidence. Indeed, a critical examination of the record discloses the fact that there is no substantial evidence that Alma C. Dahlstrom attempted to exercise undue influence, or even resorted to any activity whatever to obtain from her mother the gift of warrants or the creation of the joint tenancy account in the bank. We are thoroughly convinced from the evidence that Mrs. Jorgensen was intelligent, sound-minded and capable of understanding and transacting her own business affairs at all times to the very date of her death, and that she voluntarily gave to her daughter the warrants in question and created the joint tenancy in the savings bank account of her own free will, without any solicitation or influence, undue or otherwise, exerted upon her by her daughter. It is not seriously contended that Mrs. Jorgensen was of unsound mind. The appellants seem to concede there is no evidence to upset the court's finding that the irrigation ditch and improvement district warrants were presented by the deceased to her daughter as a birthday gift, six months before her death.

With respect to the creation of the joint tenancy account the only serious contention of the appellants is that since a confidential relationship existed between the mother and the daughter, the burden therefore shifted to the defendant Alma C. Dahlstrom to overcome the presumption of law that she procured the creation of the joint tenancy account by means of undue influence, and that she failed to meet that burden.

[9] A conveyance of property from a parent to her child is not deemed to be void merely because of the confidential relationship which exists between them. Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910; 20 Cal.Jur. 442, §§ 40, 41. In the text last cited it is said: "It certainly is not true that the relationship of parent and child, in and of itself, is creative of any inference of imposition, undue influence or fraud."

In 2 Jones Comm. on Evidence, 2d edition, page 1055, section 552, it is said, regarding a gift of property from a parent to his child: "It cannot be deemed prima facie void; the presumption is in favor of its validity; and, in order to set it aside, the court must be satisfied that it was not the voluntary act of the donor."

[10, 11] Nor is it true that mere proof of the relationship of parent and child which exists between the parties to a conveyance of property, will *shift the burden* upon the grantee to affirmatively prove that it was voluntarily executed and free from fraud or undue influence. Estate of Hansen, 38 Cal.App.2d 99, 116, 100 P.2d 776 785. The proof of a confidential relationship *coupled with activity* in procuring the execution of a conveyance or a will is merely deemed to constitute a prima facie showing of undue influence, which requires adequate evidence to rebut the presumption. In the case last cited it is said in that regard: "When a presumption of undue influence is raised by showing the existence of a confidential relationship, coupled with activity * * * a *prima facie* showing of undue influence is thereby established which *in the absence of evidence to the contrary,* necessarily has the effect of invalidating the will. * * * To overcome that prima facie showing it becomes necessary for the proponent to rebut the presumption by evidence which, at least, will have the effect of balancing the *prima facie* showing." (Italics added.)

In the present case there is an abundance of evidence to overcome the bare showing that the relationship of mother and daughter existed between the parties to the joint tenancy bank account agreement which is involved on this appeal. The mother had independent advice regarding that transfer of property. She talked with her business adviser and friend, Mr. McPheeters, about that very transfer to her daughter, after her husband died, and about a year and a half before it was actually done. Mrs. Jorgensen was intelligent, clear-minded and evidently possessed unusual initiative and will-power for a woman of her age. There was no previous conversation between the mother and daughter regarding that transaction. The mother was alone when she visited the bank and talked with a bank employee about the transfer of the fund, and when she procured the form required for creating that joint tenancy account. She took the document home and signed it before she handed it to her daughter and told her to execute and return it to the bank. Apparently that is the first time she told her daughter about her purpose to make the transfer. The daughter exhibited no anxiety or haste in obtaining the agreement. She let the document lay around the house for several days. After two or three days had passed the mother asked her daughter if she had signed and returned the joint tenancy card to the bank. When the daughter replied that she had not done so, the mother urged her to sign and return the agreement at once. At the urgent request of Mrs. Jorgensen, that was done about twenty days before her death. Far from showing activity on the part of the daughter to procure the conveyance of the interest in the joint tenancy account, the evidence shows that Mrs. Jorgensen, after securing independent advice, voluntarily created that joint tenancy account, of her own free will, with full realization that it would have the effect of conveying the absolute title in that fund to her daughter upon her death. The findings of the court and the judgment to the effect that the joint tenancy account was voluntarily transferred to Mrs. Dahlstrom by her mother, entirely free from undue influence or fraud, are adequately supported by the evidence.

There is no substantial evidence that Mrs. Jorgensen was of unsound mind.

[12] It was not prejudicial error for the court to sustain defendants' objection to a question propounded by plaintiffs' attorney to Alma C. Dahlstrom, on cross-examination, inquiring whether she did not know that her brother Ansell still acknowledged his debt of $3,700 to the estate, in spite of the fact that his mother handed him his notes for that amount and told him, in effect, that she intended to cancel the debt and that she wanted him to burn the notes, which he did. It is contended this evidence of his acknowledgment of the debt would have been competent to show the unreasonableness of the assumption that Mrs. Jorgensen intended to give her daughter the savings fund of $10,000 on the theory that she had also made similar "advancements" to her sons, which were to be subsequently charged against them in distribution of the mother's estate.

[13] In view of the broad scope of examination which is allowed in suits in which the question of the mental competency of the donor of a gift of property is involved, that evidence might have been properly re-

ceived. However, the question of "advancements" to the children, to be charged against the estate, was not involved in this case. It was not contended that the gifts of the bank account and the improvement district warrants to Mrs. Dahlstrom were made *as advancements* against the estate. Moreover, the subject of the cancellation of those notes of Ansell was fully covered in his subsequent unrestricted examination as a witness. He corroborated in every detail his sister's testimony in that regard. He said that his mother, in the presence of his sister Alma, asked for an envelope upon which his name was written, and that she then opened and carefully examined its contents, saying to him: "Ansell, I have got something I want to give you. * * * I want you to burn those papers. * * * You have paid me a lot on it * * * and I have never kept track of what you have paid me. * * * You burn those papers. * * * They are all here, I guess. * * *" Handing the documents to him, she said: "Now, Ansell, you burn those papers."

He testified that the envelope contained the notes which he had previously given to his mother to represent several loans of money which he had procured from her, together with one chattel mortgage. He said he did not know that his mother had even recorded the chattel mortgage. He admitted that he and his sister then burned the documents in the kitchen stove, as he was requested to do.

In a subsequent lengthy examination of Ansell which was not restricted in any particular, the entire subject-matter appears to have been fully covered. Plaintiffs then had every opportunity to ask him if it was not true that he did not accept the notes from his mother as a gift, and, on the contrary, if he did not still consider himself indebted to the estate. No such question was asked of him. If he had so stated, it would have been inconsistent with his unqualified admissions regarding that transaction. At least the order sustaining the former question was harmless.

[14, 15] The court did not err in permitting Mr. McPheeters to testify that Mrs. Jorgensen consulted him regarding her desire to give some of her property to her children. He said she told him she wanted to give her savings bank account to her daughter. He said she frequently discussed with him her various business transactions. He advised her to procure from the bank a printed form for creating a joint tenancy account, which the bank was accustomed to use, and to execute it herself and have her daughter also sign it, and then file it with the bank. He explained the result of that transaction, saying that the title would then vest in her daughter upon the death of Mrs. Jorgensen. He said that she followed his advice and transferred the account in that manner. That evidence was competent to show that the creation of the joint tenancy account was voluntarily made by the deceased, upon the independent advice of an expert broker and friend whom she was accustomed to consult regarding her business transactions. That evidence was directly addressed to the issue of undue influence. The fact that she acted voluntarily with independent advice in arranging to give that savings fund to her daughter refutes the theory that it was procured by undue influence. When the mental condition of a donor or a testator is involved in a conveyance or a will, the declarations of a decedent with relation thereto are competent, whether they are made before or after the transaction is completed, provided they are not too remote. (4 Jones Comm. on Evidence [2d ed.] 2949, § 1614.)

The court did not err in permitting W. W. Ferguson, the assistant manager of the Bank of America, where Mrs. Jorgensen had kept her accounts for many years, to testify regarding numerous business transactions which he had discussed with her, that: "In all the transactions we had with her, why, we considered her a woman of very alert mind and positive in her manner. * * * I would consider that Mrs. Jorgensen was a very alert business woman."

[16, 17] The witness said that he knew Mrs. Jorgensen well, and that he had seen her at least once or twice a month, or possibly every week for five years before her death, and that she was accustomed to talk with him about her business affairs and property interests. The challenged statements are competent evidence of the characteristics of an individual which may be readily observed by an acquaintance who frequently comes in contact with her, and who is accustomed to discuss with her many business affairs. Such characteristics and traits may be testified to by a non-expert witness, without first qualifying as an intimate acquaintance under the provisions of section 1870, subdivision 10, of the Code of Civil Procedure. People v. Lavelle, 71

Cal. 351, 12 P. 226; People v. Manoogian, 141 Cal. 592, 75 P. 177.

[18, 19] The appellants contend that the court erred in permitting Mr. McPheeters to testify regarding Mrs. Jorgensen that she was "a very shrewd investor" and that "her mental condition was good," for the reason that it does not appear he was an intimate acquaintance of the deceased. The plaintiffs also moved to strike those answers from the record on the same ground. That motion was denied, as the minute order shows, "with limitations expressed in the opinion filed herein." We assume that "opinion," to which reference is made in the minute order, contains the decision of the court prescribing the limitation of the application of the evidence, and the purpose and extent for which it is conditionally permitted to remain in the record. That part of the decision is not before us. Ordinarily an opinion of a trial court is no part of the record on appeal, and may not be considered by a reviewing court. But where a written document which is referred to in the minute order and filed by the court specifically determines the motion to strike out evidence, it becomes a part of the court's order and may be considered in determining what the court decided. Since that portion of the ruling is not before us, we must assume, in support of the judgment, that it specifically limited the application of the evidence to the purpose for which it is competent.

[20] Moreover, we are of the opinion the record contains sufficient evidence upon which the court was warranted in holding that the witness was an intimate acquaintance of Mrs. Jorgensen, in contemplation of the provisions of section 1870, subdivision 10, of the Code of Civil Procedure, and that he was therefore qualified to testify to his opinion regarding her mental sanity.

[21] The evidence clearly shows that Mr. McPheeters was an expert broker in Turlock, of wide experience in business affairs; that he had known the deceased for twelve years, and that she was accustomed to consult with him frequently regarding her family affairs and her property interests; that she had often talked with him about rendering financial aid to her children, and had consulted him regarding her desire to give to her daughter the savings account which is involved in this suit, together with the manner of accomplishing that purpose. In a lengthy examination he related many of those transactions. We may not say such evidence fails to show the existence of an intimate acquaintanceship. The question as to whether a witness has been shown to be an intimate acquaintance of one whose mental soundness is challenged is addressed to the sound discretion of the trial judge. Except for an abuse of that discretion, a reviewing court may not interfere with the determination of the trial court in that regard. In the syllabus to the case of People v. Manoogian, supra, it is said: "The question whether a witness is such an 'intimate acquaintance' as to be allowed to give his opinion on the general question of sanity or insanity is from its nature peculiarly addressed to the discretion of the trial court, and the appellate court will not interpose, unless there is a clear abuse of discretion."

[22] The challenged evidence is therefore competent, and the court did not err in receiving it subject to limitation, or otherwise.

[23] The court did not err in receiving in evidence defendants' exhibits A, C, D, E or F, which were statements of Mrs. Jorgensen's bank accounts, including items of deposits therein and withdrawals therefrom, except exhibits E and F, which were promissory notes executed to their mother by the plaintiff C. H. Jorgensen and his deceased brother Ed P. Jorgensen, for previous loans secured by them. Both the bank accounts and the notes were competent as affecting the issue of alleged undue influence. They tended to show that Mrs. Jorgensen had always been on good terms with all of her children and that she had assisted each of them financially, without discrimination, in times of need.

[24] The testimony of Mr. Walter Moline, the assistant manager of the Bank of America, where Mrs. Jorgensen had kept her accounts for several years, was also competent. He had known and dealt with the deceased for many years and was familiar with her signature. He identified and explained the various bank accounts of the deceased and testified to the genuineness of her signature on the joint tenancy agreement and upon other documents. We do not perceive that his testimony tended to vary the terms of any of those written documents. It was merely explanatory of the instruments and the results thereof.

For the reasons heretofore stated, the motion for a new trial was properly denied. The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concurred.

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WILDE v. SUPERIOR COURT OF SAN DIEGO COUNTY et al.

Civ. 2967.

District Court of Appeal, Fourth District, California.

June 30, 1942.

Hearing Denied Aug. 27, 1942.

1. **Attorney and client 🔑11**

A disbarred lawyer representing his own cause in court, on a claim actually and legally acquired before disbarment, does not assume to be an "officer" or "attorney" of a court, and does not act as such without authority within meaning of statute. St.1939, p. 2732, § 6127(a, b).

See Words and Phrases, Permanent Edition, for all other definitions of "Attorney" and "Officer".

2. **Attorney and client 🔑11**

A disbarred lawyer representing his own cause in court, on a claim actually and legally acquired before disbarment, does not hold himself out as "practicing law" or as "entitled to practice law" as forbidden by statute, by a single appearance in court in his own behalf in pressing his own individual claim acquired before disbarment. St. 1939, p. 2732, § 6127(a, b).

See Words and Phrases, Permanent Edition, for all other definitions of "Entitled to Practice Law" and "Practicing Law".

3. **Attorney and client 🔑60**

In certiorari proceeding to review an order holding a disbarred attorney guilty of contempt on ground that he violated the Business and Professions Code by appearing as assignee of judgment assigned only for collection, District Court of Appeal could receive and consider attorney's testimony given before the court, not to impeach the record made in the court below but to supplement and explain it. St.1939, p. 2732, § 6127(a, b), p. 360, § 6130.

4. **Attorney and client 🔑60**

The statute forbidding a disbarred attorney to appear on his own behalf as plaintiff in prosecution of any action, where the subject of the action has been assigned to him subsequent to disbarment and solely for collection, is violated only if disbarred attorney has received the assignment solely for collection. St.1939, p. 360, § 6130.

5. **Certiorari 🔑28(2), 65**

A writ of "certiorari" may be used only to review an order or judgment of an inferior court to determine if it acted without or in excess of its jurisdiction and the reviewing court may receive and consider evidence outside of the record to be reviewed.

See Words and Phrases, Permanent Edition, for all other definitions of "Certiorari".

6. **Contempt 🔑54(4)**

In cases of contempt committed outside the presence of the court, affidavit charging the contempt must show facts which constitute contempt.

7. **Contempt 🔑63(4)**

In cases of contempt committed in the presence of the court, the order adjudging the contempt must recite facts which actually constitute contempt.

8. **Contempt 🔑40**

"Contempt" of court is a specific criminal offense and a "contempt proceeding" is not a "civil action", either at law or in equity, but is a separate proceeding of a criminal nature and of summary character in which the court exercises but limited jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Action", "Contempt", "Contempt Proceeding".

9. **Certiorari 🔑64(1)**

Though a writ of "certiorari" is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself, where necessary to determine jurisdiction.

10. **Contempt 🔑67**

On certiorari proceeding to review contempt proceeding, the charge, evidence, findings, and judgment are to be strictly construed in accused's favor, and no intendments or presumptions can be indulged in aid of their sufficiency.

11. Contempt ⚿67

On certiorari proceeding, if record of contempt proceeding fails to show affirmatively on its face the existence of all necessary facts on which jurisdiction depended, the contempt order must be annulled.

12. Contempt ⚿44

Jurisdiction of a court in contempt cases depends on the existence of evidence showing that an actual contempt of court has been committed, and in the absence of such evidence, a court pronouncing a judgment of contempt lacks jurisdiction, and its order should be annulled.

13. Attorney and client ⚿60

In contempt proceeding against disbarred attorney charged with violation of statute forbidding a disbarred attorney to appear on his own behalf as plaintiff in the prosecution of any action, where the subject of the action has been assigned to him subsequent to disbarment, and solely for collection, it could not be presumed, without supporting evidence, that assignment was made solely for purpose of collection but there was a presumption that assignment, which recited consideration for the assignment, was supported by good and sufficient consideration. St.1939, p. 360, § 6130; Code Civ.Proc. § 1963, subds. 1, 39.

14. Attorney and client ⚿60

In contempt proceeding against disbarred attorney charged with violation of statute forbidding a disbarred attorney to appear on his own behalf as plaintiff in the prosecution of any action where the subject of the action has been assigned to him subsequent to disbarment and solely for purpose of collection, evidence was insufficient to show that disbarred attorney was guilty of contempt. St.1939, p. 360, § 6130.

◆

Proceeding by W. C. Wilde, petitioner, against the Superior Court of San Diego County and others, respondents, to review an order holding petitioner guilty of contempt of court.

Order annulled.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

Clarence Harden, of San Diego, for petitioner.

Thomas Whelan, Dist. Atty., and Robert E. Jenson, Deputy Dist. Atty., both of San Diego, for respondents.

Jerold E. Weil, amicus curiæ, Los Angeles, on behalf of respondents.

MARKS, Justice.

This is a proceeding instituted in this court to review an order holding petitioner guilty of contempt of court, and punishing him by the imposition of a fine of $300 to be collected by one day's imprisonment for each $2 of such fine in case it be not paid.

On January 20, 1941, petitioner, who had been an attorney at law, was permanently disbarred from practice in this state.

The material facts recited in the petition filed here should be briefly summarized. It recites that on December 2, 1936, judgment was recovered in the sum of $778.57 by plaintiffs in the Superior Court of San Diego County in an action entitled Union Trust Company of San Diego and Mortimer Rieser, as executors of the last will and testament of William B. Gross, deceased, substituted plaintiffs v. Meryl P. Bennett and Charles F. Naylor, defendants; that $313.50 was paid on the judgment on October 7, 1941; that the balance was unsatisfied; that by a writing dated March 30, 1936, and filed September 30, 1941, plaintiffs' cause of action was assigned to Ethel Eaton who was the secretary of petitioner and who took the assignment in her name for the convenience of petitioner; that she was never the actual or beneficial owner of the cause of action and judgment; that on September 6, 1941 Ethel Reed (formerly Ethel Eaton) in writing assigned the cause of action and judgment to plaintiff; that this assignment was filed September 30, 1941; that both assignments authorized the respective assignees to take any and all steps necessary or desirable to collect and enforce payment of the judgment in the names of the plaintiffs or otherwise; that on October 10, 1941, petitioner, in propria persona, as assignee of the judgment creditor, filed a verified petition and application for an order charging with the lien of the judgment a partnership interest of Meryl P. Bennett in a partnership in which it was alleged he was a member; that an order to show cause was issued and came on for hearing on November 3, 1941; that petitioner, as assignee of the judgment, appearing in propria persona, presented the petition to the judge presiding who found that the "judgment was assigned (to petitioner) solely for collection" and found him guilty of contempt for violating the provisions of section 6130 and of subdivisions a and b of section 6127 of the Business and Professions Code, St.1937, p. 1229, as added and amended St.1939, pp. 360, 2732; that during the presentation of the petition to the court, petitioner stated to the judge presiding that he was the beneficial owner of the cause of action and judgment assigned to Ethel Reed and became the absolute, sole and record owner thereof under the assignment of September 6, 1941, and was presenting the petition as petitioner in propria persona solely in his own interest as such owner for himself and not for or on behalf of anyone else; that he offered to produce Ethel Reed "as a witness who would testify that said W. C. Wilde at all times since said March 30, 1936, has been and now is the absolute, beneficial and sole owner of said cause of action and judgment and that she had never had any personal or beneficial interest therein but that she so took and held the same in her name for the use and benefit of said W. C. Wilde and as his property."

The petition then summarized the various proceedings which resulted in the judgment in question and in the two assignments. On September 2, 1932, William B. Gross, through petitioner, as his attorney, filed an action in the Justices' Court of San Diego Township to recover a money judgment against Bennett and Naylor; that Gross died May 25, 1933, and his executors were substituted as plaintiffs; that on March 3, 1936, judgment was rendered in the justices' court in favor of plaintiffs in the sum of $391.45. This is the cause of action and judgment which was assigned to Ethel Eaton.

It is also alleged that claims were presented to the executors of the Gross estate by petitioner and two others totaling $386.40; that suit was filed in the justices' court on these claims in the name of Ethel Eaton; that the executors filed a cross-complaint in this action seeking to recover judgment against Wilde; that another action was pending against Wilde on a claim in favor of Gross; that these cross demands were compromised which compromise was approved by order of the superior court in which the Gross estate was being probated which order authorized the executors to assign the claim and judgment against Bennett and Naylor; that the other actions were dismissed; that Wilde paid the other claimants the full amount of their claims against the estate of Gross; that in accordance with the order of the probate court the claim and judgment against Bennett and Naylor was assigned to Ethel Eaton "solely for the use and benefit and beneficial interest of said W. C. Wilde and as his property."

Respondents maintain that the court cannot base its decision on any of the allegations of the petition. Donovan v. Board of Police Commissioners, 32 Cal.App. 392, 163 P. 69; Goodrich v. Superior Court, 92 Cal.App. 695, 268 P. 669. Whatever may be the correct rule in cases of this kind we do not need to refer to the allegations of the petition again except to shorten the subsequent summary of the return filed and of testimony taken. However, it was stipulated at the hearing that the petition be considered a traverse to the return. It is unnecessary to determine the propriety of this proceeding.

The return filed by respondents consists of a clerk's transcript of the superior court action, there having been an appeal taken from a justices' court judgment. The documents show the pleadings in the action of Gross v. Bennett and Naylor in the justices' court, the substitution of the executors as plaintiffs, the judgment for plaintiffs dated March 3, 1936, and the assignment to Ethel Eaton, as set forth in the petition. This assignment recites that it was made pursuant to an order of the Superior Court of San Diego County in the Matter of the Estate of William B. Gross, deceased. A copy of this order is not in the record. The record contains a notice of appeal from the judgment of the justices' court, an undertaking on appeal, the judgment of the superior court and other files not necessary to mention. It concludes with the order adjudging Wilde guilty of contempt. In the judgment in the superior court action against Bennett and Naylor, Wilde was allowed $100 attorney's fees.

There is no indication in the record that any testimony was taken at the hearing which resulted in the order holding Wilde in contempt so that order must be supported, if at all, by the record contained in the return.

Over the strenuous objections of respondents, Wilde was called as a witness in his own behalf and was permitted to testify at the hearing before this court. His evidence substantiated the material allegations of his petition already summarized, as well as the part of the return relating to the appeal. He also testified that after he had been held guilty of contempt the balance of the judgment against Bennett and Naylor was paid to him in full; that the money was his; that he divided it with no one and that no other person had any claim upon it or any part of it.

[1, 2] The first important question to be considered is the propriety of the ruling of this court permitting Wilde to testify here, for, if his evidence can be considered, it establishes without dispute that he was the actual bona fide owner of the judgment and that it was not "assigned to him for collection" as found by the trial court. § 6130, Business & Professions Code. Nor was he "Assuming to be an officer or attorney of a court and acting as such, without authority" nor "Advertising or holding oneself out as practicing or as entitled to practice law or otherwise practicing law in any court, without being an active member of the State Bar," Subds. (a) and (b), § 6127, Business & Professions Code, as found by the trial court as the basis of the order of contempt. A disbarred lawyer presenting his own cause in court, on a claim actually and legally acquired before disbarment, does not assume to be an officer or attorney of the court and does not act as such without authority. Nor does he hold himself out as practicing or as entitled to practice law by a single appearance in court in his own behalf in pressing his own individual claim so acquired before disbarment.

Counsel have been diligent in their citations of authorities on all questions argued by them. It would unduly extend this opinion to attempt to review the many cases cited and we will not attempt to do so.

In considering the question of the propriety of the reviewing court receiving evidence not in the return, it must be admitted that there is a general rule, rather firmly supported in the earlier cases, that the review should be confined to the record before the lower court in order to determine if it acted without or in excess of its jurisdiction. However, even in the earlier cases it was suggested that there might be exceptions to this general rule.

In City of Los Angeles v. Young, 118 Cal. 295, 50 P. 534, 535, 62 Am.St.Rep. 234, relied upon by respondents, the Supreme Court said: "Upon certiorari, if it becomes necessary for the court of review to be put in possession of the facts upon which the court below acted, and which are not technically of record, it is competent for that court to require the lower court to certify such facts in its return to the writ, and this statement of facts would then be a part of the record. 2 Spell. Extr. Relief, § 2020. Under this principle, it was not perhaps improper for the trial court to admit the evidence of Yonken, not as contradicting the record of the justice, but as supplemental thereto. People [ex rel. Whitney] v. San Francisco Fire Dept., 14 Cal. 479."

In Donovan v. Board of Police Commissioners, 32 Cal.App. 392, 163 P. 69, 71, also relied on by respondents, the court said: "However, the court to whom the petition is addressed may, it seems, in the exercise of its discretion, and for the purpose of determining whether or not, despite the irregularities complained of, injustice may be done by the issuance of the writ, resort to evidence from without the record sought to be reviewed. [Citing cases.]"

More recent cases in which evidence outside of the record to be reviewed was received before the Supreme Court, are, In re Mooney, 10 Cal.2d 1, 73 P.2d 554; Ex parte Connor, 16 Cal.2d 701, 108 P.2d 10, and Ex parte Bell, 19 Cal.2d 488, 122 P.2d 22.

In re Mooney was heard by the Supreme Court of this state in response to a suggestion of the Supreme Court of the United States in denying, without prejudice, Mooney's application to file an original petition for a writ of habeas corpus in the latter court seeking his release from confinement on the ground he had been convicted on testimony which, after his conviction, was proved to have been perjured and that evidence favorable to him had been wilfully suppressed by the prosecutors and thus he had been denied the due process guaranteed by the Federal Constitution, Amend. 14. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406.

A similar petition was filed in the Supreme Court of this state. A writ was issued and a referee was appointed for the purpose of taking evidence. For more than a year the referee took evidence in San Francisco and various cities throughout the United States. His report, says the Supreme Court [10 Cal.2d 1, 73 P.2d 561], consisted of "20 volumes, containing 13,416 pages of evidence or proffered evidence and hundreds of exhibits". This evidence, much of it obviously outside the record of the superior court to be reviewed, was carefully considered by the Supreme Court in reaching its decision. This case is an example of an exception to the earlier general rule prevailing in this state, if it does not establish a new rule to govern later proceedings.

Ex parte Connor, supra, was also heard as the result of a writ of certiorari issued by the Supreme Court of the United States to the Supreme Court of California. A former judgment was vacated and the cause was remanded for further consideration. Connor v. California, 309 U.S. 631, 60 S.Ct. 708, 84 L.Ed. 989. In accordance with this order the Supreme Court of this state issued a writ of habeas corpus and proceeded to review the case. At the hearing before that court a photostatic copy of a letter written by petitioner, not a part of the record of the court below, was offered and received in evidence after objections to its introduction in evidence had been overruled. This letter was considered by the court and furnished a partial basis for one of the conclusions reached. In commenting on the scope of the inquiry in such proceedings it was said [16 Cal.2d 701, 108 P.2d 17]: "The scope of inquiry on habeas corpus in this state may, as above stated, under exceptional circumstances, extend over the entire course of proceedings in the lower courts. In re Lake, 65 Cal.App. 420, 224 P. 126; In re Friday, 138 Cal.App. 660, 32 P.2d 1117; In re Connolly, 16 Cal.App.2d 709, 61 P.2d 490, and cases cited), and may embrace additional evidence received by this court either directly or under an order of reference. In re Mooney, 10 Cal.2d 1, 73 P.2d 554. * * * In defining the scope of inquiry in the federal courts it is stated in Frank v. Mangum, 237 U.S. 309, 331, 35 S.Ct. 582, 589, 59 L.Ed. 969, that upon an application for a writ of habeas corpus the court has the right 'to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not.' "

Ex parte Bell, supra [19 Cal.2d 488, 122 P.2d 30], was also a case in which the Supreme Court had occasion to consider the scope of the inquiry in the reviewing court under a writ of habeas corpus. It was there said: "A petitioner seeking habeas corpus, however, is not confined to the face of the record in attempting to sustain the burden of proving that his conviction was in violation of his constitutional rights. The courts of both the United States and California have declared that the remedy of habeas corpus permits an examination not only of the actual evidence introduced at petitioner's trial but of any necessary additional evidence bearing upon the infringement of petitioner's constitutional rights. [Citing cases.]"

It therefore seems to be settled that now, in habeas corpus proceedings, the reviewing court, in exceptional cases, in order that justice may be done, and in order that the petitioner may not be deprived of his constitutional right to due process, may receive and consider evidence outside of the record to be reviewed. The question arises: Does this rule prevail in proceedings in certiorari?

It has repeatedly been held in this state, as said in Re Lake, 65 Cal.App. 420, 224 P. 126, 127, that: "The scope of the inquiry which the court can make upon either habeas corpus or certiorari is precisely the same. Ex parte Drew, 188 Cal. 717, 207 P. 249, 250; Commercial Bank, etc., v. Superior Court [192 Cal. 395], 220 P. 422, 423."

[3] See, also, In re Wilkins, 66 Cal.App. 754, 226 P. 964; In re Chaus, 92 Cal.App. 384, 268 P. 422; In re Sears, 137 Cal.App. 308, 30 P.2d 571; In re Connolly, 16 Cal. App.2d 709, 61 P.2d 490. We therefore conclude that under the rule already considered, and under the circumstances here, we may receive and consider the evidence of petitioner given before this court, not to impeach the record made in the court below but to supplement and explain it and to develop the true facts upon which must rest the question of the jurisdiction of the superior court to punish petitioner for contempt.

As we have already observed the trial court based its order solely upon violation of the sections of the Business and Professions Code already referred to.

Section 6130 of that code provides as follows: "No person, who has been an attorney, shall while a judgment of disbarment or suspension is in force appear on his own behalf as plaintiff in the prosecution of any action where the subject of the action has been assigned to him subsequent to the entry of the judgment of disbarment or suspension and solely for purpose of collection."

[4] Under this section the disbarred attorney must not only appear in court in his own behalf on a claim assigned to him after disbarment, but the assignment must have been "solely for purpose of collection." Here, while the actual assignment was made after disbarment, it clearly appears that for several years prior to such assignment, petitioner had been the actual owner of the claim and that the assignment was not solely for the purpose of collection, but to complete the record title and vest in him what was already his. Nor do the facts before us bring the case within the provisions of section 6127 of the Business and Professions Code for reasons already noted.

[5-7] It is true that the writ of certiorari may be used only to review an order or a judgment of an inferior court to determine if it acted without or in excess of its jurisdiction. In cases of contempt committed outside the presence of the court it is necessary that the affidavit charging the contempt show facts which actually constitute contempt. Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A.L.R. 127; Wutchumna Water Co. v. Superior Court, 215 Cal. 734, 12 P.2d 1033, 29 A.L.R. 127. In cases of contempt committed in the presence of the court, the order adjudging the contempt must also recite facts which actually constitute contempt. It is also true that as the proceedings are of a criminal nature no presumptions may be indulged in favor of the judgment. These rules were clearly stated in Re Lake, supra, as follows:

[8-11] "The reason for this rule is clearly stated in the Hotaling case, from which we quote ([191 Cal. 501], 217 P. 74 [29 A.L.R. 127]): 'Contempt of court is a specific criminal offense. [Citing cases.] A contempt proceeding is not a civil action, either at law or in equity (herein disagreeing with In re Selowsky [189 Cal. 331], 208 P. 99, 100) * * *, but is a separate proceeding of a criminal nature and summary character (McClatchy v. Superior Court, supra [119 Cal. 413, 51 P. 696, 39 L.R.A. 691]; In re McCarty, 154 Cal. 534, 98 P. 540; Schwarz v. Superior Court, 111 Cal. 106, 43 P. 580; Selowsky v. Superior Court, 180 Cal. 404, 181 P. 652), in which the court exercises but a limited jurisdiction. * * * The proceeding is of such a distinctly criminal nature that a mere preponderance of evidence is insufficient.' Following this statement of principles the court then announces the rule in such clear and succinct language that we can do no better than quote it in full: 'While the writ of *certiorari* is not a writ of error, it nevertheless extends to the whole of the record of the court below, and even to the evidence itself where necessary to determine jurisdiction. [Citing cases.] *In reviewing this proceeding, the charge, the evidence, the findings and the judgment are all to be strictly construed in favor of the accused* (Schwarz v. Superior Court, supra), *and no intendments or presumptions can be indulged in aid of their sufficiency* (Frowley v. Superior Court, supra [158 Cal. 220, 110 P. 817]). *If the record* of the proceedings, reviewed in the light of the foregoing rules, *fails to show affirmatively upon its face* the existence of all the necessary facts upon which jurisdiction depended, the order must be annulled. Frowley v. Superior Court, In re McCarty, and other cases above cited.' (Emphasis ours.)

"The court was there considering a case of constructive contempt. The case before us is one charging a contempt committed in the immediate view and presence of the court. The difference is that in cases of constructive contempt an affidavit must be filed containing a formal charge upon which a hearing must be held while in these cases the court may proceed summarily without a charging affidavit. In the latter case the order of commitment must state the facts constituting the contempt (section 1211, Code Civ. Proc.), and, on review, this order must bear the same scrutiny as is given the affidavit in the former case. * * * There is the same unanimity of opinion supporting the rule that in cases of direct contempt the order of commitment is void, 'unless it shows on its face acts sufficient to constitute a legal contempt. The order must contain a statement of facts equivalent to those which the law says must be incorporated in an affidavit for constructive contempt; and such facts must prove the contempt. Mere conclusions are not sufficient.' 5 Cal.Jur. pp. 950, 951."

[12] Jurisdiction of the court in contempt cases, like those in which reviews of awards of the Industrial Accident Commission are sought, depends on the existence of evidence showing that an actual contempt of court has been committed. In the absence of such evidence a court pronouncing

a judgment of contempt lacks jurisdiction and its order should be annulled. In re Lake, supra; In re Chaus, supra; In re Cunha, 123 Cal.App. 625, 11 P.2d 902, 18 P.2d 979; In re Cutler, 1 Cal.App.2d 273, 36 P.2d 441; In re Roberts, 2 Cal.App.2d 70, 37 P. 2d 477; King v. Superior Court, 12 Cal. App.2d 501, 56 P.2d 268; In re Critchlow, 11 Cal.2d 751, 81 P.2d 966.

The reasons for this rule in contempt cases are stated in King v. Superior Court, supra [12 Cal.App.2d 501, 56 P.2d 273], as follows: "When jurisdiction to inquire and act depends upon the existence of certain facts, the absence of proof of such facts limits the power to that of inquiry only, and, if action is attempted it is in excess of jurisdiction. The same reasoning is applied to cases before the Industrial Accident Commission. It is thus stated in Re Lake, 65 Cal.App. 420, 224 P. 126, 127: '* * * This inquiry, of course, cannot go beyond the question of jurisdiction, and the review of the evidence is limited to the sole purpose of determining, first, whether jurisdiction existed; and, second, whether jurisdiction was exceeded. Thus, where the question is whether jurisdictional facts were or were not proved, the review extends, not only to the entire record, but to the evidence itself. [Citing cases.] In Van Hoosear v. Railroad Comm., supra, the Supreme Court, on this point, say (189 Cal. (228), 236, 207 P. (903), 906): "That under a writ of review, the evidence of facts upon which the lower court or tribunal depended for its jurisdiction may be considered, and its judgment set aside if jurisdiction is without support in the evidence, is beyond dispute." In the same case (189 Cal. (228), 236, 207 P. (903), 907) the court quoted with approval the following passage from McClatchy v. Superior Court, supra: "While the writ of certiorari is not a writ of error, 'it is nevertheless,' as suggested in Schwarz v. Superior Court, 111 Cal. (106), 112, 43 P. 580, 'a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends, not only to the whole of the record of the court below, but even to the evidence itself, when necessary to determine the jurisdictional fact.'"'"

In examining the evidence on which the court below acted (without considering testimony taken here), we find that such evidence consists entirely of the documentary record in the case of Union Trust Co. of San Diego, etc., v. Bennett, et al. This record shows the judgments obtained in the Justices' Court and Superior Court, the pleadings and other formal matters, and the two assignments. The assignment to Ethel Eaton recites that it was made "For Valuable Consideration and pursuant to an order made in the Superior Court of the State of California, in and for the County of San Diego, in the proceedings entitled In the Matter of the Estate of William B. Gross, deceased, No. 20439." The assignment to petitioner recites, "For value received, the receipt whereof is hereby acknowledged, the undersigned hereby assigns and transfers to W. C. Wilde plaintiff's cause of action and judgment in the above entitled action. * * *"

While the assignment to petitioner was made after his disbarment, and to that extent comes within the prohibitive provisions of section 6130 of the Business and Professions Code, there is nothing in that record to indicate that this assignment was made "solely for purpose of collection" which is an element that must be proved before a violation of that section can be established.

[13, 14] As we have seen, neither the trial court nor this court can indulge in any presumptions against one charged with contempt. It cannot be presumed, without supporting evidence, that the assignment was made "solely for purpose of collection." The assignment was in writing and recited the fact of consideration. There is a presumption "that there was a good and sufficient consideration for a written contract" Subd. 39, § 1963, Code Civ. Proc., and also, what has been characterized as one of the strongest presumptions, "that a person is innocent of crime or wrong". Subd. 1, § 1963, Code Civ. Proc. These presumptions in favor of petitioner were with him in the trial court and should have been invoked in his favor. Certainly in the face of these presumptions and in the total absence of any evidence contradicting them it cannot be said that there was any showing that the assignment to petitioner was made "solely for purpose of collection." In the absence of such showing the evidence in the court below (without reference to the evidence taken in this court) failed to show the fact of contempt and the order adjudging defendant guilty of contempt must be annulled.

The State Bar of California has appeared as amicus curiae and its attorney has filed an able brief in support of the judgment. It states its principal object in appearing is to obtain a ruling on what showing must be made to establish the fact that an attorney has prosecuted a claim assigned to him "solely for the purpose of collection" so as to prevent former attorneys from evading the results of their disbarments and actually engaging in the practice of law through the means of assignments of causes of actions to them.

While this purpose is praiseworthy the determination of that question should wait a proper case in which it is directly involved. It cannot be decided here where there is an entire lack of any evidence in the record to be reviewed even suggesting that the assignment to plaintiff was made solely for collection and strong presumptions are against such a conclusion. However, it might not be out of place to say that we have no sympathy with a disbarred attorney who attempts to evade the consequences of his disbarment by purchasing claims after he is disbarred and prosecuting them in court in his own name and propria persona. Should such a case arise it might be held that the courts have an inherent power regardless of statute, to prevent such a flagrant effort to evade the effect of an order of disbarment.

The order adjudging petitioner guilty of contempt of court is annulled.

BARNARD, P. J., and GRIFFIN, J., concurred.

53 Cal.App.2d 286

PEOPLE v. GRANT.

Cr. 3577.

District Court of Appeal, Second District, Division 2, California.
July 7, 1942.

Rehearing Denied July 16, 1942.

1. **Criminal law 🔑1159(4)**

District court of appeal would not disturb verdict of guilty of committing lewd or lascivious acts upon a child if jury could reasonably conclude from the evidence that accused committed the acts charged, since the credibility of prosecutrix' testimony was for the jury. Pen.Code, § 288.

2. **Criminal law 🔑1159(4)**

To warrant reversal of conviction on ground that prosecutrix' testimony was "inherently improbable", district court of appeal must conclude that testimony was so unbelievable as to amount to no evidence at all.

> See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Improbable Testimony".

3. **Criminal law 1159(4)**

Testimony of 11-year old prosecutrix as to conduct of accused while he and prosecutrix were in her bedroom listening to radio while accused's wife and prosecutrix' mother were in the kitchen of house was not so "inherently improbable" as to warrant reversal of conviction for committing lewd or lascivious acts upon a child. Pen. Code, § 288.

4. **Criminal law 🔑867**

A motion for a mistrial is addressed to the sound discretion of the trial court and may properly be refused where the court is satisfied that no injustice has resulted or will result from the occurrences of which complaint is made.

5. **Criminal law 🔑867**

Where 11 year old prosecutrix, while testifying in prosecution for the commission of lewd or lascivious acts upon a child, burst into tears whereupon her aunt going to the witness stand put her arms around the prosecutrix and was directed by judge to return to her seat, court did not abuse its discretion in denying accused's motion for a mistrial on account of such occurrence. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Jesse Wilford Grant was convicted of the offense of committing lewd or lascivious acts upon a child under 14 years of age in violation of Penal Code, § 288, and he appeals.

Judgment affirmed.

Edward C. Purpus and Lorrin Andrews, both of Los Angeles, for apellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

Defendant has appealed from a judgment of conviction of the crime of violation of section 288 of the Penal Code.

Defendant's main contention is that the testimony of the prosecutrix, Mary, is inherently improbable and for this reason the evidence is insufficient to support the conviction. The prosecutrix at the time of the offense was eleven years of age. She clearly related acts of defendant which unquestionably were sufficient to establish guilt of the crime charged but defendant argues that the circumstances surrounding these acts demonstrate that her story is unbelievable. On the evening of March 31, 1941, defendant and his wife were dinner guests at the home of Mary and her mother. Mary's aunt was also present. After dinner as the three women were in the kitchen washing dishes Mary and defendant went into the living room. Mary then said she was going into her bedroom to listen to the Lone Ranger on the radio. Defendant went with her and Mary got into bed while appellant sat on a chair beside the bed. At this time defendant committed the indecent acts which form the basis of the charge against him. During this time defendant's wife came from the kitchen into the bedroom, asked defendant for a cigaret and returned to the kitchen. In arguing that Mary's story is unbelievable defendant refers to the close proximity of his wife and Mary's mother at the time of the acts in question and to the fact that the door of the bedroom was open; also to Mary's testifying that she and defendant on later occasions engaged in similar acts but did not mention them to her mother until she learned that defendant had been spreading untrue stories about her mother and her friends.

[1-3] The credibility of the prosecutrix's story was for the determination of the jury and this court may not disturb the verdict if the jury could reasonably draw the conclusion from the evidence that defendant committed the acts charged. To stamp the story of the prosecutrix as inherently improbable we must conclude that it was so unbelievable as to amount to no evidence at all. People v. Fremont, 47 Cal. App.2d 341, 117 P.2d 891. We find nothing in the testimony of the prosecutrix or in the circumstances surrounding the commission of the offense which would warrant our branding the testimony inherently improbable.

Defendant also contends that the trial court erred in not granting his motion for a mistrial because of an incident which occurred in the presence of the jury. While Mary was giving her testimony and was being cross-examined she burst into tears, whereupon her aunt went to the witness stand and put her arms around the witness. The judge then said to the aunt: "I wish you would go back and sit down and let me handle this trial." At the conclusion of the introduction of the evidence when counsel for defendant moved for a mistrial because of this incident the judge stated: "The motion for a mistrial is denied. The record at that time was this, that that little girl was sobbing and crying on the witness stand. Human nature is the same inside a court room as it is outside a court room, and the aunt merely came up and put her arms around the little girl while the girl was sobbing and crying, and it is true the court did order her to leave the witness stand, and made the remark, 'Let the court or let us handle this situation.' I can't see any prejudice in the record by that occurrence at all. The aunt had been sitting in the court room. That is all I have to say."

[4, 5] A motion for a mistrial is addressed to the sound discretion of the trial court. It may properly be refused where the court is satisfied that no injustice has resulted or will result from the occurrences of which complaint is made. 23 C.J.S. Criminal Law, § 961. We see no abuse of discretion in the action of the court in denying the motion.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

53 Cal.App.2d 181

PEOPLE v. DUDLEY.

Cr. 547.

District Court of Appeal, Fourth District, California.

June 30, 1942.

Hearing Denied July 27, 1942.

Infants ⚷13

Prosecutrix, who was born on November 4, 1927, was 14 years old on November 3, 1941, and hence defendant could not be convicted for violation of section 288 of Penal Code based on acts allegedly committed on prosecutrix on such date, in view of provision thereof requiring acts to have been committed on "a child under the age of 14 years". Pen.Code, § 288; Civ.Code, § 26.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Proceeding by the People against Elbert Hayward Dudley on an indictment charging defendant with violating provisions of section 288 of the Penal Code. From an order granting a new trial, following verdict finding defendant guilty, the People appeal.

Affirmed.

Hearing denied; CURTIS, J., dissenting.

Earl Warren, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Tom Scott, Dist. Atty., and Norman F. Main and George P. McCarthy, Deputy District Attys., all of Bakersfield, for appellant.

W. C. Dorris, C. Fleharty, Jr., Jackson Mahon, and R. W. Henderson, all of Bakersfield, for respondent.

MARKS, Justice.

Defendant was charged with the crime of rape in one count of the information and with violating the provisions of section 288 of the Penal Code in a second count, both acts alleged to have been committed on the person of the same girl. The jury disagreed on the guilt of the defendant of the alleged crime of rape so no further attention will be given to that phase of the case. He was found guilty of the other crime.

The information charged that the crime of which defendant was convicted was committed on November 3, 1941, and evidence was offered tending to show its occurrence between two and three o'clock on the afternoon of that date. The evidence is sharply conflicting, with much evidence indicating that neither crime had been committed.

Defendant moved for a new trial on all statutory grounds of which three were urged at the hearing of the motion. The trial judge denied the motion on the grounds of improper introduction of evidence over the objection of defendant and an improper instruction, and granted the motion on the ground that the evidence failed to support the verdict, specifying as his reason that the evidence showed the prosecutrix to be fourteen years of age on November 3, 1941, so that the provisions of section 288 of the Penal Code had not been violated by the alleged acts of defendant. Plaintiff has appealed from the order granting the motion for new trial.

It is admitted that November 4, 1941, was the fourteenth anniversary of the birth of the prosecutrix. The controlling question submitted by counsel for decision here is the proper construction to be placed on section 26 of the Civil Code, which provides as follows: "The period specified in the preceding section must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority."

It is admitted that the common law rule that "Full age in male or female is twenty-one years, which age is completed on the day preceding the twenty-first anniversary of a person's birth" (1 Black.Com. 497) prevails in many jurisdictions. If that rule has not been abrogated by section 26 of the Civil Code the order must be affirmed because, if the section is merely a reenactment of the common law rule, the minor was fourteen years old at the time the acts were alleged to have been committed. Under section 288 of the Penal Code the acts must have been committeed on "a child under the age of fourteen years" to constitute a crime. If the common law rule is applicable the prosecutrix was fourteen years of age on November 3, 1941, the day before the anniversary of her birth, so that the crime charged could not have been committed against her person under the provisions of section 288 of the Penal Code.

We have been cited to but two California cases directly bearing on this question. The first is Ganahl v. Soher, 2 Cal.Unrep. 415, 5 P. 80, decided in 1884, the opinion having been written by Mr. Justice Ross and concurred in by Mr. Justice McKee and Mr. Justice McKinstry. The second is Ex parte Wood, 5 Cal.App. 471, 90 P. 961, decided in 1907, the opinion having been written by Mr. Justice Shaw and concurred in by Mr. Presiding Justice Allen and Mr. Justice Taggart.

In the Ganahl case it appears that Henry Gordon Ganahl was born on April 11, 1855. After quoting sections 25 and 26 of the Civil Code, the opinion proceeds: "Under the rule prescribed by the section last quoted, Henry Gordon Ganahl became of age the first minute of the eleventh day of April, 1876, and by virtue of section 328 of the Code of Civil Procedure he was entitled to commence an action for the recovery of whatever interest he had in the land within the period of five years thereafter, but not after the expiration of that period. In computing the period of five years we must include the eleventh day of April, 1876, because, as the plaintiff in question attained his majority the first minute of that day, he had the whole of the day in which to sue; and computing that as the first day of the five years, the whole period of five years expired with the tenth day of April, 1881, and the action not having been commenced until the eleventh of April, 1881, was barred by the provisions of the statute." (The application of section 10 of the Civil Code to those facts was not considered.)

In weighing the force of this opinion it should be observed that under the reasoning of the court the cause of action was clearly barred by the five year statute of limitations regardless of the question of whether Ganahl reached his majority on April 10, 1881, or on April 11, 1881. Thus the statement in the opinion that he reached his majority on April 11, 1881, is to a certain extent dicta. The result would have been the same had it been concluded that he was 21 years of age on April 10, 1881. No authorities, other than the code sections are cited or considered in the opinion.

Ex parte Wood, supra, was on a writ of habeas corpus directed to the superintendent of the Whittier State School to secure the release of Julia A. Wood who had been committed to that institution on March 16, 1907.

She was committed under an act of the Legislature approved March 11, 1889, entitled "An act to establish a state reform school for juvenile offenders, and to make an appropriation therefor." [5 Cal.App. 471, 90 P. 962.] This act made it lawful to receive into that school minors between the ages of eight and eighteen years. Julia A. Wood was born on March 17, 1889, so that the eighteenth anniversary of her birth fell on March 17, 1907, the day after she was committed to the institution. Thus the precise question we have here was presented to the court in that case.

After quoting sections 25 and 26 of the Civil Code, it was said: "It thus conclusively appears that the said Julia A. Wood completed the period of her minority at the commencement of the 16th day of March, 1907, and that at the time of said adjudication and commitment she was of full adult age."

The only authority cited in support of that conclusion was Ganahl v. Soher, supra, which contains dicta to the contrary.

It should be observed that Oklahoma has a statute practically identical with our section 26 of the Civil Code. The Supreme Court of that State has construed that section to mean "that the statute of this state changes the common law, and a minor becomes of full age on the first minute of the anniversary of his birth." Bynum v. Moore, 101 Okl. 128, 223 P. 687, 691.

We are of the opinion that section 26 of the Civil Code is merely a reenactment of the rule of the common law. The prosecutrix was born on November 4, 1927. The cycle of fourteen years was completed at the end of November 3, 1941. That day was, therefore, "the corresponding *day completing* the period * * *" of fourteen years. (Emphasis ours.) On November 4, 1941, she started her fifteenth year so her fourteenth year was completed on November 3, 1941, and under the provisions of the section she was fourteen years old on that day and defendant cannot be convicted under the clear provisions of section 288 of the Penal Code.

Having reached this conclusion it is unnecessary to consider the other errors urged by counsel for defendant.

The order granting the new trial is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

LINNASTRUTH v. MUTUAL BENEFIT HEALTH & ACCIDENT ASS'N.

Civ. 13542.

District Court of Appeal, Second District, Division 2, California.

July 7, 1942.

Rehearing Denied Aug. 5, 1942.

Hearing Granted Sept. 3, 1942.

1. Insurance 🔑138(1)

Parties to insurance contracts may make such agreements as they see fit, and the courts will enforce the terms mutually agreed upon, provided the contract is not against public policy or in contravention of express provisions of law.

2. Insurance 🔑146(3)

Application for accident policy providing that application should not be binding upon the insurer until policy was issued was not free from "ambiguity" as to the meaning of the word "binding" as therein used, necessitating construction thereof most strongly against the insurer.

See Words and Phrases, Permanent Edition, for all other definitions of "Ambiguity".

3. Insurance 🔑146(3)

Any ambiguity in insurance contract must be construed most strongly against the party responsible for the uncertainty.

4. Insurance 🔑130(1)

Insurer may accept proposals for a contract of insurance contained in application for policy, or may reject them and return the premium paid, but insurer cannot retain the premium and at the same time alter the proposed terms of insurance and make such alterations effective without the consent of the applicant.

5. Insurance 🔑175

Application for accident policy providing that application should not be binding upon insurer until policy was issued used the word "binding" to mean that insurer was not liable until it accepted application and issued policy but that when policy was in fact issued insurer was obligated to comply with terms proposed in application, including provision for insurance protection to commence with the date of the application, so as to entitle beneficiary to recovery of death benefits for death of insured occurring following delivery of policy as result of injury suffered prior to such delivery but following the making of application.

See Words and Phrases, Permanent Edition, for all other definitions of "Binding".

McCOMB, J., dissenting.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Belle Linnastruth against the Mutual Benefit Health & Accident Association, a corporation, to have two accident policies issued by defendant to plaintiff's deceased husband reformed so as to provide that the terms thereof commenced on a specified date prior to the date of the policies, and to recover death benefits provided for in the policies. From a judgment in favor of defendant, plaintiff appeals.

Judgment reversed.

Lyle W. Rucker, of Los Angeles, for appellant.

J. Edward Haley, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Upon the application of Frank Linnastruth defendant issued two accident insurance policies each providing for the payment of $1,250 in case of the death of the applicant resulting from bodily injury. The policies were dated August 5, 1940. Plaintiff, the widow of Frank Linnastruth, who died on August 6, 1940, seeks in this action to have the court reform the two policies so as to provide that the terms of the two policies commenced on July 17, 1940, and to have judgment entered for the sum of $2,500. Plaintiff has appealed from a judgment in favor of defendant.

Carl H. Abrams, a soliciting agent of defendant corporation, obtained from Frank Linnastruth on July 17, 1940, applications for the policies in question to be issued by defendant. The applications were completed and signed by Linnastruth and twenty-six dollars, thirteen dollars on each application, was paid to Abraham. Abraham dated the applications July 20, 1940, which was the date he submitted them to the office of Mutual Insurance Agency, a broker, in Los Angeles, California, for transmission to the home office of respondent at Omaha, Nebraska, where all policies of insurance of defendant are issued. The applications reached the home office on or about August 1, 1940, were approved by the underwriting department on August 2, 1940, and the two policies were issued bearing date August 5, 1940. The policies set forth the terms thereof as beginning August 5, 1940, and ending December 1, 1940, at which time the balance of the annual premiums would be due or said policies could be renewed.

Frank Linnastruth received bodily injury on July 26, 1940, as the result of a fall and on July 30, 1940, received further injury in a fall. In one of these falls he suffered a fracture of his elbow joint. Infection followed, resulting in his death on August 6, 1940. The two policies were delivered to Linnastruth on August 6, 1940, just prior to his death and while he was unconscious. On July 30, 1940, plaintiff wrote to defendant that Mr. Linnastruth had had an accident and asked that blanks be sent to her. The blanks were sent to her but she did not use them. Plaintiff promptly notified defendant of the death of her husband and on August 10, 1940, defendant wrote to her denying liability on the ground that the injuries which resulted in Mr. Linnastruth's death were received prior to the date on which the policies were issued.

The two applications for insurance are identical and one of them is attached to each of the policies. Each application contains fourteen questions and answers and at the head of each application there appears the following: "I, the undersigned, hereby make application to the Mutual Benefit Health and Accident Association, for policy form MIA50 on the annual basis. I understand and agree that this application shall not be binding upon the Association until the policy is issued to me." The last question in each application reads as follows: "Do you hereby apply to the Mutual Benefit Health and Accident Association for a policy issued solely and entirely in reliance upon the written answers to the foregoing questions and do you agree that the association is not bound by any statement made by or to any agent unless written herein?" In answer to this question the applicant wrote "Yes." On the reverse side of each application appears the following: "Insurance policy. This policy goes into immediate effect from date of issue on accident, and on sickness as plainly stated in the policy". The signature of Mr. Linnastruth does not appear on this side of the application.

[1-5] The policies and the applications constituted contracts between Mr. Linnastruth and defendant corporation. It is expressly so stated in each policy. The general rules which pertain to contracts are applicable. Parties to insurance contracts may make such agreements as they see fit and the courts will enforce the terms mutually agreed upon, subject to the rule that the contract is not against public policy or in contravention of express provisions of law. Boyer v. United States Fidelity & Guaranty Co., 206 Cal. 273, 274 P. 57. But, as is often the case with insurance contracts, a question has arisen as to the terms upon which the parties agreed. In his applications Mr. Linnastruth stated that he understood and agreed that the applications should "not be binding upon the Association until the policy is issued to me." Defendant argues that this language is clear and free from ambiguity and that by the terms of the contracts defendant is not liable for injuries received before the date of the insurance of the policies. In our view the contracts are not free from ambiguity as to the meaning of the word, binding, as here used, and under well established principles the ambiguity must be construed most strongly against the party responsible for the uncertainty. Rankin v. Amazon Ins. Co., 89 Cal. 203, 26 P. 872, 23 Am.St.Rep. 460. When Mr. Linnastruth signed the application he made, in legal effect, proposals to defendant which, when accepted by defendant, resulted in valid contracts. But to what extent and in what manner did these valid contracts "bind" defendant? Defendant could accept the proposals as made or reject them and return the premiums which had been paid but it could not retain the premiums and at the same time alter the terms proposed and make the alterations effective without the consent of the applicant. Defendant did not exercise its right to reject the applications but it accepted them and issued the policies. The argument which it now presents is tantamount to a contention that it had the right to postpone the date on which the applicant would be protected by insurance to a date of its own selection. It does not seem reasonable to conclude that the parties to the contract intended such a condition. The more reasonable view appears to be that defendant was not liable in any sense until it accepted the applications and issued the policies; but that when it did in fact issue the policies defendant was obligated to

comply with the terms which had been proposed; and that these terms included insurance protection for the period commencing with the date of the applications and extending to the date for which premiums were paid.

The remarks of the court in Beswick v. National Casualty Co., 206 Mo.App. 67, 226 S.W. 1031, 1033, are of especial interest. Although the facts of that case contain elements dissimilar to the facts of the present case in that the agent gave a receipt for the premium bearing a definite date, the reasoning of the court is in line with the reasoning upon which our conclusion is based. The court there said: "But the application contained this clause: 'I agree that this application shall not be binding upon the company until accepted either by the secretary at the home office or by an agent duly authorized to issue policies.' And defendant contends that this entirely defeats any idea or provision that the insurance should begin on the date of the application. We do not think this clause has reference to the time when the insurance, if accepted, is to take effect, but only makes the contract of insurance, which the plaintiff sought subject to defendant's acceptance. If the defendant did not choose to accept the insurance thus proffered, it could decline it and return the premium, and it was agreed in the receipt that if they did not accept it in 20 days they would return the money. They did not decline the insurance. They accepted it, but chose to date the policy November 1, 1917, which made it commence after the accident had occurred. The duty of the defendant, if it chose to accept the insurance at all—and it did choose to accept it—was to issue the policy pursuant to the terms of the contract made by its authorized agent with the applicant."

It is contended by plaintiff that the trial court erred in refusing to permit testimony concerning a conversation between the agent Abraham and Mr. Linnastruth in which Mr. Abraham stated that the applicant would be protected from the date of the application. It is also contended that under the doctrines of waiver and estoppel defendant may not now assert nonliability. The conclusion at which we have arrived, as above set forth, makes it unnecessary to discuss these contentions.

The judgment is reversed.

MOORE, Presiding Justice (concurring).

I concur. Decedent signed his applications for the policies on July 17. He knew that before the contracts could be issued the applications must be received and considered by defendant at its office in Omaha. While the application form notified decedent that he should not be protected until the policies were issued, such notice could not reasonably have intended that an application for insurance might be suspended in this way, thereby leaving decedent without insurance for a period to be determined solely by the insurer. The public expects, and it is entitled to expect, generous treatment at the hands of such corporations as are under state regulation. When decedent applied for insurance he paid the designated premiums and supplied the factual data concerning himself as of that date. He bargained for insurance then and there, and it is a reasonable construction of the contracts that he knew upon acceptance of the applications the insurance dated back to July 17, the day on which decedent signed the agreements for the insurance and paid the price demanded.

The premiums were retained not only until the applicant deceased but for more than four months thereafter, and until defendant answered in this action. It had no right or authority arbitrarily to defer the issuance of the policies after accepting decedent as an insurable risk. Decedent was entitled within a reasonable time to action upon his applications. Such time would have required the date and issuance of the policies to be prior to July 26, the day of the first accident. Having prepared the forms for the applications, defendant may not after a loss so construe uncertain phrases of the contract as to defeat it, if by reasonable construction the policy may be made valid. Narver v. California State Life Ins. Co., 211 Cal. 176, 294 P. 393, 71 A.L.R. 1374.

McCOMB, J., dissented.

53 Cal.App.2d 260

MATTEONI v. PACIFIC GAS & ELECTRIC CO.

Civ. 6734.

District Court of Appeal, Third District, California.

July 3, 1942.

Rehearing Denied Aug. 1, 1942.

Hearing Denied Sept. 1, 1942.

1. Negligence ⚷69

Forgetfulness of a known danger is not "contributory negligence" barring recovery for injuries sustained as result of another's negligence unless such forgetfulness shows want of ordinary care.

See Words and Phrases, Permanent Edition, for all other definitions of "Contributory negligence".

2. Negligence ⚷136(26)

Whether forgetfulness of a known danger will operate as contributory negligence barring recovery for injuries resulting from negligence of another is ordinarily a question for the jury.

3. Electricity ⚷19(3)

In action against gas and electric company for injuries sustained as the result of electric shock received from defendant's broken live wire, burden of establishing contributory negligence was upon the company.

4. Electricity ⚷19(12)

Where member of volunteer fire department seeking damages for injuries resulting from electric shock received from broken high voltage wire while fighting fire started by broken wire testified that he did not know of presence of broken live wire until he suffered shock, whether his failure to recall that 4 years prior thereto he had participated in fighting a fire in the same vicinity started by live wire broken by falling limb and the precautions then taken to guard against electrocution constituted contributory negligence barring recovery was for jury.

5. Witnesses ⚷260

When a witness fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, the party calling him may refresh his recollection by directing his attention to former statements, by reading testimony given upon a former trial or examination, or in some cases by reading of information on file.

6. Appeal and error ⚷926(7)

Where appellant failed to point out just what alleged variance between testimony given by witness and previous written statement of witness consisted of, District Court of Appeal would assume in support of judgment that trial court found no such variance as would warrant permitting witness to refresh her memory from such previous statement.

7. Appeal and error ⚷901, 1032(2)

Appellant seeking reversal on the ground of erroneous refusal to permit witness to refresh his recollection from his previous written statement must not only convince reviewing court that trial court erred, but must go further and snow that the ruling complained of was prejudicial in its effect and result.

◆

Appeal from Superior Court, Sonoma County; W. D. L. Held, Judge.

Action by Alfredo Matteoni against Pacific Gas and Electric Company for personal injuries suffered as result of electric shock received from broken power line maintained by defendant. From a judgment entered on verdict in favor of plaintiff, defendant appeals.

Judgment affirmed.

Thos. J. Straub and J. J. Briare, both of San Francisco, Barrett & McConnell, of Santa Rosa, and W. R. Dunn, of San Francisco, for appellant.

Linforth, Cannon & Miller, Jesse H. Miller, and Eugene H. O'Donnell, all of San Francisco, and Geary & Tauzer, of Santa Rosa, for respondent.

PER CURIAM.

This action was brought to recover damages arising out of personal injuries received by plaintiff. The issues were submitted to a jury, which brought in a verdict in the sum of $20,387.25. The appeal is taken from the judgment entered upon said verdict.

The facts of the case are practically without substantial conflict. At the date of the accident (July 12, 1939), and for many years prior thereto, defendant had constructed and maintained a power-line near Agua Caliente, Sonoma County, immediately south of a row of eucalyptus trees, which varied from seventy-five to one hundred feet in height, and were some twenty-eight years old. This type of eucalyptus tree was known as "Red Gum," and is more brittle than the ordinary eucalyptus, the limbs having a tendency to break and fall of their own weight. The powerline consisted of the usual poles, upon which were strung three wires carrying 6,900 volts. Each of said wires carried about 4,000 volts of electricity to ground. This voltage was sufficient to cause the death of a human being. Some of the limbs of said trees overhung the wires. In *1935*, a limb from one of these trees had fallen and broken the wires, causing a fire. This incident was called to the attention of the local agent of appellant at that time. Shortly after said fire, the local agent was told that "unless they trim the trees, some day somebody is going to get killed." The local agent said he had reported the situation to appellant. On the afternoon of July 12, *1939*, which was a normal summer day with no unusual or high wind blowing, a limb fell from one of the trees, said limb being six or seven inches in diameter and about twenty-five feet in length. This limb appeared to have fallen of its own weight. It remained attached to the trunk of the tree, and fell toward the south, and was found after the fire resting on the two remaining wires of the circuit, the third wire having been broken and fallen to the ground. One end of the broken wire was lying across the roof of a dwelling nearby, the broken end of said wire extending into the field. It is conceded by both parties that the fire started by the contact of a broken end of said wire with some tree or other object on the ground.

Respondent was a volunteer fireman, and when the alarm was given, proceeded to the premises. He reported to the fire chief in charge, who handed him a hose and told him to proceed to fight the fire. What took place thereafter is described by him as follows: "I got the hose in my hand, and that is all I remember; a great big train went by, just boom, like a locomotive going by; that is all. The next thing I remember, I was home in bed." Witness Eastman, who was the agent of the volunteer fire department, testified: "At the time I handed him the hose to play water on the fire, I did not know the wire was down, because the flame and smoke was so bad we could not see anything."

With reference to whether or not respondent had knowledge that there was a live wire in the vicinity of the fire, he testified that he had no such knowledge at the time of the accident. The following excerpts from the record substantiate the foregoing statement: "Question: Now, in 1939, July 12, 1939, when you arrived at the fire, did you see any wire down? Answer: No, sir. * * * Question: At the time chief Eastman handed you the hose, is it not a fact, Mr. Matteoni, that you saw the wire on the ground at that time? Answer: No, sir." Witness Huber, called by appellant, testified that he was within five or six feet of respondent when the latter started to use the hose on the fire. He stated that he was only there a moment when he heard respondent say something, and saw him "straighten up and sort of stiffen up, and just at that time someone called out 'live wire.' *Before the cry of 'live wire,' I did not observe an electric wire upon the ground in that vicinity.*" Immediately thereafter, however, the witness testified that he did see the end of a live wire which was tangled on the ground and sparking. He stated, however, that before the accident he did not know that a live wire was down in the field. Substantially the same testimony was given by witness Delaney, called by appellant. No attack is made upon the amount of the award. Before the accident, respondent was a healthy and robust man, fifty-four years of age. Immediately thereafter he became paralyzed from the waist down. He was still under the care of physicians at the time of the trial, some twenty months after the accident. He has no sensation in either foot, and drags himself around with difficulty on two canes. He has suffered complete loss of his sexual powers. His heart function was impaired, and he will not be able to do any physical labor in the future.

Turning to the contentions of appellant on this appeal, no attack is made upon the sufficiency of the evidence to sustain the charge that appellant was negligent in failing to cut and remove those portions of the eucalyptus trees which overhung its powerlines, or which were likely to have fallen thereon under ordinary circumstances. There are but *two grounds* urged for a reversal of the judgment. The *first* is the contributory negligence of appellant as a matter of law; and the *second,* the ruling of the court whereby defendant was denied the right to show a witness a previous written statement for the purpose of refreshing her recollection.

[1, 2] Taking up the first contention, it is necessary to detail further facts which appear in the record, respecting the first fire in 1935. At that time respondent was called upon to fight a fire in the same vicinity, which was caused by a broken wire. In connection with that incident respondent testified: "Question: In 1935, did you know at the time you arrived at the scene of that fire that an electric wire caused it? Answer: No, sir. Question: How soon after the fire was over did you discover it? Answer: I discovered it right away. We got the people all out of that vicinity and we fought the fire, naturally, at a distance." The position upon this question which is taken by appellant is indicated in the following excerpt from its brief: "With the known dangers accompanying the presence of broken wires covering high electric voltage, is it not reasonable to infer that if respondent even suspected that a live wire caused the fire, he would have taken added and unusual precautions to remain away from the broken wire? This he had previously done when, in 1935, a broken wire had caused a fire in the same field. If respondent had any knowledge of the broken wire being present at the time of the accident, is it not reasonable to assume that he would have followed the same course that he did in 1935 and fight the fire at a disance?" The question is whether or not it was negligence as a matter of law for respondent to have *forgotten the former incident* and the danger connected with fighting fire under such circumstances. It should first be pointed out that respondent, at the time of the second fire, and before the accident, had no knowledge that the power-line had been broken, or that the second fire was started by an electric current. The jury had a right to believe this testimony as against any inference which might be drawn to the effect that respondent must have known of the presence of a live broken wire, for the reason that he had, four years prior thereto, fought a fire there which had been caused by a broken live wire. Obviously, the jury arrived at the conclusion that respondent was telling the truth, and that he had no knowledge or recollection whatever of the danger arising out of fighting a fire under such circumstances. It is strongly urged by appellant that the previous experience of respondent with respect to the first fire was of such a character that it charged him as a matter of law, with knowledge of the danger which he might incur. It may be reasonably assumed that respondent did not have in mind, or momentarily forgot his previous experience. It is the rule that "Forgetfulness of a known danger will not always operate to prevent recovery of damages by a person who is injured. To forget is not negligence, unless it shows a want of ordinary care." Roseberry v. Edward F. Niehaus & Co., 166 Cal. 481–483, 137 P. 232, 233. It is stated in Meindersee v. Meyers, 188 Cal. 498–504, 205 P. 1078, 1081, where the foregoing holding in the Roseberry case is reiterated, that: "Generally the question is one for the jury." In the case of Gibson v. County of Mendocino, 16 Cal.2d 80, 105 P.2d 105, 109, plaintiff started to enter the outer door of the courthouse, and stood upon a smooth metal plate, in such a position that the door struck her when closing, and threw her down the outer steps to the pavement. The court took the position that while the plaintiff knew of the dangerous condition arising out of the smooth metal plate, and also that the door was operated by a self-closing device, her forgetfulness of such danger was excused by the fact that as she stood on the plate, and in a position of danger, she heard the fire alarm, and turned away in order to listen to a number of blasts, so that she might determine the location of the fire, she having testified that she had been "burned out once." In the instant case the jury might have found from the surrounding facts and circumstances that respondent was excused in failing to recollect his experience with the first fire. It is a matter of common knowledge that there is considerable excitement surrounding the fighting of a fire, and the jury may have found that respondent was not called upon to exercise that degree of deliberation which would be called for under ordinary circumstances. The case comes clearly within the rule laid down in Giraudi v. Electric Imp. Co., 107 Cal. 120, 40 P. 108, 110, 48 Am.St. Rep. 114, 28 L.R.A. 596:

> "It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction."

[3] See, also, Ramos v. Service Bros., 118 Cal.App. 432, 5 P.2d 623. The interval of over four years between the two

fires and the emergency character of the act in which appellant was engaged when injured, are potent factors which may well have justified the jury in finding that the failure of respondent to have remembered the hazard connected with the first fire was not such negligence as would bar recovery. Finally, as stated by this court in Langazo v. San Joaquin Light & Power Corp., 32 Cal.App.2d 678, 685, 90 P.2d 825, 829:

> "It must be remembered that the burden of establishing a defense of contributory negligence is upon the defendant. Such burden has not been sustained to the degree that 'from the facts, reasonable men can draw but one inference, which inference points unerringly to the negligence of plaintiff proximately contributing to his own injury'. Crawford v. Southern Pacific Co., et al., 3 Cal.2d 427, 45 P.2d 183."

[4] The cases relied upon by appellant are not factually comparable. In the first place they involve situations where the danger was *admittedly* known to the injured party at the time of the accident (Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76), or where the danger was *clearly apparent.* Anderson v. Western Pac. R. Co., 17 Cal.App.2d 244, 61 P.2d 1209. Here, respondent testified that he did not know of the presence of the live broken wire, and the evidence shows that there was practically no visibility at all when he started to use the hose. In other words, the jury may have found that the danger was not obvious or clearly apparent. We cannot say, as a matter of law, that it was.

[5] The second ground urged for reversal is error predicated upon a ruling of the trial court in refusing to permit witness Hickey to refresh her memory from a previous statement which she had made. Appellant sets out the statement and the testimony, and says that there is a variance between them. The latter is spread over some twelve pages of appellant's brief. Nowhere does appellant point out just what the alleged variance consisted of, or what particular facts are involved. It certainly is not the duty of this court to search for any inconsistencies or conflicts between the statement and the testimony. Appellant relies upon the rule stated in 27 Cal.Jur. 86, where it is said:

> "When a witness fails to testify to matters previously within his recollection, or gives evidence in apparent variance with that formerly given, the party calling him may with propriety refresh his recollection by directing his attention to former statements, by reading testimony given upon a former trial or examination, or, in some cases, by reading an information on file. And it has been stated that when attention is being directed to prior statements leading questions may be rightfully resorted to."

[6, 7] As the matter is presented to us, we may, and do assume, in support of the judgment, that the trial court found no such variance, and therefore ruled as stated. "If an appellant seeks a reversal upon such grounds, not only must he convince the reviewing court that the trial court erred, but he must go further, and show that the ruling complained of was prejudicial in its effect and result." Robertson v. Weingart, 91 Cal.App. 715, 267 P. 741, 746. Appellant here has failed to sustain such burden.

The judgment is affirmed.

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53 Cal.App.2d 207

KERBY v. HAL ROACH STUDIOS, Inc., et al.

Civ. 12923.

District Court of Appeal, Second District, Division 3, California.

July 1, 1942.

Rehearing Denied July 27, 1942.

Hearing Denied Aug. 27, 1942.

1. **Torts** 🔑8

In California, the right of privacy is accepted as a right the breach of which gives rise to a cause of action.

2. **Torts** 🔑8

The "right of privacy" is the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity, in short, it is the right to be let alone.

See Words and Phrases, Permanent Edition, for all other definitions of "Right of Privacy".

3. Constitutional law ⚿86

The constitutional right to pursue and obtain happiness includes right to freedom from unnecessary attacks on one's character, social standing, or reputation.

4. Torts ⚿8

The circulating of a letter bearing plaintiff's name as apparent signer and handwritten in a feminine hand, of a nature which cast doubt on plaintiff's moral character, which letter was circulated for purpose of advertising a moving picture, was actionable as constituting an invasion of plaintiff's "right of privacy".

5. Torts ⚿8

The "right of privacy" includes protection against mortifying notoriety, unless some legal justification for its infliction exists.

6. Evidence ⚿20(1)

It is a matter of judicial knowledge that by use of an engraved plate a print of a longhand letter can be made which, in absence of close inspection, will pass for original handwriting.

7. Torts ⚿8

That letter bearing plaintiff's name as apparent signer, which was of a nature which cast doubt on plaintiff's moral character, was circulated by defendants for purpose of advertising a moving picture, and that defendants had no intent to refer therein to plaintiff and did not know of her existence, tended to show want of "malice" and might have averted an award of punitive damages, but it constituted no defense to action for invasion of plaintiff's right of privacy.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice".

8. Libel and slander ⚿2

Inadvertence or mistake affords no defense to a charge of libel, where defamatory publication does, in fact, refer to plaintiff.

9. Libel and slander ⚿19

A "libel" need not be a statement directly referring to a person and stating something defamatory about him, but it may as well be accomplished by falsely putting words into mouth or attaching them to pen of person defamed, thus imputing to such person a willingness to use them, where mere fact of having uttered or used the words would produce any of results enumerated in statute. Civ.Code, § 45.

See Words and Phrases, Permanent Edition, for all other definitions of "Libel".

10. Costs ⚿107

If plaintiff's cause of action for damages which allegedly resulted from circulating of a letter bearing her name as apparent signer, which was of a nature which cast doubt on her moral character, was one for libel, plaintiff's action would be subject to dismissal, unless bond for costs as required by statute were filed. Gen.Laws 1937, Act 4317.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Marion Kerby against Hal Roach Studios, Inc., and others for violation of plaintiff's right of privacy. From a judgment of nonsuit, the plaintiff appeals.

Reversed.

Hearing denied; GIBSON, C. J., and EDMONDS, J., dissenting.

John J. Wilson, Wallace L. Ware, Lowell L. Dryden, and Joseph Doyle, all of Los Angeles, for appellant.

Mitchell, Silberberg, Roth & Knupp, of Los Angeles, for respondents.

SHAW, Justice pro tem.

The plaintiff appeals from a judgment of nonsuit. No question is raised regarding the sufficiency of the complaint to present her case; hence we do not review its allegations.

The salient facts shown by the evidence are as follows: The plaintiff is an actress, concert singer, and monologist of many years' experience, both in the United States and Europe. For many years she has been and now is engaged in collecting American folk-lore, including legends, stories and songs, and in presenting them to the public on concert programs. Her character is conceded to be good. Defendant corporation is engaged in the business of producing motion pictures and defendant Seltzer is the head of its publicity department. In March, 1939, a motion picture which the corporation had produced was on exhibition in Los Angeles in the theater mentioned in the letter hereinafter set forth. For the purpose of advertising that picture the defendants caused a letter bearing plaintiff's name as apparent signer to be prepared, handwritten in a feminine hand and then reproduced mechanically on pink stationery, and also caused 1,000 copies of the letter so reproduced to be enclosed in pink envelopes, addressed in a feminine hand and sent by mail to 1,000 men householders selected by the mailing agency which addressed the envelopes. The date of mailing was March 8, 1939. All of this was done without plaintiff's knowledge or consent. The letter so sent reads as follows:

"Dearest:

"Don't breathe it to a soul, but I'm back in Los Angeles and more curious than ever to see you. Remember how I cut up about a year ago? Well, I'm raring to go again, and believe me I'm in the mood for fun.

"Let's renew our *aq*uaintanceship and I promise you an evening you won't forget. Meet me in front of Warners Downtown Theatre at 7th and Hill on Thursday. Just look for a girl with a gleam in her eye, a smile on her lips and mischief on her mind!

"Fondly,
"Your ectoplasmic playmate,
"Marion Kerby."

At the time this letter was sent plaintiff was a resident of Los Angeles. At that time and during all of the year 1939 her name and address were listed in the Los Angeles City Directory and in the Los Angeles telephone directory, and she was the only person of that name so listed. The name at the end of this letter, in addition to being that of plaintiff, was also the name of the chief character in two works of fiction previously published and of the chief feminine character in the moving picture above mentioned.

The effects of the sending of this letter in the manner and to the persons above described are not depicted in the record except by an excluded offer of proof and a showing that plaintiff had a large number of telephone calls and a personal visit in regard to it; but no evidence and little imagination and knowledge of human nature are necessary to enable anyone to understand what results should be expected. It could not but lead to misunderstandings between husbands and their wives who saw the letter and put the worst interpretation on it; it would arouse the expectations of lonesome males who were interested in the promised evening; and it must result in telephone calls and other communications from both irate wives and lonesome males and perhaps also from aggrieved but innocent husbands. It would also necessarily affect adversely the reputation of plaintiff with all who might read the letter and suppose her capable of writing and sending it. Apparently the defendants had no foresight in these matters, but they cannot for that reason escape the natural and probable consequences of their acts. The effect of all this on plaintiff does appear; she became terribly excited, nervous, unhappy; she had a feeling of disgrace and anguish; she was heartsick and didn't care what happened, whether she had the rest of a career or not; in the case of a lady caller plaintiff was afraid of being shot. Whereas she had fifteen paid engagements in the twelve months immediately preceding the publication, she had only two in seventeen months thereafter, but the evidence does not certainly show that this was due to the sending of the letter.

[1-3] Does the law refuse all redress to one who has been thus grievously imposed upon and subjected to embarrassment, humiliation and scorn, merely to satisfy the desire of some business concern for publicity? We think not. Plaintiff rests her appeal here for redress upon her right of privacy and we think it may be so supported. The law regarding privacy is of somewhat recent development. In some states the right of privacy is not yet recognized as a justiciable right. But in California it has been accepted as a right the breach of which gives rise to a cause of action. (Melvin v. Reid, 1931, 112 Cal.App. 285, 297 P. 91, 92, where the law on this subject is quite fully discussed.) The case at bar differs in its facts from that just cited and from any other to which our attention has been called in which the right of privacy has been recognized and enforced, but that fact does not necessarily require us to hold that plaintiff has no right of action here. New sets of facts are continually arising to which accepted legal principles must be applied, and the novelty of the factual situation is not an unscalable barrier to such application of the law. As stated in Melvin v. Reid, supra, quoting from another case, "The right of privacy has been defined as the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short, it is the right to be let alone." The court further said in Melvin v. Reid: "The right to pursue

and obtain happiness is guaranteed to all by the fundamental law of our state. This right by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing, or reputation."

[4, 5] Here the plaintiff was, without her consent, plucked from her regular routine of life and thrust before the world, or at least 1,000 of its persons, as the author of a letter not written by her and of a nature to at least cast doubt on her moral character, and this was done in a manner to call down on her a train of highly undesirable consequences. This constituted as strong an invasion of the right of privacy as any of those described in the cases. As stated in Pavesich v. New England Life Ins. Co., 1905, 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 113, 106 Am.St.Rep. 104, 126, 2 Ann.Cas. 561, the right of privacy includes protection against "mortifying notoriety," unless some legal justification for its infliction exists. The desire to advertise a business constitutes no such justification. A similar question was involved in Goodyear Tire & Rubber Co. v. Vandergriff, 1936, 52 Ga.App. 662, 184 S.E. 452, 454. There the respondent, Vandergriff, who was engaged in the trucking business and seems to have been a large user of tires, sued the Goodyear Tire & Rubber Company and several of its employees, and the defendants appealed from a judgment against them. One of the individual appellants telephoned to several tire dealers who were competitors of the Goodyear Company, falsely represented to them that the respondent, Vandergriff, was talking and thus obtained from these competitors the confidential prices they would have quoted to Vandergriff. Another of the appellants then telephoned to one of these competitors, objecting to the lowness of the prices so quoted, and falsely informed this competitor that Vandergriff had revealed the prices quoted to him by the competitor. The competitors sent representatives to call on Vandergriff because of the statement that he was in the market for tires, and he was also subjected to embarrassment, chagrin, contempt and ridicule because of this conduct of appellants. On these facts it was held that Vandergriff had a cause of action. While the decision was partly based on a statute forbidding false personation, the court also held that there was an actionable invasion of Vandergriff's right of privacy, citing and following Pavesich v. New England Life Ins. Co., supra, and saying in this connection: "* * * placing the plaintiff in the position of having procured confidential prices on tires, and then betraying the confidence imposed in him by giving the quoted prices to competitors, had 'a tendency to bring the plaintiff into contempt or ridicule,' and 'entitles him to recover, without proof of special damage.'"

In Melvin v. Reid, 1931, supra, 112 Cal. App. 285, 297 P. 91, are listed certain qualifications and limitations of the right of privacy, but the present case does not come within any of them. The plaintiff's position as an actress and concert singer might have afforded justification for some sorts of publicity regarding her greater than that to which persons not so engaged must submit, but it in no wise justified the acts done by the defendants here.

Respondent contends that there is "nothing salacious, suggestive or immoral about the letter." Without going that far, a letter written and circulated as was this one might invade the right of privacy, but we cannot accede to this contention in all respects. To understand the full scope of the imputations made by the sending of the letter we must bear in mind all the circumstances of its sending. Plaintiff's name was signed at the end of it and this constituted an assertion that she had written it. It was handwritten in a feminine hand and on such stationery as women use in private correspondence, thus negativing any idea that it was a matter of business or anything but a personal communication to the addressee. It was sent to 1,000 male householders selected by the mailing agency. It may reasonably be inferred that many of these householders would be married and that few, if any, of them would have a personal acquaintance with plaintiff. The letter itself is of somewhat doubtful implications. While it does not directly assert or invite an improper relation between the writer and the person of the opposite sex to whom it is addressed, no great amount of imagination is necessary to read such a meaning into it, and it is easy to see how the wife of an addressee, if she saw the letter, might have done so. But apart from this, and giving the letter the most innocent meaning its words will reasonably bear, no modest woman of fine feelings and sensibilities would write such a letter as this to men whom she did not know. To suggest that a woman has written such a letter under such circumstances is to impute to her a laxness of character, a coarseness of moral fibre and a willingness to scrape acquaintance for no good purpose; and to spread such imputations abroad, as defendants have done, is as much an invasion of the right of privacy as was the publication of true but derogatory statements in Melvin v. Reid, 1931, supra, 112 Cal.App. 285, 297 P. 91.

[6] Defendants also contend that the letter "is plainly an advertisement and should have been so regarded by any reasonable person," advancing in support of this contention the claim that it was printed and that it fixed no time for the meeting proposed. The exact method by which the letter was reproduced does not appear, but the evidence does show that it was first typewritten, then handwritten by a woman clerk, and that the longhand letter was turned over to an engraving plant by which an engraved plate was made. It is a matter of judicial notice that by such methods prints can be made which, in the absence of close inspection, will pass for original handwriting, and we cannot assume that this letter was obviously a printed one. There is nothing in its words to refer to the motion picture or to warn any reader that it was merely an advertisement or other work of fiction. As to the rendezvous, the letter proposed that it be in the evening "on Thursday." The recipient would easily understand this to mean the next Thursday after receipt of the letter, and this would not be so vague as to make it obvious that frustration would meet any attempt to keep the appointment.

[7,8] As already indicated, the letter was circulated by defendants for the purpose of advertising a moving picture, and as far as appears they had no intent to refer therein to plaintiff and did not know of her existence, although they might easily have discovered it. These facts, which are stressed by defendants, tend to show want of malice and might avert an award of punitive damages, but they constitute no defense to plaintiff's action. The letter did, in fact, refer to plaintiff in clear and definite fashion, and would reasonably have been so understood by anyone who knew of her existence. The wrong complained of is the invasion of plaintiff's right of privacy, and such an invasion is no less real or damaging because the invader supposed he was in other territory. The case bears considerable analogy, both as to the right invaded and the nature of the injury inflicted, to one of libel. It is well established that inadvertence or mistake affords no defense to a charge of libel, where the defamatory publication does, in fact, refer to the plaintiff. Davis v. Hearst, 1911, 160 Cal. 143, 155, 116 P. 530; Taylor v. Hearst, (1895) 107 Cal. 262, 270, 40 P. 392; Restatement, Torts, §§ 564, 579, and comment; Peck v. Tribune Co., 1909, 214 U.S. 185, 29 S.Ct. 554, 53 L.Ed. 960, 16 Ann.Cas. 1075; Corrigan v. Bobbs-Merrill Co., 1920, 228 N.Y. 58, 63, 126 N.E. 260, 262, 10 A.L.R. 662, 666. "The question is not so much who was aimed at as who was hit." Corrigan v. Bobbs-Merrill Co., supra.

[9] The letter complained of here might very well have formed the basis of a charge of libel. It appears to come fully within the definition of libel in section 45 of the Civil Code. A libel need not be a statement directly referring to a person and stating something defamatory about him. It may as well be accomplished by falsely putting words into the mouth or attaching them to the pen of the person defamed and thus imputing to such person a willingness to use them, where the mere fact of having uttered or used the words would produce any of the results enumerated in section 45, supra. Karjavainean v. MacFadden Publications, 1940, 305 Mass. 573, 26 N.E.2d 538; Ben-Oliel v. Press Pub. Co., 1929, 251 N.Y. 250, 167 N.E. 432, 434; Gershwin v. Ethical Pub. Co., 1937, 166 Misc. 39, 1 N.Y.S.2d 904; D'Altomonte v. New York Herald Co., 1913, 154 App.Div. 453, 139 N.Y.S. 200, 202, approved on this point in 208 N.Y. 596, 102 N.E. 1101.

[10] We do not, however, rest our decision on the ground of libel, for several reasons. The appellant has not sought to uphold her action as one for libel, and the complaint, while possibly sufficient to charge a libel, is not so labeled and was obviously not drawn for that purpose. The record does not show whether or not plaintiff complied with the statute (Stats.1871-72 p. 533; Deering's Gen.Laws, 1937, Act 4317) requiring a bond for costs to be filed in an action for libel or slander, but the facts above recited imbue us with a strong suspicion that she did not; and if

such be the case her action, if for libel, would be subject to dismissal on its return to the lower court, unless such bond were filed. Williams v. Superior Court, 1935, 7 Cal.App.2d 436, 45 P.2d 1027; Bried v. Superior Court, 1938, 11 Cal.2d 351, 354, 79 P.2d 1091.

The judgment is reversed.

SCHAUER, P. J., and SHINN, J., concurred.

53 Cal.App.2d 81

WILLIAMS v. LAYNE et al.

Civ. 11934.

District Court of Appeal, First District, Division 1, California.

June 29, 1942.

1. Automobiles 🔑245(83)

Where motorist making a right angle turn at street intersection at night at speed of about 15 miles per hour collided with the rear of an unlighted truck parked on the traveled portion of street about 25 feet from the intersection, whether motorist was guilty of contributory negligence barring recovery for injuries sustained was for jury.

2. Appeal and error 🔑1001(1)

Jury's finding on the issue of contributory negligence, when supported by substantial evidence, is binding.

3. Automobiles 🔑243(9)

In action for injuries sustained when automobile collided with parked truck, testimony of plaintiff's witness as to whether there were any clearance lights on the truck, as a part of the witness' description of the scene of the accident immediately after it happened, was admissible.

4. Trial 🔑295(1)

Instructions to the jury must be read and considered as a whole.

5. Appeal and error 🔑882(12)
Trial 🔑253(4), 296(4)

An instruction that if defendants' negligence solely and proximately caused collision, plaintiff was entitled to recover for injuries sustained, was not erroneous as eliminating defense of contributory negligence, particularly where such matter was fully covered in other instructions, nor was it erroneous for failure to explain "proximately caused", where such phrase appeared throughout instructions prepared by defendants themselves without any explanation of its meaning.

6. Appeal and error 🔑207

Generally where alleged misconduct is not assigned as error in the trial court at the time the incident occurs, the point is not available on appeal.

7. Appeal and error 🔑1060(4)

In action for injuries sustained in automobile collision, an inquiry by plaintiff's attorney on voir dire examination as to whether prospective juror, whose office was in the same building as those of defendants' attorney with whom venireman was well acquainted, was not engaged in the insurance business did not constitute "misconduct" prejudicial to defendants, where damages assessed were not excessive, and defendants' liability under the evidence was not a close question.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

8. Trial 🔑108½

Evidence that defendant is insured against loss is inadmissible and the effort to get such fact before the jury by questions designed for that purpose is improper and may be regarded as prejudicial "misconduct", but such questions may properly be asked as are reasonably necessary to ascertain whether a prospective juror is free from bias or interest, including inquiry as to interest as an agent or stockholder in a specified insurance company or in any company insuring against liability.

9. Appeal and error 🔑1060(4)

A question relating to insurance asked on voir dire, even though improper, cannot be said to have resulted in a "miscarriage of justice" so as to be prejudicial unless amount assessed by jury as damage is disproportionate to that which evidence reasonably shows, or defendant's liability therefor under the evidence is a close question.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

10. Appeal and error ⚿1069(1)

"Misconduct" necessitating a new trial could not be predicated on statements made by juror in the presence of two other jurors, the court reporter and the bailiff during a recess in the trial, where no reference was made in the conversation to the case on trial or the facts involved therein.

11. Appeal and error ⚿1069(1)

Where it is shown that jurors have improperly talked to each other about the case before its final submission, a new trial is not justified unless it appears that prejudice to the substantial rights of a party resulted therefrom.

12. Appeal and error ⚿1004(4)

Reviewing court may not set aside jury's award of damages as excessive merely because court's opinion is at variance with that of the jurors, but may do so only where the excess appears as a matter of law or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise at once a presumption that it is the result of passion, prejudice, or corruption rather than honest and sober judgment.

13. Damages ⚿131(1)

An award of $2,500 to a woman 64 years of age formerly employed as cook and housekeeper at a salary of $50 per month plus board and room was not excessive where injuries to back, shoulders, neck and right side caused severe pain and had incapacitated her for manual labor of any kind at the time of trial one year after accident and for the four months prior thereto.

◆

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Bessie Williams against Roy Layne and another for personal injuries sustained when plaintiff's automobile collided with the parked truck of defendants. From a judgment entered upon a verdict in favor of plaintiff, defendants appeal.

Judgment affirmed.

F. E. Hoffmann, of San Mateo, for appellants.

Norman S. Menifee, of Redwood City, for respondent.

KNIGHT, Justice.

Defendants parked their truck on Waverly Street close to the corner of Dexter Street, just south of Redwood City, and allowed it to remain there after dark without lights. About 9 o'clock that night the plaintiff while driving alone in her automobile collided with the rear end of the truck, and on account of the personal injuries received she brought this action for damages and a jury returned a verdict in her favor for $2,500. From the judgment entered thereon the defendants appeal. They make no claim that they were not negligent, but as first ground of appeal urge that plaintiff was guilty of contributory negligence as a matter of law in failing to observe the presence of the truck before she collided with it, and that therefore their motion for a nonsuit should have been granted. The point is without merit.

It appears from the evidence that on the evening in question plaintiff had been visiting her daughter at the latter's home on the south side of Dexter Street, which runs east and west. She parked her car on the same side of the street about 30 or 40 feet from and facing the corner of Waverly Street, which runs north and south, and about 9 o'clock she started to drive home. In rounding the corner into Waverly Street she ran into the rear end of the truck which was parked about 25 feet from the corner on the west side of Waverly Street parallel with the curb, with all four wheels on the traveled portion of the street and without lights, admittedly in violation of law. The evidence is conflicting as to whether the truck was equipped with a rear end reflector, but in this connection it shows that the back of the truck was so covered with mud that neither glass nor metal of any type were visible. At the time of the impact plaintiff was still driving in low gear, about 15 miles an hour, with her headlights burning, giving visibility for at least 60 feet; but her failure to see the truck can be readily accounted for by the fact that as she rounded the corner the lights of her car did not focus on the truck in time to avoid colliding with it.

[1, 2] Under the foregoing circumstances the question of contributory negligence was one of pure fact for the jury to decide, and the granting of a nonsuit would have been reversible error. Gammon v. Wales, 115 Cal.App. 133, 300 P. 988; Smyth v. Harris & Devine, 3 Cal.App.2d 194, 38 P.2d 862. Furthermore, since it appears that the jury's determination on that issue is supported by substantial evi-

dence, it is binding on appeal. Sawdey v. Producers' Milk Co., 107 Cal.App. 467, 290 P. 684; Smarda v. Fruit Growers' Supply Co., 1 Cal.App.2d 265, 36 P.2d 701; Casey v. Gritsch, 1 Cal.App.2d 206, 36 P.2d 696. There is no similarity between the facts of this case and those involved in Pate v. Pickwick Stages System, 125 Cal.App. 670, 14 P.2d 174, cited by defendants; but the decision therein may be taken as supporting plaintiff's position here that when there is substantial evidence supporting the finding of a jury on the issue of negligence, its finding is binding on appeal.

[3] There was no error in overruling defendants' objection to a question propounded to one of plaintiff's witnesses as to whether there were any clearance lights on the truck. The testimony elicited was part of the witness's description of the scene of the accident immediately after it happened, and therefore was clearly admissible.

[4, 5] The Court gave an instruction to the effect that if the jury found that at the time of the collision the defendants were violating any of the provisions of the Vehicle Code referred to in the instructions, then defendants were guilty of negligence as a matter of law, and that if it further found that such negligence "solely and proximately caused the collision" plaintiff was entitled to a verdict in her favor. Defendants contend that the instruction is objectionable for two reasons: That it eliminated from the consideration of the jury the defense of contributory negligence, and that it did not explain the term "proximately caused." Neither point is well taken. The instructions must be read and considered as a whole, and it appears therefrom that at defendants' request the court gave several instructions expounding the law upon the defense of contributory negligence, wherein the jury was definitely and properly instructed that if it found "by a preponderance of the evidence that plaintiff was guilty of contributory negligence, proximately contributing to the accident" she was not entitled to damages, and its "verdict must be in favor of the defendants." It must be assumed, therefore, that the jury gave full consideration to the instructions so given. Even standing alone the instruction complained of was not erroneous because as will be noted the jury was in effect told that if the accident was proximately caused by the sole negligence of the defendants plaintiff was entitled to a verdict; and such is doubtless the law. With respect to the second point, the record shows that throughout these same instructions, which defendants themselves proposed, they employed the term "proximately caused." If, therefore, as they now claim, the use of that term required explanation, an appropriate instruction to accomplish that purpose should have been offered by them along with their other instructions.

During the voir dire examination of a prospective juror he stated that his office and those of defendants' attorney were in the same building; that he knew said attorney quite well, and saw him every day. He was then asked this question: "You are also in the insurance business, aren't you, Mr. Signarowitz?" and he replied, "Yes, sir." Defendants' attorney then stated: "I cannot ask Mr. Signarowitz anything. I have known him for ten years." Thereupon the juror was excused peremptorily by counsel for plaintiff. No objection whatever was interposed to the quoted question, nor was any complaint or assignment of misconduct made as to the asking thereof; but defendants now contend that the asking thereof constituted prejudicial misconduct.

[6-9] It is held generally that where alleged misconduct is not assigned as error in the trial court at the time the incident takes place, the point is not available on appeal. Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346, citing numerous authorities; Aydlott v. Key System Transit Co., 104 Cal.App. 621, 286 P. 456. However, regardless of the failure here to make timely complaint, there was no impropriety in asking the question. As said in Coursault v. Schwebel, 118 Cal.App. 259, 5 P.2d 77, 80, "While it has been held that evidence that the defendant is insured against loss is not admissible, and that it would be improper for counsel to endeavor to get such fact before the jury by questions designed for that purpose, and that any unfairness in that respect might be regarded as prejudicial misconduct (Pierce v. United Gas & Elec. Co., 161 Cal. 176, 118 P. 700), nevertheless, it is entirely proper to ask such questions as may be reasonably necessary to ascertain whether a prospective juror is free from bias or interest, and to this end to ask whether he is interested as an agent or stockholder in a specified insurance company, or the question whether he is interested in any com-

pany insuring against liability. Arnold v. California Portland Cement Co., 41 Cal. App. 420, 183 P. 171." Here the question propounded did not go beyond that legitimate purpose. It implied nothing more than that besides having offices in the same building with counsel for defendant the venireman was engaged in the insurance business and that therefore he was not acceptable to plaintiff as a juror. As said also in Coursault v. Schwebel, supra, it has been held that a question relating to the matter of insurance, even conceding its impropriety, "cannot be said to have resulted in a miscarriage of justice, unless the amount assessed by the jury as damage is disproportionate to that which the evidence reasonably shows, or defendant's liability therefor under the evidence is a close question. Arnold v. California Portland Cement Co., supra; Eldridge v. Clark & Henery Const. Co., 75 Cal.App. 516, 243 P. 43." Neither of those conditions is here present.

[10, 11] Entirely without merit is defendants' charge that certain members of the jury were guilty of misconduct during the trial. The charge is based on a statement made by one of the jurors during a conversation which took place on the morning of the second day of the trial, during a court recess, in the hall just outside the court chambers, at which were present two other jurors, the court reporter and the bailiff. The only testimony concerning the conversation was given by the court reporter and the bailiff in chambers soon after the conversation took place, and both testified positively that no reference whatever was made to the present case or to any of the facts involved. Even where it is shown that jurors have improperly talked to each other about the case before its final submission, a new trial is not justified unless it appears that prejudice to the substantial rights of a party resulted therefrom. MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 271 P. 509. Here, however, as stated, no reference whatever was made in the conversation to the present case.

[12, 13] Defendants' final contention is that the amount of damages awarded was grossly excessive. The record suggests no legal reason for so holding. Even though the award could be deemed generous, it is the well settled law that reviewing courts are not authorized to set aside an award of damages made by a jury as excessive merely because the opinion of the court is at variance with that of the jurors. It is only where the excess appears as a matter of law, or where the recovery is so grossly disproportionate to any compensation reasonably warranted by the facts as to shock the sense of justice and raise at once a presumption that it is the result of passion, prejudice, or corruption, rather than honest and sober judgment, that the court may exercise this power. 8 Cal.Jur. 834, and cases cited. At the time of the accident, which occurred in April, 1940, plaintiff was 64 years of age, and working on a dairy, doing housework and the cooking for several men. She received $50 a month and her board and room. As the result of the accident she suffered no broken bones, but sustained severe and extremely painful injuries to her back, shoulders, neck and right side, which at the time of the trial in April, 1941, and for the preceding four months incapacitated her from accepting any kind of employment. She was in constant pain, unable to bend over or do any lifting, or perform any kind of manual labor. Between the date of the accident and the time of trial she had consulted two doctors, and while her condition was not such as required hospitalization, she suffered constantly from severe pain which she partially relieved by taking opiates. On the second day after the accident she visited her doctor, and while she did not quit her employment at the dairy, she was unable to continue with the housework. With some assistance she carried on the cooking until December, 1940, when the dairy went out of business. Thereafter she tried other jobs, but was unable to work, and as stated, for four months preceding the trial had been unable to follow any gainful occupation and was compelled to make her home with her daughter. If her testimony is true, the jury was justified in concluding therefrom that her injuries were not of a temporary nature, and if not temporary it cannot be said that the amount of the award was excessive. The jury had full opportunity to observe her while she gave her testimony at the trial, and it was properly instructed on the matter of damages. Evidently it believed she was not a malingerer, but on the contrary that she told the truth concerning her physical condition and inability to work. The trial judge was afforded an equal opportunity with the jury to observe plaintiff's physical condition and weigh her testimony; and the fact that in disposing of the motion for

new trial the amount of the jury's award was allowed to stand demonstrates that he considered it not excessive; moreover it cannot be said that plaintiff's testimony is inherently improbable. Such being the state of the record, it is not within our province as a reviewing court to disturb the amount of the jury's award.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

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53 Cal.App.2d 250

LOUGHRAN v. REYNOLDS.

Civ. 13444.

District Court of Appeal, Second District, Division 1, California.

July 2, 1942.

Rehearing Denied July 27, 1942.

Hearing Denied Aug. 27, 1942.

1. Corporations 🔑1

Complaint alleging that all stock of corporate defendant was owned by individual defendant, that corporate board of directors consisted of individual, his wife, and daughter, that individual was sole owner of all of business and assets of corporation and controlled the corporation, its business, property, and affairs, and that corporation was operated by individual to divert profits to his own use and avoid individual obligations, and that plaintiff was hired at an agreed compensation, but was not permitted to continue with work for corporation, stated a cause of action for breach of contract against individual as well as against corporation.

2. Corporations 🔑1

An individual may not hide behind a corporation entity when there is such a community of ownership that the individual is, in fact, the corporation, and when, under such circumstances, to observe the fiction of corporate ownership would work injustice on others.

3. Corporations 🔑1

Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, it must appear that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, of such person and the corporation has ceased, and that the facts are such that an adherence to the fiction of separate existence of the corporation would sanction a fraud or promote injustice.

Appeal from Superior Court, Los Angeles County; Frank G. Swain and B. Rey Schauer, Judges.

Action by John X. Loughran against James G. Reynolds and another to recover damages for breach of contract. From a judgment in favor of the named defendant after the trial court sustained a demurrer to plaintiff's first amended complaint without leave to amend, the plaintiff appeals.

Judgment reversed.

Wolfson & Swetow, of Los Angeles, and Abraham Setzer, of San Francisco, for appellant.

Stanley M. Arndt, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

In this action for damages for breach of contract, judgment was rendered in favor of a defendant in his individual capacity, after the trial court sustained a demurrer to plaintiff's first amended complaint without leave to amend. The effect of the judgment was to leave a corporate defendant in the case and to release an individual sued on the same cause of action.

There is no question but that the complaint states a cause of action as to damages. The only possible contention is whether or not the facts alleged in the complaint apply to the individual defendant and are sufficient as a pleading to establish that the cause of action as against him arose out of his operations through the agency of a corporation as his alter ego.

The complaint alleges that all of the subscribed, issued, and outstanding capital stock of the corporate defendant was three shares and that the individual defendant was the owner of all of it; that the corporate board of directors consisted of three persons, the individual defendant, his wife, and his daughter; that the individual defendant was the sole and exclusive owner of all of the business and assets of the corporate defendant; that he alone controlled the corporation, its business, property and affairs; that the corporation "has been and is now a mere shell and naked corporate framework," which the individual defendant used "for the conduct of his personal business, property, and affairs." It is next alleged that the corporation was created and continued in existence pursuant to a plan on the part of the individual defendant whereby he diverted the income, revenue, and profits thereof to his own use, in order to avoid his individual obligations, and in particular his individual obligation as alleged in the complaint. For cause of action for damages against both defendants, the complaint alleges the hiring of the plaintiff at an agreed compensation, refusal on the part of the defendants to permit him to continue with the work for which he was hired, and damages ex contractu in the sum of $39,264.00.

[1] The complaint states a cause of action as against both the corporate defendant and the individual defendant operating through the agency of the corporation. The general demurrer should have been overruled. If upon the trial of this case, the plaintiff should prevail upon the merits, and if it should then develop that all of the property of the corporation had been diverted to the individual defendant so that the plaintiff could not enforce his judgment against the corporation, it is clear that injustice would result.

[2] No man may hide behind a corporation entity when there is such a community of ownership that he is in fact the corporation, and when under such circumstances to observe the fiction of corporate ownership would work injustice upon other men. Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 P. 986; Clark v. Millsap, 197 Cal. 765, 242 P. 918; Continental Securities & Investment Co. v. Rawson, 208 Cal. 228, 280 P. 954; D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 6 P.2d 251, 79 A.L.R. 329; Watson v. Commonwealth Insurance Co., 8 Cal.2d 61, 63 P.2d 295; Mirabito v. San Francisco Dairy Co., 8 Cal.App.2d 54, 47 P.2d 530; Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 50 P.2d 106; Goldberg v. Engelberg, 34 Cal.App.2d 10, 92 P.2d 935; Wood Estate Co. v. Chanslor, 209 Cal. 241, 286 P. 1001; Hollywood C. & P. Co. v. Hollywood L. Service, Inc., 217 Cal. 124, 17 P.2d 709; Wiseman v. Sierra Highland Min. Co., 17 Cal.2d 690, 111 P.2d 646.

[3] The rule which is determinative in this case is well stated in Minifie v. Rowley, 187 Cal. 481, at page 487, 202 P. 673, at page 676: "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would under the particular circumstances, sanction a fraud or promote injustice. [Citing cases.]" This rule is repeated and approved in the later case of Continental Securities, etc., Co. v. Rawson, 208 Cal. 228, at page 238, 280 P. 954. In effect this rule has been applied in every case above cited. Sometimes the facts of a particular case did not establish the alter ego relationship; sometimes they did.

Upon reading the complaint in the present case, it is evident that facts are alleged from which it appears that the corporate defendant was solely influenced and governed by the individual defendant; that there was as between them a unity of interest and ownership; and that under the circumstances particular to this case as pleaded, an adherence to the fiction of the separate existence of the corporation would sanction fraud and promote injustice.

The judgment is reversed.

DORAN, Acting P. J., and WHITE, J., concurred.

52 Cal.App.2d 701

HIGH v. PACIFIC GAS & ELECTRIC CO.

Civ. 3010.

District Court of Appeal, Fourth District, California.

July 7, 1942.

Hearing Denied Aug. 10, 1942.

1. Appeal and error ⚿994(2)
Witnesses ⚿316

Contradictions and inconsistencies in testimony go to weight of witnesses' testimony and to witnesses' credibility and are matters settled before case reaches appellate court.

2. Evidence ⚿588

The jury has privilege of accepting parts of evidence offered in behalf of plaintiff as true.

3. Appeal and error ⚿930(1)

On appeal all reasonable inferences from evidence must be drawn in favor of prevailing parties.

4. Appeal and error ⚿1005(1)

The questions of sufficiency of evidence, credibility of witnesses, weight to be given their testimony and conflicts in evidence are addressed to jury in first instance and next to trial judge on motion for new trial.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

On petition for rehearing.

Rehearing denied. For prior opinion see 126 P.2d 911.

Thos. J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, for appellant.

T. H. Werdel, of Bakersfield, for respondent.

PER CURIAM.

Defendant has petitioned for a rehearing and has urged rather pointedly that the statement of facts set forth in the opinion filed in this case is not fair to it.

The testimony quoted in the opinion appears in the record exactly as quoted. It is true that in other parts of the testimony of the same witnesses the force of the quoted evidence was weakened.

Another witness testified concerning the soapsuds test as follows:

"Q. All you saw was soapsuds on the pipe and little bubbles on the soap? A. Coming up from the pipe.

"Q. What do you mean by that? A. Where they put it on the pipe there was bubbles.

"Q. Wasn't there bubbles all along the pipe where the soap was applied? A. No sir.

"Q. Did you ever use that method? A. Yes.

"Q. Whenever you apply soapsuds aren't there always bubbles? A. Yes, but they don't come up from the pipe." This witness also testified that he did not know if the bubbles increased in size.

[1, 2] Contradictions and inconsistencies in the testimony of a witness go to the weight of his evidence and to his credibility and are matters settled before the case reaches the appellate court. Here the jury evidently accepted parts of the evidence offered in behalf of plaintiff as true. This was its privilege. Angelo v. Esau, 34 Cal. App.2d 130, 93 P.2d 205. The trial judge evidently agreed with the jury except as to the amount of the damages, because he denied the motion for new trial.

[3] If we are correct in our understanding of the rules to the effect that the credibility of witnesses, the weight to be given to their evidence and conflicts in the evidence are addressed to and settled by the jury and the trial judge, and not on appeal, and that on appeal all reasonable inferences from the evidence must be drawn in favor of the prevailing party, we cannot agree with counsel for defendant that there is no substantial evidence supporting the verdict and judgment. This is true even though we are of the opinion that we would have granted the motion for new trial had we been sitting in the trial court.

Defendant urges that we have overemphasized the testimony of the expert called by plaintiff on the cause of the explosion. It is true that he did not use the expression that "in all probability" the explosion was caused by gas vapors being ignited by the electric spark from the switch. We have reviewed his evidence and it is seemingly apparent from all of it that he believed the explosion to have been caused by gas. He stated several times that, in his opinion, there was the greater probability that the explosion had been caused by the escaping gas rather than by escaping gasoline fumes although he could not eliminate the possibility of the latter having caused it. When all of his testimony is considered as a whole, the statement that it was the opinion of this witness that in all probability the explosion was caused by gas does not seem to be an unfair inference to be drawn.

[4] The questions of the sufficiency of the evidence, the credibility of the witnesses, the weight to be given their testimony and conflicts in the evidence are addressed to the jury in the first instance and next to the trial judge on the motion for new trial. Clippinger v. Reiss, 17 Cal.App.2d 604, 62 P.2d 418; Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213. This is one of the cases where our study of the record has caused us to feel that the motion for new trial should have been granted. The jury having returned a verdict for plaintiff and the trial judge having denied the motion for new trial we cannot reverse the judgment even though the study of the record leads us to believe that the preponderance of the evidence is with the defendant.

The petition for rehearing is denied.

53 Cal.App.2d 160

In re LINDAUER'S ESTATE.

EWING v. LINDAUER.

Civ. 2859.

District Court of Appeal, Fourth District, California.

June 30, 1942.

Hearing Denied Aug. 27, 1942.

1. Executors and administrators 🔑109(1)

Where legal representative in good faith makes proper expenditures for estate, either from his own funds or from estate funds, without order of court, representative is entitled to credit. Probate Code, § 929.

2. Executors and administrators 🔑510(10)

In absence of bad faith or abuse of discretion by trial judge, appellate court will not interfere with trial judge's action on claim of a legal representative for expenditures for estate, either from his own funds or estate funds, without order of court. Probate Code, § 929.

3. Executors and administrators 🔑510(2)

An order approving administrator's account current is an "appealable order". Probate Code, § 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

4. Courts 🔑472(4)

The probate court has exclusive jurisdiction upon settlement of the account, after notice to parties interested, to determine what items of expenditure incurred during administration are proper charges against the estate.

5. Executors and administrators 🔑510(10)

The probate court, in determining what items of expenditure incurred during administration are proper charges against decedent's estate, is vested with a broad discretion which will not be disturbed on appeal except when abused.

6. Executors and administrators 🔑510(2), 513(1)

Where payment of claims is credited in administrator's current account and such account is allowed and settled by probate court, order allowing it is not void, but is an "appealable order" which, however erroneous, becomes conclusive upon unpaid creditors who do not appeal therefrom. Probate Code, § 931.

7. Executors and administrators 🔑510(2), 510(8)

Where creditor of decedent's estate, at time of filing executor's account current, contested allowance of certain claims, but creditor thereafter failed to appeal from order approving account current, order approving account current was an "appealable order" barring creditor from thereafter raising same questions on a collateral attack on an appeal from an order approving the final account. Probate Code, §§ 931, 1240.

8. Executors and administrators 🔑510(8)

Where, on appeal from order settling final account of administrator with will annexed, judgment roll, record on appeal, and approved bill of exceptions established that items attacked by objecting creditor had been previously approved in executor's account current, and that objecting creditor, though contesting the allowance did not appeal from such order, further pleadings were unnecessary to raise question of whether creditor was barred from contesting such items by reason of former order under the ory of "estoppel" or "res judicata". Probate Code, §§ 931, 1240.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Res Judicata".

9. Executors and administrators ⟹510(8)

Judgment creditor of decedent's estate could not complain on appeal of order distributing to heirs water stock belonging to the estate, even if such distribution was improper, where probate court found both in account current and in final account, that estate was indebted to executor for advances made by executor to estate in payment of preferred claims in excess of amount that could have been realized by sale of stock, so that, even if stock had been sold for benefit of creditors, judgment creditor would have received no part of the proceeds. Probate Code, §§ 750, 754, 950.

◆

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Proceeding in the matter of the estate of Luther Lindauer, deceased. Gold E. Lindauer, as administrator with the will annexed, etc., rendered to the court his final account, and Mildred Ewing, judgment creditor, filed her objection thereto. From a judgment decreeing distribution and from an order settling final account, the judgment creditor appeals.

Affirmed.

Oliver M. Hickey and Alfred J. Smallberg, both of Los Angeles, for appellant.

Riley M. Reed, of La Habra, for respondent.

GRIFFIN, Justice.

Luther Lindauer died August 11, 1936, leaving his wife Lucy Lindauer as surviving joint tenant and sole devisee and executrix of his will. She died on August 11, 1940. Their son, Gold E. Lindauer, was appointed administrator with the will annexed August 30, 1940. The joint tenancy property was appraised by the State Inheritance Tax Appraiser at $128,990, and the probate property, being separate and community property, was appraised at $39,305.34. On July 10, 1939, Lucy Lindauer, as executrix, filed her account current, which came on for hearing August 7, 1939, before Hon. G. K. Scovel, judge of the Superior Court of Orange county. Apparently, the account current set forth certain statutory attorneys' fees and fees for extraordinary services and executrix' fees that were claimed to have been paid by the executrix based on the original appraisal of the property. It also contained an account of claimed payment by her of state and federal inheritance taxes. In dispute was a claim filed by Gold E. Lindauer for $5,000 against the estate which was disallowed in its entirety. The account current also set forth a claim for moneys advanced by the executrix for which she asked credit, covering costs, expenses of last sickness, funeral expenses, taxes paid on the estate property, and mortgages paid off. It was stipulated between the attorneys of record that the executrix, during her administration of the affairs of the estate, did not keep the funds of the estate in a separate account at the bank, but commingled the funds of the estate with her personal funds. The decree settling the account current recites that: "On this 7th day of August, 1939, the account current * * * came on for hearing. * * * Mildred Ewing, a creditor, having filed objections to said account and report, * * * and Oliver M. Hickey and Alfred J. Smallberg appearing for Mildred Ewing and all parties announced ready, the court, after hearing the evidence," found certain deductions should be made from the appraised value of the estate which was appraised at $39,305.34, leaving the appraised value at $32,430.34, and ordered that the attorneys' fees allowed by law and executrix's commissions be computed upon that sum rather than the sum shown in the original appraisal. It specifically decreed: "(2) that the executrix is entitled to the sum of $978.60, and Riley M. Reed is entitled to the sum of $978.60 as attorneys' fees allowed by law; that $350.00 of said attorneys' fees have been paid, leaving a balance of $628.60, which is hereby allowed. (3) That Riley M. Reed and Thomas L. McFadden are entitled to the sum of $500.00 attorneys' fees extraordinary, for representing the executrix in the cause of Mildred Ewing vs. Lucy Lindauer, executrix * * * which fees are hereby allowed and the said Riley M. Reed is entitled to the further sum of $300.00 as attorney's fees extraordinary for additional services performed for said executrix to date of said account." The court then decreed that the executrix was entitled to credits for the advancements she had made for costs, expenses of last sickness and funeral expenses, taxes paid, including federal inheritance taxes in the sum of $1,162.30, and state inheritance taxes in the sum of $545.86. As thus corrected, the court ordered the account be allowed and settled and ordered the claims and credits above listed to be paid in the course of administration together with such other credits as may become due and that any balance or residue remaining should be applied on the judgment of Mildred Ewing. This decree was dated August 11, 1939. No appeal was taken from this decree.

On May 5, 1941, Gold E. Lindauer, as administrator with the will annexed, rendered to the court his final account, and after setting forth the assets as originally appraised, and chargeable to Lucy Lindauer, as executrix of said estate, claimed to be entitled to credits for the items allowed in the account current as of July 10, 1939, for costs, including $350 on attorneys' fees to Riley M. Reed, expenses of last sickness, funeral expenses, taxes paid, federal inheritance taxes, state inheritance taxes, commissions and statutory attorneys' fees, as well as extraordinary fees, all in the same amounts as allowed in the account current. He then listed certain expenses and expenditures since July 10, 1939, for which he claimed credit, which did not include any of the above listed items allowed in the account current or for any further claim for statutory fees for himself or for the attorney.

On May 21, 1941, appellant, as a judgment creditor, appeared through her counsel and filed her objections to the final account claiming (1) that the statutory fees of counsel and of the executrix were improperly computed in that the computation did not take into consideration an existing obligation against the realty in the estate in the sum of $8,000, nor did it take into consideration the re-appraisal value of the property; that the fees in question should have been predicated on the total charges as they appeared after the re-appraisal, and minus the mortgage lien in the sum of $8,000, which would make a net sum of $13,576.58 on which fees should be predicated. (2) That the executor and administrator filed no claim for moneys loaned or advanced to the estate to discharge the certain particular claims entitled to preference and that they should not therefore be reimbursed for same. (3) That 14 shares of certain water stock claimed to be valued at $750 should be considered as an asset of the estate subject to the payment of appellant's claim. (4) That the final account upon its face shows that payment of state and federal inheritance taxes were predicated upon the sum of $39,305.34, whereas, they should have been predicated on the sum of $11,081.07. (5) That the payments of the obligations of the estate were not made by the executrix or administrator with the will annexed in their official capacity because they did not deposit the funds of the estate to the credit of the estate, but on the contrary, commingled the estate funds with their private funds without an order or direction of the court, and that whatever payments they made in their individual capacity must be considered as payments made by a volunteer. It is then claimed that the final account should be corrected accordingly and that the remaining assets of the estate would then be sufficient to discharge the claim of the appellant.

On June 9, 1941, all parties appeared. The court found: (1) That all items in the final account and report, including the items objected to by the objector, were correct, and that the credits shown in the account and report to which the administrator was entitled represented expenditures for funeral expenses and last illness, costs of administration, taxes and liens on properties, and expenditures for the preservation of the estate, and were properly allowable. (2) that the shares of water stock were assets of the estate, and according to stipulation, valued at $310. (The decree of distribution shows that this stock was "issued to Elizabeth G. Worth, pledgee, for Lucy Lindauer, as executrix of Luther Lindauer, deceased.") (3) That the claims and credits of the administrator set forth in the final account are preferred in order of payment over the claim of the objector Mildred Ewing; that as such claims and credits exceed the sum total of the net proceeds from the sale of the property of the estate and said sum of $310, valuation of the water stock, the administrator is entitled to have such proceeds applied on his credits, and the heirs of the estate are entitled to have the said water stock distributed to them.

On June 16, 1941, the order settling the final account and decreeing distribution was entered accordingly. From this order and decree the judgment creditor has appealed.

[1, 2] The questions now raised on appeal involve practically the same questions presented on objections to the allowance of the account current. The question in respect to the right of the legal representatives of an estate to commingle funds of the estate with their private funds and then urge a claim against the estate for claimed

advancements without a previous order of the court, has been considered in this state. Estate of Smith, 118 Cal. 462, 50 P. 701. It appears from the record that Lucy Lindauer, as executrix, received upon her appointment, cash in the sum of $935.34, and to the date of filing of the account current, she received from the sale of avocados $1,623.83; from the sale of realty $2,298.20; and from the sale of Lindauer Corporation stock $200; a total of $5,057.37; that up to said date she paid out for costs of administration, funeral and expenses of last illness, taxes, caring for property, and on mortgages and inheritance taxes, the sum of $10,150.41. It cannot be said that the executrix profited by such transactions or injured any interested party. Appellant makes no claim of wrong-doing or injury. Where the legal representative, in good faith, makes proper expenditures for the estate, either from his own funds or from estate funds, without order of court, he is entitled to credit. In the absence of bad faith or abuse of discretion by the trial judge, the appellate court will not interfere with the action of the trial judge. § 929, Probate Code; Estate of Maddalena, 42 Cal.App.2d 12, 108 P.2d 17.

[3] The remaining contentions of appellant may be considered under one heading, i. e., the determination of the amount of and the allowance of attorneys' fees, executor's fees, payment of state and federal inheritance taxes, payments on mortgages paid by the executor or ordered paid by the court, and the other items about which appellant complains. These items were all contained in the account current and considered by the trial court upon the hearing after notice to and after the opposition thereto was presented by the appellant on the hearing of the account current. The order approving this account current was an appealable order. § 1240, Probate Code. Apparently appellant consented to the allowances there made or failed to appeal from the order allowing and approving such account current containing these items. Our research of the authorities reaches but one conclusion. The failure to appeal therefrom now bars appellant from a consideration of those matters on an appeal from the order approving the final account. Directly in point is Estate of Richards, 17 Cal.2d 259, 109 P.2d 923.

[4-6] The Probate Court has exclusive jurisdiction upon the settlement of the account, after notice to the parties interested, to determine what items of expenditure incurred during administration are proper charges against the estate. Gurnee v. Maloney, 38 Cal. 85, 99 Am.Dec. 352. The court in passing upon such expenditures is vested with a broad discretion whch will not be disturbed on appeal except when abused. Estate of Parker, 186 Cal. 668, 200 P. 619. Where payment of claims is credited in a current account and such account is allowed and settled by the court, the order allowing it is not void, but is an appealable order which, however ill allowed or erroneous, becomes conclusive upon unpaid creditors who do not appeal therefrom. § 931 Probate Code; Estate of Fernandez, 119 Cal. 579, 51 P. 851; Estate of King, 19 Cal.2d 354, 360, 121 P.2d 716, and cases cited.

[7] Assuming the correctness of appellant's contention that the trial court erred in allowing statutory attorney's and executor's fees in excess of the amount due at the time of the filing of the account current (§ 911, Probate Code), or that the trial court failed to take into consideration the mortgage indebtedness in fixing the value of the property for the purpose of determining the proper statutory fees, as the record apparently discloses (§ 901 Probate Code; Estate of Lampman, 15 Cal.2d 212, 100 P.2d 488), or that certain portions of the federal and state inheritance taxes were probably not directly chargeable to the estate, or that certain credits were not properly due the executor, it nevertheless appears that all of these matters were presented in the account current. Appellant appeared and contested them or at least made no objection thereto, and failed to appeal from the order approving the account. She is now barred from raising the same questions there presented on a collateral attack on an appeal from an order approving the final account. Estate of Richards, supra.

[8] Finally, appellant contends that respondent's answer to appellant's objections to the final account does not set forth a defense based upon the ground that appellant was barred from again raising the questions presented by reason of the decree settling the account current; that therefore respondent waived his right to rely upon the doctrine of estoppel or res adjudicata and cannot raise that question for the first time on appeal, citing Semple v. Ware, 42 Cal. 619; Harper v. Gordon, 128 Cal. 489, 61 P. 84. We only have before us the judgment roll and bill of exceptions upon which to consider the point

presented. The record fully sets forth the fact that all of the items complained of were allowed in the account current and no appeal was taken from that order. A copy of respondent's claimed answer to appellant's objections does not, in direct terms, raise the particular issue here argued, but the answer does contain the allegation that the "administrator says that all items of credit set out in the account current, and decree settling account current, and set out in the final account filed herein, are preferred in the order of payment over the judgment claim of said Mildred Ewing." Whether the trial court tried the issues there presented upon the theory that appellant was barred by reason of the former order cannot be here considered as the entire record is not before us. We must therefore conclude, in support of the judgment, that it was so considered. The final judgment recites that the "final account is correct"; that the allegations in the petition for distribution are true; that all claims against the estate are paid except the claims of the administrator as set out in said final account and the claim of the said Mildred Ewing; that the claims of the administrator are preferred in the order of payment over the claim of the said Mildred Ewing; and that the total funds and proceeds of said estate, including proceeds from sale of said stock, were it sold, are not sufficient to satisfy the claims of the administrator.

The allegations of the final account establish the fact, in themselves, that the items complained of were approved in a former account. The judgment roll, the record on appeal, and the approved bill of exceptions contain the decree and order approving the account current so establishing that fact. The entire record, including the former order, were all properly before the court for consideration when the final account was approved. Further pleadings on this subject, under these circumstances, were unnecessary. From the record it cannot be said that the question of estoppel or res adjudicata was not properly pleaded or was improperly presented for the first time on appeal.

[9] Just why the trial court distributed the water stock, valued at $310, the only remaining asset of the estate, to the heirs, is not ascertainable from the record. There is some indication that the stock was being held as a pledge. It would appear that any remaining assets of the estate should ordinarily be sold to satisfy first the preferred creditors and then the others according to preference. §§ 750, 754 and 950, Probate Code. In the account current, and again approved in the final account, the court found that the estate was still indebted to the executor for advances made by her to the estate in payment of preferred claims in a sum in excess of $2,500. As appellant could not, therefore, benefit if said water stock was sold for the benefit of creditors, she would not have any preference, under her claim, to the proceeds of the sale of the water stock, if made. She therefore cannot be heard to complain in this respect, on appeal, as she would neither be injured nor benefited if the order of distribution of the water shares to the heirs was erroneous.

The order and decree are affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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53 Cal.App.2d 243

In re WORRALL'S ESTATE.

ALLEN et al. v. WORRALL.

Civ. No. 2861.

District Court of Appeal, Fourth District, California.

July 1, 1942.

Hearing Denied Aug. 27, 1942.

1. Wills 🔑21

Under statute authorizing every person of sound mind over age 18 to make will, an inquiry into factual situation with respect to testamentary capacity at time will was executed is permissible. Probate Code, § 20.

2. Wills 🔑37

Under statute authorizing every person of sound mind over age 18 to make will, an insane person can make a will during lucid intervals if the facts disclose the required elements of capacity at the time of making the will. Probate Code, § 20.

3. Wills 🔑35

The statute prohibiting persons judicially determined to be of unsound mind, from making conveyance or contract or delegating any power or waiving any right, as originally enacted and as amended in 1878, was intended to cover the making of contracts and conveyances, and not to control on the matter of testamentary capacity. Civ.Code, § 40.

4. Wills ⚿35

In will contest on ground of incapacity of testatrix who had been declared incompetent and for whom a guardian had been appointed, the statute prohibiting person judicially determined to be of unsound mind from making conveyance or contract or delegating any power or waiving any right, not being intended to control on matter of testamentary capacity, was inapplicable, and did not prevent an inquiry into the question whether testatrix was of sound and disposing mind and memory at the time of execution of will. Probate Code, §§ 20, 1460, 1470; Civ.Code, § 40.

◆

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Proceeding in the matter of the estate of Sibbilla B. Worrall, deceased, wherein a will was offered for probate by Charles Eugene Allen, as executor, etc., and others, opposed by Albert Edson Worrall. From the judgment upholding the will Albert Edson Worrall appeals.

Affirmed.

Luce, Forward, Lee & Kunzel, of San Diego, for appellant.

Lindley & Higgins, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment denying a contest of a will and admitting the will to probate.

On September 22, 1939, in a proceeding brought under section 1460 of the Probate Code, Sibbilla B. Worrall was declared to be incompetent and "incapable of taking care of herself and/or managing her property," and a guardian for her estate was appointed. She was then 86 years old. A proceeding for restoration to capacity brought under section 1470 of that Code was unsuccessful and was dismissed on February 21, 1940. On June 14, 1940, she executed the will in question, leaving two-thirds of her estate to her daughter and the other one-third to her son and certain grandchildren, share and share alike. The will was offered for probate and the son contested upon the grounds of incapacity to make a will and of undue influence. At the trial, he carefully refrained from offering any evidence as to the competency or capacity of his mother at the time the will was executed and relied entirely on the record of the two guardianship proceedings, to which we have referred. From the judgment upholding the will, he has appealed.

The appellant contends that since this will was executed at a time when the judgment or decree in the guardianship proceeding was still in force, that judgment was conclusive with respect to her capacity to make a will and that the court, therefore, erred in receiving and acting upon evidence as to whether or not she was of sound and disposing mind and memory at the time the will was executed. It is argued that this necessarily follows from a proper interpretation of section 40 of the Civil Code. That section originally read:

"After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity *is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined.*" (Italics ours.)

The italicized portion was eliminated by an amendment in 1878 and the following substituted: "But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge."

It is argued that the first part of this section, which has not been amended, prohibits such a person from making a will until he has been restored to capacity, since a will is a delegation of power; that the section originally contained an exception allowing one who has been actually restored to capacity to make a will although such restoration had not been judicially determined; and that the elimination of this exception by the amendment of 1878 leaves the first part of the section in full force, prohibiting such a person from making a will while the adjudication of incapacity remains in force, with a result that is conclusive in this case.

[1, 2] In our opinion, this interpretation of section 40 of the Civil Code and the effect of the 1878 amendment thereto cannot be sustained. If appellant's interpretation were to be accepted, section 40 of the Civil Code would be in conflict with the spirit and effect of section 20 of the Probate Code as the latter section has been consistently interpreted in this state. Under that interpretation, an inquiry into the factual situation with respect to testamentary capacity at the time the will was executed has always been allowed. Even an insane person may make a will during lucid intervals if the facts disclose the required elements of capacity at the time in question.

[3] It is unnecessary, however, to hold that there is any conflict between section 40 of the Civil Code and section 20 of the Probate Code. Section 40 of the Civil Code appears as one of a number of sections relating to the making of contracts and conveyances, and the main purpose in adopting section 40 was to cover activities of that nature on the part of persons adjudged to be of unsound mind. When that section was adopted in 1872, as now, other sections provided not only for the appointment of a guardian, both in cases of insanity and where the person in question was mentally incapable of managing his property, but also provided who might make a will. The Legislature may have had this in mind when, in adopting section 40 in 1872, it added the provision which it eliminated in 1878. In any event, that provision very clearly stated that the requirement for a judicial restoration to capacity, which applied to prohibited conveyances, contracts and delegations of power, should not apply with respect to testamentary capacity, which was left to be determined as a question of fact. The provision thus was consistent with other statutes, and not only recognized that different elements of capacity are involved in making a will and in determining whether a person is in a degree of mental weakness which may cause him to fall prey to designing persons, but its inclusion indicates that the preceding provisions were not intended to control upon the matter of testamentary capacity.

It seems rather clear that originally it was not intended to make the provisions of section 40 which still remain, applicable to testamentary capacity. The section was adopted for quite another purpose, and the reference to making a will was probably inserted as a matter of precaution to make sure it would not be understood as applying thereto. The elimination of all reference to the making of wills, in 1878, and the substitution of a provision for presumptive restoration to capacity in certain cases, indicate an intention to somewhat relax the requirement for judicial restoration in cases where the facts naturally warrant this being done, rather than an intent to extend the conclusive effect of an adjudication of incompetency to a field which it had never been intended to cover, regardless of the actual facts in that connection and of other rules applicable thereto. By omitting all reference to wills, through the 1878 amendment, it may have been intended to more fully carry out the original intent of the section by eliminating any possible prima facie effect of an adjudication of incompetency, since the statute was not designed to cover and affect the matter of testamentary capacity. See In re Estate of Johnson, 57 Cal. 529. Be that as it may, it would reasonably appear that this amendment was not intended to completely change the original purpose of the section by so extending it as to give it a conclusive effect over matters which it had expressly excluded from its scope and which were otherwise covered and provided for.

This interpretation is in line with the decisions of the courts of this state. In re Estate of Johnson, 200 Cal. 299, 252 P. 1049, 1051, involved a contest of a will executed after the testator had been adjudged incompetent to manage her property and a guardian had been appointed. While the contestant in that case was successful the question as to the effect of the prior adjudication of incompetency was presented and considered. The court there said: "The court instructed the jury that the adjudications of March 22, 1922, and January 31, 1923, declaring the decedent to be an incompetent person in the guardianship proceedings, were 'prima facie evidence of want of testamentary capacity' on the dates of said orders. It is urged that such was not the legal effect of such orders. We are cited to no authority in this state, and we have discovered none since the amendment of section 40 of the Civil Code in 1878, holding that an adjudication of incompetency in a guardianship proceeding raises a presumption of testamentary incapacity or is even prima facie evidence of testamentary incapacity. [In re] Estate of Johnson, 57 Cal. 529, construed said section 40 prior to its amendment. Proof of incompetency in a guardianship proceeding is evidence of mental condition on the date of the adjudication but it is not prima facie evidence of testamentary incapacity so as to shift the burden of proof to the proponent of the will. [In re] Estate of Loveland [162 Cal. 595, 123 P. 801], supra; Rice v. Rice, 50 Mich. 448, 15 N.W. 545. Notwithstanding the erroneous use of the term 'prima facie' in the instruction complained of, we are of the opinion that the appellants were not prejudiced thereby, in view of the fact that the court elsewhere fully instructed the jury that said adjudications of incompetency in the guardianship proceedings did not necessarily mean that the decedent was of unsound mind at the time of such adjudications, or that she was not ther competent to make a valid will * * *. When considered as a whole, we think the jury was made clearly to understand that, notwithstanding the several adjudications, the burden of proving unsoundness of mind on the date of the alleged will was always on the contestant."

The appellant argues that views exactly opposite to those just quoted were expressed in the later case of Hellman Commercial T. & S. Bk. v. Alden, 206 Cal. 592, 275 P. 794, 799, where the court said: "The adjudication of mental incapacity therefore applies to both the insane and the incompetent, regardless of the character or degree of the mental derangement. No further evidence of mental incapacity is required under our statute while such a decree remains in full force and effect." It is argued that this is a holding that a prior adjudication of mental incapacity is conclusive, that no other evidence of mental capacity is required or may be received, and that this is determinative of the problem now before us. No such effect can be given the language of the Hellman decision thus relied on. In using that language the court was considering and discussing an endorsement and transfer of a cashier's check by a person then under an adjudication of incompetency. The language used referred to a situation which was clearly within the purview of section 40 of the Civil Code, and not to any question of testamentary capacity. While it may have been dicta the court, in the Hellman case, further stated: "It is the settled law of California that an adjudication of the incompetency of a testator is merely prima facie evidence of his incapacity to make a valid will." Regardless of any distinctions as to whether presumptions exist and what is necessary to constitute prima facie evidence these cases indicate a disposition to hold that an adjudication of incompetency is certainly not conclusive evidence of incapacity to make a will. In Re Estate of De Graaf, 34 Cal.App.2d 120, 93 P.2d 199, a somewhat similar question was presented in that the appellants argued that since the testatrix had been adjudged insane and a guardian had been later appointed for her estate it must be presumed that her incapacity continued and that there was no evidence that her condition had improved. In passing upon that point this court, in effect, stated that any such presumption was nothing more than conflicting evidence, that it could not be said as a matter of law that the testatrix lacked testamentary capacity on the day the will was executed, and that the question was one of fact for the trial court. A similar holding is announced in Re Estate of Young, 38 Cal. App.2d 588, 101 P.2d 770, 771. In that case, a will made by an elderly man after he had been adjudged incompetent and a guardian had been appointed for his estate, was upheld, the court approving an instruction to the effect that a prior adjudication of mental disorder was not conclusive on the question of capacity to make a will. The court there said: "Moreover, proceedings for the purpose of adjudicating the mental status, although satisfactory to all parties concerned, are frequently uncontested and therefore no more comprehensive or extensive than the particular circumstances require. A judgment based upon such a proceeding may be valid but it is not conclusive on the question of decedent's incompetency for the purpose of testamentary disposition."

[4] The appellant argues that the cases to which we have referred have no controlling effect here either because the precise point was not there presented or because the interested party there had waived the point here raised by introducing evidence on the question of the capacity of the testator to make the will and allowing the matter to be tried as a question of fact without standing squarely on the prior adjudication, as was done in the instant case. Whether or not such a matter could be thus waived, if a statute gave a conclusive effect to a prior adjudication of

incompetence, need not be considered. In our opinion, no such effect is given in this case by section 40 of the Civil Code, the matter is here squarely presented, and we hold that this section had no application here which prevented or rendered improper an inquiry into the testamentary capacity of this decedent at the time the will was executed and that the court did not err in admitting the testimony objected to, which was ample to sustain the finding made.

The appellant introduced no evidence on the issue of undue influence, relying entirely on certain presumptions from facts which otherwise appeared. It is not, and it could not well be, argued that the evidence is insufficient in this respect.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

53 Cal.App.2d 196

RILEY, State Controller, v. ZELLERBACH et al.

Civ. 12011.

District Court of Appeal, First District
Division One, California.

July 1, 1942.

Hearing Denied Aug. 27, 1942.

1. Taxation 🔑 895(4)

Where irrevocable trusts reserved to settlor a life income in the property and provided for vested remainder over, on his death, of corpus to remaindermen, and tax on transfers was governed by Inheritance Tax Act of 1921 imposing tax on clear market value of what the transferee received, inheritance tax should not be computed on value of trust property as of date of creation of trust in 1923, but on value of property as of date of death of settlor in 1937 when remaindermen came into possession of property. St.1921, pp. 1501, 1507, §§ 2, 8(1).

2. Taxation 🔑 862

An amendment of Inheritance Tax Act of 1911 conforming to doctrine of decision construing such act, and not inconsistent with decision, would be deemed a ratification of the doctrine of the decision rather than a repudiation thereof. St.1911, p. 716, § 5; St.1921, pp. 1501, 1507, §§ 2, 8(1).

Appeal from Superior Court, City and County of San Francisco; Maurice T. Dooling, Jr., Judge Assigned.

Proceeding involving inheritance taxes by Harry B. Riley, as State Controller, etc., against Harold Zellerbach and others. From a decree fixing the amount of the inheritance tax, Harold Zellerbach and others appeal.

Affirmed.

Philip S. Ehrlich, Orrick, Dahlquist, Neff & Herrington, Albert A. Axelrod, Julian R. Bauer, and Oroville A. Rohlf, all of San Francisco, for appellants.

James W. Hickey, of Sacramento, and A. W. Brouillet and Hugo P. Correll, both of San Francisco, for respondent.

KNIGHT, Justice.

This is an appeal by taxpayers from a decree fixing the amount of an inheritance tax.

In 1923 Arthur Zellerbach, uncle of appellants, created two irrevocable trusts whereby he transferred certain shares of stock to trustees, expressly reserving to himself a life income in the property and providing for a vested remainder over on his death of the corpus to appellants. He died in 1937, and between the date of the creation of the trusts and the date of his death other stock and other trustees were substituted in the trusts. At the time of the creation of the trusts in 1923 the value of the property subject thereto was $142,000; whereas its value at the date of the termination of the trust in 1937 was $403,739.69. It was agreed for all the purposes of this particular case that the Inheritance Tax Act of 1921, Stats. 1921, p. 1500, governed the taxability of the transfers in question; and the legal problem involved was whether the tax to be imposed should be computed on the value of the trust property as of the date of the creation of the trust in 1923, or as of the date of the death of the decedent in 1937 when appellants came into the possession and enjoyment of the property. If computed on the 1923 value the total tax would be $1,154.91, but if computed on the 1937 value the tax would be $39,162.71. The trial court held that the tax should be computed as of the date of the death of the trustor in 1937, and fixed the amount of the tax accordingly.

[1] In support of the trial court's decision and in accordance with its written opinion giving the reasons therefor, the respondent contends that In re Estate of Miller, 184 Cal. 674, 195 P. 413, 417, 16 A.L.R. 694, is decisive of the question here presented, and we are in accord with such view. There the decedent died in 1916. In 1913 he had executed a deed of trust to his daughter and her husband as trustees, assigning to them 120,000 shares of the capital stock of Miller and Lux Company, a Nevada corporation. By the trust instrument the decedent reserved a life estate in the property, followed by a life estate in the daughter and her husband, with a remainder over in fee. Subsequent to the transfer but before the decedent's death both the federal government and the state of Nevada levied a death tax on the transfer; and in fixing the amount of the inheritance taxes on the transfer under the California law (the Inheritance Tax Act of 1911) the question arose whether the federal and Nevada state taxes could be deducted in determining the clear market value of the property subject to the California inheritance tax. If the value was to be taken as of the date of the transfer, the deduction would not be allowed, but if the property were to be valued at the date of the death of the grantor it would be allowed. For the purposes of its decision the Supreme Court assumed the validity of the federal and Nevada taxes, amounting to some $4,048,000. The court stated that the question presented was "as to whether under our own statute the tax in this case is to be computed upon the value of the beneficial interests transferred as of the date of transfer, or as of the date of the death of Miller, the transferor." It will be noted that this is the identical question presented in the present case; and the court there held that the property should be valued as of the date of the death of the trustor. In so holding the court in part said: "There is no declaration in the statute as to what shall be the rule when the dates are not the same; i. e., when a taxable transfer is made prior to the death of the transferor. The statute, however, does contain a provision which closely approaches a declaration that the valuation of future, contingent, or limited estates, created by the transfer, shall be as of the date of death. Such estates were created by the transfer here involved. * * * The provision of the statute referred to is the portion of section 5 reading, * * *" quoting section 5, which is identical to section 8 (1) of the 1921 act here governing. The court goes on: "This provision is plainly one for the valuation of future, contingent, or limited estates. It appropriately requires an appraisal, both of the property as a whole out of which such estates are carved, and of the particular estates into which it is carved. * * * The provision of section 5, particularly significant upon the point under discussion, is that the appraisal in such cases, whether the taxable transfer be by death or inter vivos, be made 'immediately after the death of the decedent.' This, of course, is literally a provision as to the time of actually making the appraisal, not as to the time as of which it shall be made. * * * At the time when the statute requires the appraisal to be made, the death upon which the estates to be valued depend has actually occurred, and the natural and reasonable method of computing their value would be to take the actual date of death * * *. We think it fairly certain, therefore, that when the statute provides that in such cases as the present the appraisal is to be made immediately after the death of the transferor, it contemplates and requires that the appraisal be on the basis of the actual date of his death, and therefore, of necessity, as of that date." As stated, section 8 (1) of the 1921 act is identical with section 5 of the 1911 act referred to in the Miller case (with the exception of the reference to certain sections which have been renumbered). From the foregoing it will be seen that the decision therein is directly in point and therefore here controlling.

Furthermore, in deciding the Miller case, the court held that the California inheritance tax was a succession tax—a tax on the beneficial interest of each beneficiary or heir; whereas the federal tax is an estate tax imposed upon the net estate of the deceased as a unit; that therefore the federal tax must be deducted in order to determine the amount upon which the state tax should be levied "since it is plain that what the transferee receives is only the portion of what the decedent left which remains after the federal tax is taken." "It is the settled law of this state that the inheritance tax is imposed upon the net clear market value of what the transferee receives, and that to ascertain this the value of what he does not receive, in contemplation of law, must be deducted from the value of what the decedent left. The application of this principle plainly requires the deduction of the federal estate tax." This same reasoning applies here; the inheritance tax is imposed upon the net clear market value of what the transferee receives. In the Miller case the beneficiaries received less than actually transferred on account of the deduction of the federal and Nevada taxes; while here they receive more because of the increase in the value of the trust property subsequent to the transfer.

Appellant contends, however, that in Chambers v. Lamb, 186 Cal. 261, 199 P. 33, 34, which was under consideration at the time the Miller case was decided, the court declared a doctrine inconsistent with that announced in the Miller case. An analysis of the two cases shows otherwise. In Chambers v. Lamb the decedent executed a deed in 1909 in contemplation of death which transferred certain property. The deed was recorded in 1910, and decedent died in 1911. The grantor retained no rights in the property transferred. The 1905 act governed the transfer. The question arose as to whether the property should be valued as of the date of the delivery of the deed or the death of the grantor. It was there stipulated, however, "* * * that full title, control, and enjoyment passed to the grantee in 1909, at the time of the delivery of the deed" and the court held therefore that "Logic and consistency compel the conclusion that the property should be valued, for the purposes of the tax, as of the date of the delivery of the deed." In other words, the date of the transfer happened to be also the date when the beneficial enjoyment commenced, since the transferee went into immediate possession and enjoyment; but it was this latter factor rather than the date of the transfer which controlled. As said by the trial court herein in its written opinion: "Both cases [the Miller and the Lamb cases] were decided by the same justices within less than six months of each other and both recognize the distinction between the transfer inter vivos of a fee simple in contemplation of death and the transfer of a remainder subject to a life estate in the transferor. In Re Estate of Miller the court applied one rule in the case of a remainder, recognizing and expressly stating that a different rule might apply in the case of a transfer inter vivos of a fee simple in contemplation of death. 184 Cal. at pages 686, 687 [195 P. 413, 16 A.L.R. 694]. In the Lamb case the court distinguished but did not disapprove the Miller case. 186 Cal. at page 264 [199 P. 33]. The Supreme Court simply adopted different rules for the two cases and the Legislature, with presumptive knowledge of both decisions, substantially reenacted section 5 of the previous act into subdivision 1 of section 8 of the present act, thereby in effect adopting the rule of the Miller case." In the Chambers case the court in pointing out the factual distinction between the two cases says: "Section 5 of the act, which in effect requires an appraisal as of the date of the death of the transferor, is limited to future, contingent or limited estates, and has no application to transfers, such as that in the instant case, which do not create estates of that character. [In re] Estate of Miller [184 Cal. 674], 195 P. 413, 418, [16 A.L.R. 694]." The Miller case likewise makes plain the distinction between the two kinds of cases, wherein it is said: "We should, perhaps, say that the conclusion so reached, based, as it is, on the particular provisions of section 5 as to the appraisal of future, contingent, or limited estates, does not involve a determination of the question as to whether it is the date of transfer or the date of death of the transferor as of which the appraisement should be made in cases of taxable transfers inter vivos which do not create estates of that particular character. That question is not involved here, and should not be determined."

Nor is there any merit in appellants' contention that the doctrine of the Miller case was in effect abrogated by the decision in Re Estate of Potter, 188 Cal. 55, 204 P. 826. The majority opinion therein makes no reference whatever to the Miller case, nor is there any language used therein indicating an intention to reject the doctrine of the Miller case.

[2] Appellants argue that the decision in the Miller case is founded on an obviously strained construction of the 1911 act, which is explained by the desire of the court to give the transferee the benefit of large estate and inheritance taxes paid the federal government and the state of Nevada; and that it is no longer necessary to perpetuate the strained construction to reach this result, because the act was subsequently amended to provide for deduction of other taxes paid. Irrespective, however, of the reasons which may have induced the court to arrive at its decision, the doctrine therein

declared has not been altered or rejected by any later decisions, either expressly or by implication, and until that is done the decision therein stands as the law. Furthermore it cannot be said that the doctrine of the Miller case is inequitable, because while valuation as of the date of the death gives the state the benefit of a larger tax where the property has increased in value, a decrease in value results in a smaller tax, and the taxpayer thus benefits in not being compelled to pay a tax on a value which he has never enjoyed in possession.

Appellants argue also that since immediately after the Miller case was decided the Legislature amended the act so as to allow the deduction of federal estate and inheritance taxes and state inheritance, succession and transfer taxes, from the market value of the property transferred, it "repudiated the means by which the court in Estate of Miller achieved the result, but sanctioned the result." Inasmuch, however, as the amendment conformed to the doctrine of that case and was not inconsistent therewith, it must be deemed that the amendment was intended as a ratification of the doctrine rather than a repudiation thereof.

Paraphrasing section 2 of the 1921 act, it provides that a tax is imposed on the transfer of property, "said taxes to be upon the market value of such property" when the transfer is made in contemplation of death or intended to take effect in possession or enjoyment at or after death. Then follows this sentence: "When such person, institution or corporation becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, whether made before or after the passage of this act." (As will be noted, the sentence is not complete grammatically, and in Re Estate of Potter, supra, it was held that the sentence should be separated from the matter which preceded it by a comma, rather than a period.) Appellants argue that the quoted provision constitutes an express declaration that property transferred inter vivos is to be valued as of the date of transfer. They contend that it means that when a person is entitled "in expectancy" by any transfer the property is to be valued as of the date he becomes entitled in expectancy, that is, the date of transfer. The negative answer to this contention is to be found in those portions of the decisions in the Miller and Chambers cases above quoted, wherein it is held that future, contingent or limited estates such as we have here, are to be governed by section 5 (section 8 (1) of the 1921 act), rather than by section 1 (section 2 of the 1921 act).

Appellants further contend that there is a change in the 1921 act which permits of reaching a different conclusion than under the 1911 act, involved in Re Estate of Miller. The only change which is here pertinent is in the position of the provision to the effect that the tax is upon the market value of the property, and it is apparent that such change in position will not permit giving a different interpretation under the 1921 act than under the 1911 act.

The decree is affirmed.

PETERS, P. J., and WARD, J., concurred.

53 Cal.App.2d 288

HUNDLEY et al. v. MARINKOVICH et al.

Civ. 6716.

District Court of Appeal, Third District, California.

July 7, 1942.

1. Appeal and error 🔑1010(1)
Mechanics' liens 🔑288(3)

Under statute providing that occupation or use of a building by owner or his representative, accompanied by cessation of labor thereon, is a completion of the job for purpose of determining limitation of time within which a notice of claim of lien may be filed, time of completion is a "question of fact", and reviewing court may not interfere with a determination on the question where there is substantial evidence to support it. Code Civ.Proc. § 1187.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

2. Appeal and error 🔑907(3)

Where appeal is upon judgment roll alone, trial court's findings are conclusively presumed to be supported by the evidence.

3. Trial 🔑395(1)

Where claimants asserting a mechanics' lien for materials furnished in construction

of apartment were relying upon date of replacement of defective lock installed in construction of building after owner had entered into possession and a notice of completion had been filed as the date of completion of job for purpose of determining limitation of time within which the claim of lien might be filed, trial court's finding that replacement of defective lock constituted no part of construction of building supported judgment denying lien. Code Civ.Proc. §§ 1183, 1187.

◆

Appeal from Superior Court, Sacramento County; Dal. M. Lemmon, Judge.

Action by E. E. Hundley and others against A. Marinkovich and others, to enforce a materialmen's lien for materials furnished by plaintiffs to building contractor and used in construction of apartment house on property of defendants Marinkovich. From a judgment holding that plaintiffs were not entitled to any lien against the property or to any judgment against defendants Marinkovich, the plaintiffs appeal.

Affirmed.

Huston, Huston & Huston and Mervin H. Reith, all of Sacramento, for appellants.

Treadwell & Laughlin and Russell E. Barnes, all of San Francisco, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal upon the judgment roll alone, in an action to enforce a materialman's lien for materials furnished by appellants to the contractor, and used in the construction of an apartment house on the property of respondents Marinkovich.

The trial court found that on May 12, 1937, respondents Marinkovich entered into a contract with one Vukicevich, as contractor, for the construction of an apartment house, and that respondent Maryland Casualty Company executed the usual surety bond for the faithful performance of said contract, and the payment for labor and materials used in connection therewith.

The findings of the court then proceed:

That the construction of the said building was completed on or before the 9th day of November, 1939, and on or prior to the 9th day of November, 1939, the labor ceased on the construction of the said building, and the said building was delivered by the contractor to the owners, and the said owners entered into possession thereof and entered into the actual occupancy of the said property by themselves and their subtenants. That the said owners, within ten days after the completion of the said contract and work of improvement, and on the 9th day of November, 1939, did file for record in the office of the county recorder of the county where the property is situated, a notice setting forth the date the said work was completed, and on which cessation of labor occurred, together with their names, addresses and the nature of their title, and a description of the property sufficient for identification, together with the name of the contractor, which notice was verified by the said owners, and they duly paid the fee for recording the same. That at the time that the said notice was recorded, the said construction had been completed, said building had been accepted and occupied by the owners, and there had been a cessation of labor on the said building, and no labor was subsequently employed in the construction of said building.

The trial court found further that appellants did not, within thirty days after the completion of such work of improvement as a whole, file any claim of lien or give any notice to the surety, and that the only notice or claim of lien ever filed by appellants was filed on the 21st day of December, 1939, more than thirty days after the filing of said notice of completion, and after the cessation of labor on said building, and after occupancy and use of said property by the owners, and after the acceptance of said work and improvement by the owners; that during the course of construction, and before respondents Marinkovich accepted the building, appellants furnished materials to the contractor Vukicevich, of the value of $788.94, which materials were delivered between August 26, 1939, and November 8, 1939; that appellants on November 29, 1939, furnished the contractor "with a certain part of a lock of the value of $4.12 to replace a defective part of a lock installed in the construction of said building. The said portion of said lock was thereafter installed in the lock in said building, but the same constituted no part of the construction of said building"; that on December 21, 1939, appellants recorded a claim of lien "for materials furnished in the sum of $793.06, but said notice of lien was not recorded within thirty days after the completion of said building, and was not recorded within thirty days of the last delivery of material used in the construction of said building, but was recorded within thirty days after the furnishing of said material used to replace a defective portion of a lock of said building"; that appellants' cause of action to enforce a lien upon said property is barred by the provisions of section 1183 and 1187 of the Code of Civil Procedure, excepting as to a lien for said sum of $4.12, which said sum the respondents paid into court for the benefit of appellants.

From said findings the court concluded that appellants were entitled to judgment against the contractor Vukicevich for the sum of $793.06, but were not entitled to any lien against the property, or to any judgment against respondents, and appellants appeal from the judgment entered in accordance with said findings and conclusions.

Section 1187 of the Code of Civil Procedure reads as follows:

"Every original contractor, claiming the benefit of this chapter, within sixty days after the completion of his contract, and every person save the original contractor claiming the benefit of this chapter, at any time after he has ceased to perform labor or furnish material, or both, for any work of improvement mentioned in this chapter, and until thirty days after the completion of such work of improvement, as a whole, may file for record with the county recorder of the county or city and county in which such property or some part thereof is situated a claim of lien containing a statement of his demand * * *. In all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter; the occupation or use of a building, improvement or structure by the owner, or his representative, accompanied by cessation from labor thereon; or the acceptance by the owner, or said agent, of said building, improvement or structure, or cessation from labor for thirty days upon any contract or upon any building, improvement or structure, or the alteration, addition to, or repair thereof; the filing of the notice hereinafter provided for.

"The owner shall within ten days after the completion of any contract or work of improvement provided for in this chapter, or within ten days after there has been a cessation from labor thereon for a period of thirty days, file for record in the office of the county recorder of the county where the property is situated a notice setting forth the date when the same was completed, or on which cessation from labor occurred, together with his name, address and the nature of his title, and a description of the property sufficient for identification, together with the name of the contractor, if any, which notice shall be verified by himself or some other person on his behalf. * * * In case such notice be not so filed, then all persons claiming the benefit of this chapter shall have ninety days after the completion of said work of improvement within which to file their claims of lien. The phrase 'work of improvement' and the word 'improvement' as used in this chapter are each hereby defined to mean the entire structure or scheme of improvement as a whole."

Appellants contend that because of the furnishing by appellants to the contractor on November 29, 1939, of the part of a lock to replace a defective part of a lock installed in the construction of said building, their lien, as filed on December 21, 1939, was within thirty days after the completion of said building. Appellants argue that a substitution or replacement of material, at the demand of the owner or the original contractor, will operate where the labor or material was not gratuitous, to validate a mechanic's lien filed within the statutory period.

[1] Appellants cite the case of Nevada County Lumber Co. v. Janiss, 25 Cal.App. 2d 579, 78 P.2d 200. In that case the trial court found that although the building was occupied by a tenant on December 2nd, the sewage system failed to operate, and replacement pipes for said system were necessary to the completion of the building under the contract, and that such necessary work was not completed until December 20th, and that a lien filed was within the ninety-day limitation prescribed by section 1187, supra. Upon appeal, this court said, at page 582 of 25 Cal.App.2d at page 201, of 78 P.2d: "Section 1187 of the Code of Civil Procedure specifies certain circumstances which 'shall be deemed equivalent to a completion' of a contract for the purposes of that chapter of the Code. The provision relied on by the appellant declares that 'the occupation or use of a building * * * by the owner, or his representative, accompanied by a cessation from labor thereon' will be deemed to constitute a completion of the job, for the

purpose of determining the limitation of time within which a notice of claim of lien may be filed. It will be observed the statute does not declare that mere occupation of the building is sufficient to set the statute of limitations running. That occupation must be accompanied by cessation from labor thereon. The question of the completion of a building is one of fact, with the determination of which we may not interfere where there is substantial evidence to support the finding in that regard."

The cited case does not support the position of appellants, but is merely authority to the effect that the question of the completion of a building is one of fact.

Appellants also cite "54 A.L.R. pages 984 to 988, and the authorities there cited," and have referred to two cases mentioned in said note. In those two cases it was held that the question of the date of completion was a question of fact, and that, considering all the facts, the finding that the building had not been completed was supported. In neither of the cases was there involved any statutory provision such as we have in California defining completion.

[2, 3] As hereinbefore stated, this appeal is on the judgment roll alone. We are asked by appellants to hold that the furnishing and installation of a part to replace a defective part of a lock on November 29, 1939, extended the time of the completion of the construction of the building to that date. This appeal, being upon the judgment roll alone, the findings of the trial court are conclusively presumed to be supported by the evidence. The trial court found that said portion of said lock constituted no part of the construction of said building; that on November 9, 1939, the construction of the building was completed, labor thereon ceased, possession thereof was delivered by the contractor to the owners, and the owners entered into the possession and occupancy thereof; that on November 10, 1939, notice of completion was recorded, and that the claim of lien of appellants was not recorded until December 21, 1939. These facts so found by the trial court properly led to the conclusion that appellants were not entitled to a lien upon said property.

Section 1187 of the Code of Civil Procedure sets forth what shall be deemed equivalent to completion, and it is for the trial court to say whether or not a building has been completed. If there is substantial evidence to support such finding, an appellate tribunal may not interfere. The trial court in the instant case found that the various steps specified by section 1187, supra, to be equivalent to completion, had been complied with, and that the installing of the portion of the lock constituted no part of the construction of said building. These findings are conclusively presumed to be true, as the appeal is upon the judgment roll alone. The judgment in favor of respondents is therefore fully supported by the record.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

53 Cal.App.2d 253

ESTRIN v. FROMSKY.

Civ. 13562.

District Court of Appeal, Second District, Division 1, California.

July 2, 1942.

Hearing Denied Aug. 27, 1942.

1. Motions 🔑64

In action for accounting of proceeds of a business venture, a minute order requiring plaintiff to pay for the audit, and a subsequent nunc pro tunc order that costs of audit should be assessable as an item of costs, were not "final orders", and court in subsequently taxing costs was not bound thereby.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

2. Courts 🔑116(1)

The trial court could change or amend a minute order first entered, upon a proper motion in course of proceedings.

3. Costs 🔑193

Expense of services of an expert accountant necessary for proper determination of case and appointed by and acting under direction of the court is properly charged as an item of "costs".

See Words and Phrases, Permanent Edition, for all other definitions of "Costs".

4. Costs 🔑13

Costs in action in equity are matters within discretion of court.

5. Costs 🔑193

In action for accounting of proceeds of business venture, wherein court found that plaintiff was entitled to judgment for such sum as might be found to be credited to his account after accounting of books had been completed, item of expense for audit was properly charged as a "cost" of the action.

6. Appeal and error 🔑891

In action for accounting, wherein auditor's failure to make an exact determination of liability for sales tax was the fault of defendant who had not kept a proper set of books, appellate court would not take additional evidence on the question of tax liability, notwithstanding that since trial State Board of Equalization determined the tax liability at a greater sum than that considered in determining defendant's liability to plaintiff. Code Civ.Proc. § 956a.

7. Judgment 🔑253(1)

In action for accounting and for money had and received, a judgment for $6,000 was not improper on ground that judgment was based solely on count for money had and received, which cause of action was for but $5,851.65, where findings of court and judgment based thereon revealed that basis therefor was the amount shown to be due upon the audit of defendant's books.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by Sam Estrin against David Fromsky for dissolution of a partnership and for an accounting of proceeds, and for money had and received. From a judgment for plaintiff for an accounting and from an order denying a motion to strike certain items from the plaintiff's memorandum of costs and disbursements, defendant appeals.

Affirmed.

Abe Richman and Edward K. Brody, both of Los Angeles, for appellant.

Alfred R. Meyers, of Los Angeles, for respondent.

DORAN, Justice.

Appellant, by means of a bill of exceptions, takes this appeal from a judgment in favor of the plaintiff in an action for an accounting of the proceeds of a business venture, and from an order denying a motion to strike certain items from the plaintiff's memorandum of costs and disbursements.

The complaint herein was one for dissolution of a partnership and for an accounting of the proceeds. Before trial of the action an additional cause of action for money had and received was added by amendment. After hearing the cause, the trial court, by an interlocutory judgment, decreed that the plaintiff and the defendants were not partners and that appellant was the sole owner of the business in question, a market enterprise conducted in the name of appellant and the D. Fromsky Markets, and that the plaintiff (respondent here) was entitled to an accounting of the books of said enterprise and was entitled to judgment for such sums as might be found to be credited to his account after the accounting of the books had been completed. The court thereafter, and on January 15, 1941, ordered a firm of certified public accountants to audit the books in the action. Included in the same minute order was the statement: "The plaintiff is ordered to pay for said audit." On April 30, 1941, the following minute order was entered: "Minute order of January 15, 1941, is ordered amended nunc pro tunc to further read as follows: Costs of audit by Arthur Andersen & Company to be assessable as an item of costs in this action." After the accounting and a further hearing of the matter, the trial court found, in part, that respondent was entitled to an accounting from appellant and that the audit of the books in question indicated and reflected a credit to the account of respondent in the sum of $6,000, and ordered judgment accordingly, together with interest, costs and disbursements. The cost of the audit was allowed respondent by the court.

[1-5] Appellant bases his contention, as to the impropriety of allowing respondent the cost of the audit, upon the sole ground that the minute order of April 30, 1941, by the terms of which it was attempted to amend nunc pro tunc the previous minute order, was void. The contention is not material. It should be pointed out that the minute orders in question were in no sense final orders and the court, in subsequently

taxing costs, was not bound thereby. See 15 Cal.Jur. 112, § 177, as to the effect of such orders. Also see McAllen v. Souza, 24 Cal.App.2d 247, 250, 74 P.2d 853; Hughes v. DeMund, 96 Cal.App. 365, 274 P. 405, and cases cited. Moreover, there is no question but that the trial court could change or amend the minute order first entered, upon a proper motion in the course of proceedings. Whether the amendment was properly made in the instant case need not be decided, as already pointed out. Expense of services of an expert accountant, necessary for the proper presentation and determination of the case, and appointed by and acting under the direction of the court, is properly charged as an item of costs. Faulkner v. Hendy, 79 Cal. 265, 21 P. 754; In re Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919. In the Peterson case, supra, an order requiring either or both parties to pay the cost of appointing an auditor was said to be erroneous, since the prevailing party would be entitled to such costs, the court there indicating that the expense of the auditor should abide the result of the action. Costs in an action in equity are matters within the discretion of the court. Smalley v. Geo. C. Peckham Co., 175 Cal. 146, 148, 165 P. 438. See, also, 7 Cal.Jur. 280, § 21; 20 C.J.S. 274, 275, Costs, § 10, subsec. b; Id., 284, § 13. The item of expense for the audit was properly charged as a cost of suit herein.

[6] Appellant also contends that since the determination of the amount due respondent was based in part upon the deduction of an estimated sales tax liability of $3,000, and it has been officially determined by the State Board of Equalization since the trial of the action herein that the liability was actually $9,999.98, the judgment should be reduced accordingly; and appellant requests this court to take additional evidence upon the question, under the power given appellate courts by section 956a of the Code of Civil Procedure. In this connection, the record indicates that it was not possible to obtain an accurate determination of the sales tax liability at the time of the audit because appellant had not kept a proper set of books. The failure of the auditors to make an exact determination of the liability for sales tax appears therefore to have been the fault of appellant. The interests of justice would not be served in reopening the matter at this time, even if, under other circumstances, such a procedure could be held a proper one under section 956a of the Code of Civil Procedure.

[7] Appellant's contention, that in no event could a judgment for $6,000 be properly rendered, is without merit. The contention is founded upon the claim that the judgment was based solely on the count for money had and received, which cause of action was for but $5,851.65. The findings of the court and the judgment based thereon reveal that the basis therefor was the amount shown to be due upon the audit of appellant's books; and a judgment for such sum as was shown to be due upon an accounting was properly rendered, the action being one for an accounting.

Appellant has raised no other points. The judgment and the order are affirmed.

YORK, P. J., and WHITE, J., concurred.

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53 Cal.App.2d 123

PEOPLE v. KING.

Cr. 3594.

District Court of Appeal, Second District, Division 1, California.

June 30, 1942.

1. Infants 🔑20

Evidence sustained conviction for commission of lewd or lascivious acts against children. Pen.Code, § 288.

2. Criminal law 🔑1159(4)

However dubious the District Court of Appeal may be from reading the cold record as to the verity of the testimony given by prosecuting witnesses, unless the court can justly conclude that their entire testimony is per se unbelievable, it is without authority to interfere with the findings of the triers of fact. Const. art. 6, § 4½.

3. Criminal law 🔑1167(3)

In prosecution under two counts charging the commission of lewd or lascivious acts against children, and under two counts charging sex perversion, denial of defendant's motion to dismiss the two counts charging sex perversion, was not prejudicial error, where the evidence on which motion to dismiss was based, had already been submitted to the jury. Pen.Code, §§ 288, 288a.

4. Indictment and information ⚿128, 129(1)

The prosecution is entitled to charge in the same information more than one offense, where such offenses are connected together in their commission or where the charges are different statements of the same offense. Pen.Code, § 954.

5. Criminal law ⚿1167(3), 1168(1)

Error, if any, in refusing to dismiss two of four counts of information, or to advise the jury to acquit on those two counts, was cured by subsequent action of the court in dismissing those counts on motion for a new trial.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Roy King was convicted of lewd and lascivious acts against children, and he appeals.

Judgment affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles County, defendant was charged in two counts with violations of section 288 of the Penal Code, while the remaining two counts alleged the commission by him of acts denounced by section 288a of the same code. Following the entry of not guilty pleas as to all counts, trial before a jury resulted in guilty verdicts upon all charges. Upon hearing of defendant's motion for a new trial, the same was denied as to counts 1 and 3 charging violation of section 288 of the Penal Code, while counts 2 and 4, alleging violations of section 288a, were dismissed by the court in the interests of justice. From the judgment of conviction entered as to counts 1 and 3 defendant prosecutes this appeal.

[1] It is first contended by appellant that the stories related by the two complaining witnesses, young girls aged eleven and twelve years, respectively, are inherently improbable, and show "that it was physically impossible for the defendant to have committed these acts in the manner (they stated) it was accomplished," and that therefore a reversal of the judgment is required. This contention is refuted by the record, from which it appears that appellant resided with his family in one of the apartments of a government housing project on Via Wanda Street in North Long Beach. This project consisted of 83 buildings with 11 families living in each building. Appellant's apartment was about 100 feet from the apartment occupied by the families of the two prosecuting witnesses. According to the testimony of the prosecutrix named in count 1, she was eleven years of age and had known the appellant for some two years. She testified that about Thanksgiving time in the month of November, 1941, this witness, in company with her playmate (the prosecutrix named in count 3), went to appellant's apartment, upon which occasion he was downstairs painting some furniture. He invited the two girls to come in and look at the furniture, then requested them to come upstairs to a back bedroom. Upon arrival at the latter room, appellant showed the two girls a book containing pictures of nude men and women. One of the girls left the room, going downstairs to see her sister, leaving the other in the back bedroom with appellant. The witness who remained in the room testified that afte her playmate had departed, appellant pushed her on the bed, removed certain of her clothing, and thereupon perpetrated certain acts detailed by her that without question constituted a violation of section 288, supra.

The other prosecutrix testified that following the above occasion, and either in the same or the succeeding month, she went back to appellant's apartment to complain that his young son had destroyed one of her "play books." This she testified was on a Saturday afternoon when her mother and father had gone downtown. Appellant admitted her to his apartment, took her to the back bedroom, and requested her to lie down on the bed, whereupon he perpetrated certain lewd and lascivious acts upon her person. While appellant was engaged in these acts his young son called to him, whereupon appellant told the prosecutrix to get into the closet and told his son to go on with his play, after which he let the complaining witness out of the closet, and she then went home. Neither of the child victims complained or related to their parents or other members of their families any of the foregoing occurrences, but one of the complaining witnesses testified that they had narrated what had transpired to another of their playmates. A Juvenile Hall physician testified that she examined the complaining witnesses and found that with reference to one of them the hymen had suffered a rupture not of recent origin, and as to the other prosecutrix, the physician discovered a slight rupture on both the right and left sides of the hymen, which also was not recent, and was without irritation.

The father of one of the complaining witnesses testified that on November 22, 1941, which was a Saturday afternoon, he and his wife, together with appellant's wife, drove to Long Beach to pay a tire bill. He fixed the date through a receipt which was marked in evidence and bore that date. He testified that they stayed in Long Beach until 3 o'clock and that appellant was home on that date. The wife of this witness testified that it was the usual custom of her and her husband to take appellant's wife with them to Long Beach on Saturday afternoons.

The defendant produced witnesses who were living in the apartments of the government housing project where he and the complaining witnesses lived, all of whom testified that they remembered but one occasion, along in the fall of 1941, when appellant was painting furniture, and that on that occasion none of these witnesses saw either prosecutrix go into the apartment occupied by appellant. He also introduced testimony that his general reputation for the traits involved in the offenses charged was good. Appellant's son testified that on an occasion one of the prosecuting witnesses lay down on the bed in a semi-naked condition and asked him to come in, but that he did not go. Appellant's wife testified to an occasion when she was in the apartment of one of the prosecuting witnesses and saw the latter lying on a couch partially undressed and heard her ask the witness' son to come in and play with her. She also testified that on another occasion she came upon this particular prosecuting witness and her boy under a blanket playing on the floor, but stated that she made no mention of either occasion to the mother of the girl. The record seems to indicate that the parents of the complaining witness and the appellant and his wife were very good friends. Defendant testified in his own behalf, denying the commission of any of the offenses charged against him. He testified to an occasion upon which, instead of his exhibiting indecent pictures to the prosecuting witnesses, they showed him an indecent photograph.

Concerning appellant's first contention, we are unable to say that the testimony given by these alleged victims of his lust is inherently improbable, wholly untrustworthy and not entitled to belief. As heretofore stated, these children were of the ages of eleven and twelve years. Their competency to testify and their understanding of the meaning, solemnity and obligations of an oath were conceded by appellant's counsel at the trial. There was no claim, nor even an attempted showing, that they were coached as to their testimony, while vigorous and searching cross-examination failed to bring into the record anything upon which could be predicated a conclusion of willful or deliberate falsification by either of the prosecuting witnesses or that their testimony was the mere figment of a childish imagination. The trial judge was at all times mindful of appellant's rights, and by way of a cautionary instruction admonished the jury that "you are instructed that a charge of this nature is particularly difficult for a defendant to clear himself of. No charge can be more easily made, and none more difficult to disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. The law does not require in this character of a case that the prosecution witness be corroborated by another witness, or other corroborating circumstances, but does require that you examine her testimony with caution."

[2] However dubious we might be, from a reading of the cold record of this case, as to the verity of the testimony given by the prosecuting witnesses, unless we can justly conclude that their entire testimony is per se unbelievable we are without authority to interfere with the findings of the triers of fact, because, as was said by this court in People v. Quinn, 12 Cal. App.2d 752, 754, 55 P.2d 1277, 1278:

"While the alleged variances or inconsistencies apparent in the child's testimony and the contradictions referred to undoubtedly afforded opportunity for a persuasive argument to the jury against the reliability of her testimony, we find nothing in them from which a reviewing court could justly conclude that her entire testimony is per se unbelievable, and that it was therefore the jury's duty not only to disregard it, but to accept the defendant's denial of any wrongdoing on his part. Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly for that reason our Constitution (art. 6, § 4½) provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1114. Carrying out the spirit and intent of this constitutional provision, the Legislature has ordained that the jury are the exclusive judges of the credibility of witnesses (Code Civ.Proc., § 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by law that it shall be conclusive. Code Civ.Proc., § 2061. It necessarily follows from the rules just noted that the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that of the child witness (People v. Phelan, 123 Cal. 551, 557, 56 P. 424; People v. Wright, 4 Cal.App. 704, 706, 89 P. 364; People v. Turpin, 10 Cal.App. 526, 530, 102 P. 680; Clark v. Tulare L. D. Co., 14 Cal.App. 414, 432, 112 P. 564), and, therefore, to disbelieve the testimony of the defendant and accept that of the child as to the immediate circumstances of the alleged felonious assault and the actions constituting the same, however weak in places the latter's testimony may have been made to appear, or however sharply her testimony on other important points might have conflicted with the testimony of other witnesses.

"In addition thereto, we must remember that a motion for a new trial was made in this case and denied by the trial court. The judge of that tribunal had the witnesses before him, was fortified with an opportunity to observe their manner and demeanor on the stand and apparent candor or lack of the same, and the reasonableness or unreasonableness of the stories they told; and unless he believed the testimony of the child and disbelieved the evidence given by the defendant, it not only was his privilege but his duty to grant a new trial. In denying the motion for a new trial the lower court concurred in the action of the jury, which rejected defendant's denial and accepted the testimony of the child witness concerning the lewd and lascivious acts claimed by her to have been committed upon her by the defendant."

See, also, People v. Kearney, 20 Cal.2d 435, 126 P.2d 612.

Where, as here, the child witnesses were aged eleven and twelve years, concededly possessed of ordinary intelligence, and testified to similar acts on different occasions, the perpetration of which was not inherently improbable, and where there was no indication that the stories had been prompted by others, we are not authorized to reverse a judgment founded thereon. Moreover, there are some corroborating circumstances present. Both the prosecution and defense concede that appellant was at home painting his furniture on a Saturday, as related by the child witnesses, and that this was the only occasion in 1941 when he was so engaged. There is also testimony as to the Saturday when the parents of one of the children took appellant's wife to Long Beach, the date of which is established by a tire bill which was in evidence. Therefore, the most that can be said is that the testimony introduced on behalf of appellant created a conflict with that of the prosecuting witnesses, and that conflict was resolved by the jury against the defendant. In connection with appellant's claim that the description given by one of the complaining witnesses as to what took place was a physical impossibility, thereby rendering her testimony incredible as a matter of law, it must be remembered that the jury and the trial court had the defendant and the witness before them, and any doubt as to whether the acts described were physically impossible was resolved against the defendant by the jury and again by the trial court on the hearing of a motion for a new trial. Under the facts here present we are not empowered to disturb such finding made by the triers of fact. People v. Stangler, 18 Cal.2d 688, 691, 117 P.2d 321.

[3-5] Appellant earnestly insists that his substantial rights were prejudiced when the trial court, at the conclusion of the presentation of the case by the prosecution, denied his motion to dismiss the two counts charging violations of section 288a of the Penal Code. We are unable to un-

derstand how appellant could have been prejudiced by the action of the trial court, since the evidence upon which the motion was based had already been submitted to the jury. That the prosecution is entitled to charge in the same information more than one offense, when such offenses are allegedly connected together in their commission, or where the charges are different statements of the same offense, is established by section 954 of the Penal Code. Furthermore, even though we concede error in the refusal of the court to dismiss counts 2 and 4, or to advise the jury to acquit on those two counts, such error was cured by the subsequent action of the court in dismissing these counts upon the motion for a new trial. People v. Shekell, 5 Cal.App.2d 537, 538, 43 P.2d 328.

There being no error in the record which would justify a reversal, the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

53 Cal.App.2d 118

PEOPLE v. ATWATER.

Cr. 3557.

District Court of Appeal, Second District, Division 1, California.

June 30, 1942.

Embezzlement 🔑44(6)

Evidence that real estate agent fraudulently appropriated to his own use money belonging to his clients which money came into his control by virtue of his employment as such agent established "embezzlement" within the statutory definition thereof and sustained conviction of grand theft. Pen.Code, §§ 484, 508.

See Words and Phrases, Permanent Edition, for all other definitions of "Embezzlement".

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

John J. Atwater, Jr., was convicted of grand theft. From an order denying a new trial, he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant was convicted by the court, a jury having been waived, on three counts of an information charging him with grand theft. Following his conviction, appellant's motion for a new trial was denied, proceedings were suspended without judgment being rendered and appellant was granted probation for a period of ten years, a condition thereof being that he make restitution. The appeal herein is taken from the order denying the motion for a new trial.

Appellant has been a licensed real estate broker in the State of California for about ten years; and the circumstances which led to his prosecution on the charges herein arose out of certain real estate transactions in which appellant had acted as agent. Count one of the information charged appellant with the theft of $2,590.24, the personal property of Julia P. Casanega and Lorraine Casanega, Trustee, count two with the theft of $2,149.87, the personal property of Julia P. Casanega, and count three with the theft of $500, the personal property of Arthur W. and Frances H. Hartigan. Appellant's sole ground of appeal is that the evidence is insufficient to justify a conviction for grand theft.

At the trial the following facts were put in evidence. The Casanegas desired to exchange certain real property in Nogales, Arizona, for property in California, and called several real estate concerns or brokers on the matter, appellant among them. A conference with appellant resulted in his acting as agent for the Casanegas. After necessary information as to the Nogales property had been given appellant by the Casanegas, appellant took the Casanegas to see a certain parcel of real estate in Los Angeles, with which property the Casanegas expressed satisfaction. According to Lorraine Casanega, appellant had stated that an exchange of the Nogales property for property in California could be handled "if we had some note or mortgage or somebody else's property." Julia P. Casanega is the widow of one Tom Casanega of Nogales and Lorraine Casanega is their daughter and was made administratrix of her father's estate. Among the assets of the estate was a mortgage on a piece of property in Arizona, which mortgage was later supplanted by a new mortgage made to Julia P. Casanega, as mortgagee. As part of the transaction involving the Nogales property appellant obtained an assignment of this latter mortgage, together with an executed satisfaction of the same from Julia Casanega, for the purpose of disposing of the mortgage. In addition, appellant obtained a $1,000 note from the Casanegas for the expressed purpose of raising cash in case appellant was unable to dispose of the mortgage. Lorraine Casanega also executed a power of attorney to appellant. As a result of appellant's efforts, a realty and trust company in Tucson, Arizona, purchased the mortgage, issuing its check therefor in the sum of $2,590.24. Appellant also arranged with the same company for a loan on the Nogales property of the Casanegas, and told the secretary of said company to hold the mortgage papers until he returned, when he would bring the Casanegas to complete the transaction. With the check of the realty company, given for the mortgage, appellant obtained a cashier's check in the same amount from a national bank in Tucson. While in Tucson appellant purchased a Cadillac automobile for $2,219.50 and gave his personal check therefor. Appellant drove this automobile to Los Angeles via San Diego; and while in San Diego appellant cashed the check of the national bank and purchased a $2,000 cashier's check from the United States National Bank of San Diego. Later, appellant deposited to his account in a Los Angeles bank the cashier's check for $2,000 and $500 in currency. On the same date that this deposit was made a payment of $375 was made out of the same account on a house being purchased by appellant and occupied by him. Later Mrs. Casanega signed a mortgage for $3,250 on the Nogales property, for which she was handed two checks by the secretary of the Tucson realty company, one in the amount of $500 and the other in the sum of $1,649.87. The difference of $1,100.13 between the amount of the mortgage and the checks was for delinquent taxes. The total cost of the automobile, including accessories and other costs, was $2,619.67. At appellant's direction, Mrs. Casanega endorsed both of the checks last mentioned. The $500 check was used by appellant in payment on the Cadillac automobile. Appellant characterized this $500 as a fee. After giving Lorraine Casanega a check for $100, appellant deposited the check for $1,649.87 to his account in his Los Angeles bank, together with the sum of $100 in currency. On giving Lorraine Casanega the check for $100, appellant told her that he would have an account ready for her mother the following Tuesday. Thereafter Lorraine Casanega asked appellant to see about a mortgage held by the Casanegas on property in Colima, Mexico, and agreed to pay appellant $500 additional for his work in connection with that mortgage. However, appellant did not go to Colima in connection with this matter. Appellant arranged for and obtained a loan of $1,000 from an automobile finance company on the Cadillac automobile, placing the proceeds thereof in the safe in his office. Appellant later, in January, 1941, sold the car for $1,050, and after the loan of $1,000 was paid off to the finance company by the purchaser of the automobile, and other expenses deducted, appellant received a check therefor in the sum of $17.25. On September 23, 1940, appellant's Los Angeles bank account, wherein the deposits above mentioned had previously been made, had a balance of $1.48. This was about two months after the money in question had been deposited. The proceeds received by the Casanegas from the foregoing transactions amounted to $175. No deal was ever entered into for the exchange of the Casanega property for the Los Angeles property first shown the Casanegas by appellant; but appellant claims that an escrow was later opened for the exchange of other property, which transaction failed of completion because of the revocation of appellant's power of attorney and the refusal of the Casanegas to take steps to protect the equity in the Los Angeles property, the mortgage on which was foreclosed and the property sold. The record shows that an escrow was opened between the owner of the property and a Mrs. North, and another escrow between Mrs. North and the Casanegas. The Casanegas never signed the escrow instructions. Mrs. North testified that she entered the transaction merely as an accommodation to appellant in order that the property might be refinanced. The deed from the grantor in the first escrow was never delivered.

Mrs. North executed a grant deed of the California property to Lorraine Casanega. This deed was recorded. On the date the deed to Lorraine was recorded, appellant appears to have induced Mrs. Cox, the owner of the California property, to sign a deed to the property under the following circumstances, as related by Mrs. Cox: "I saw him on the 4th of December. He called me to come over to his office, and he said, 'I think it is about time I was giving you a little bit of money.' He read me a paper concerning the property had been sold to a Mrs. North for $5,500, he said, by the escrow papers, and so he said, 'I think I had better give you a little money,' and he said, 'I have a paper here I want you to sign,' and he said, 'I will read it to you.' I didn't have my glasses, and he read it to me and he said, 'Mrs. North is having trouble in raising the money, and she is trying to sell her automobile to pay the rest that is due me.' He said, 'The place was sold, and we are trying to refinance it to get you the money,' and so he read this over to me, and he said, 'I want you to go over to the escrow department to sign this paper, and if you don't get the money for 30 days, so you can get interest on it,' and he took me over in Westwood, and we went in there and he said, 'The gentlemen I want to see is not here,' and he went out and he was gone for about 45 minutes, and he came back and he said, 'I could not find him,' and he said he went to lunch, and we come back in about half an hour and he introduced me to Mr. Elfstrom, and he said, 'I want to get this paper fixed up for Mrs. Cox,' and he said, 'Sign here,' and I thought it was the same paper that he read over in his office about the automobile, and I signed it, and then he gave me $50, and I signed what was supposed to be a receipt for the $50, and I never saw him any more." Appellant admitted at the trial that after the property in question was deeded to Lorraine Casanega appellant took the money in his possession and used it for his own purposes. As already mentioned, the California property owned by Mrs. Cox, which was deeded to Lorraine Casanega, was sold under foreclosure.

As to appellant's dealings with Mr. and Mrs. Hartigan, the basis for the third count of the information, the Hartigans went to appellant's office and inquired about a residence appellant had advertised for sale. Appellant showed the Hartigans a residence that interested them. The price of this property was $6,750; and appellant told the Hartigans that it would be helpful in making a quick sale if the Hartigans would produce ready money. Accordingly, the Hartigans gave appellant a diamond ring and a check for $100. An additional $400 was paid into the transaction by Mr. Hartigan's brother-in-law. Some time later the owner of the residence decided not to sell. It was understood that the ring and money were to be returned if the deal did not go through. About three or four months before the trial of the instant action appellant returned the diamond ring to the Hartigans, but appellant never returned the money although demand was made upon him.

Appellant concedes that the evidence establishes that appellant was acting in the capacity of an agent and that he obtained and held the money in question in the capacity of trustee; but appellant contends that it was not established that the money belonged to his principals nor that he converted the money to his own use in violation of his trust. Obviously, the evidence above set forth is sufficient to support charges of grand theft under section 484 of the Penal Code. Section 508 of the Penal Code states: "Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement." Appellant's attempts to explain or justify his conduct merely served, if at all, to create a conflict in the evidence. The appeal is without merit; and the order denying the motion for a new trial is affirmed.

YORK, P. J., and WHITE, J., concurred.

53 Cal.App.2d 202

PEOPLE v. DONEGAN et al.

Cr. 3579.

District Court of Appeal, Second District, Division 1, California.

July 1, 1942.

1. Criminal law 🔑241

Where complaint charging burglary conformed strictly to statutory provisions, magistrate did not err in committing defendant to superior court for sentence on her plea of guilty without taking any evidence. Pen. Code, §§ 806, 859a, 951, 952; Const. art. 1, § 8.

2. Criminal law 🔑998

Where a woman, moving to vacate judgment, sentencing her to penitentiary on her plea of guilty of burglary, because of alleged duress and representations or promises by her attorney that she would be sentenced to not more than 30 days in jail, offered no evidence at hearing on motion in addition to affidavit attached thereto and affidavit controverting people's counter affidavits, probation officer's report on file noted that movant made complete confession, and evidence showed that she assisted officers in returning stolen merchandise to owners, superior court did not err in denying motion.

3. Criminal law 🔑998

The exceptional remedy of motion to vacate judgment of conviction was not designed to enable guilty person to escape punishment, but to purify administration of justice, and may be utilized only on strong and convincing showing of deprivation of legal rights by extrinsic causes.

4. Criminal law 🔑274

The fact that defendant did not receive milder punishment on pleading guilty than that which she thought might be meted out if she stood trial, or fact that she might be placed in position to receive milder punishment for other crimes, if such plea were set aside, presents no ground for court's exercise of discretion to permit withdrawal of plea.

5. Criminal law 🔑274

The fact that defendant entered plea of guilty solely on her counsel's advice is not available as ground for withdrawal of plea as fraudulently obtained.

6. Criminal law 🔑1178

Where appeal from judgment imposing sentence on plea of guilty is not urged in brief of defendant, also appealing from order denying her motion to vacate judgment, it must be assumed that she intended to abandon appeal from judgment.

7. Criminal law 🔑1069(1)

Where defendant gave no oral notice of appeal from judgment imposing sentence on her plea of guilty of crime, written notice of appeal therefrom was not filed until 48 days after entry of judgment, and her order for transcript on appeal requested only preparation of proceedings had after such entry, such appeal must be dismissed as not taken within statutory time. Pen.Code, § 1239.

Appeal from Superior Court, Los Angeles County; Leslie E. Still and Edward R. Brand, Judges.

Mollie Donegan and Loraine Ormsby pleaded guilty of burglary, and, from a judgment sentencing defendant Ormsby to the penitentiary and an order denying her motion to vacate the judgment, she appeals.

Appeal from judgment dismissed, and order denying motion to vacate judgment affirmed.

John S. Cooper, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

In a complaint filed in the Municipal Court of the City of Long Beach, defendants were charged in two counts with commission of the crime of burglary. Upon arraignment both defendants were represented by counsel and regularly pleaded guilty to the offenses charged. Thereupon, the cause was certified to the Superior Court of Los Angeles County for sentence, pursuant to the provisions of section 859a of the Penal Code. Defendants applied for probation and in due course probation was granted to the defendant Donegan but was denied as to appellant, who was sentenced to Tehachapi. Judgment was entered on September 29, 1941.

On October 15, 1941, appellant employed her present counsel, who secured a thirty-day stay of execution and on November 13, 1941, filed a notice of motion to vacate said judgment praying that appellant either be placed on probation or be permitted to change her plea to "not guilty" so as to allow her to be tried for the offenses charged against her.

Accompanying said motion was appellant's affidavit to the effect that she had employed her former counsel because she was told that he was not only competent but that he had influence with the Long Beach office of the district attorney as well as the courts, and that he was related to one of the deputy district attorneys; that she was persuaded to plead guilty by her said attorney upon the representation that he had consulted with the officers and the deputy district attorney in charge of the case and that, in his opinion as an attorney, she would not receive more than a thirty-day jail sentence; that she would not have received a greater sentence if she had been tried; that her plea of guilty was induced by fear and persuasion, and that regardless of her guilt or innocence she would not have entered a plea of guilty if she had known, suspected or believed that she would receive a penitentiary sentence.

Counter affidavits were filed by the prosecution stating that appellant's plea was entered freely and voluntarily and without any persuasion exerted by her attorney; that said attorney had not discussed the case with any member of the district attorney's office; that appellant assisted in the return of approximately $5,000 worth of merchandise to the lawful owners in an effort to make restitution; that before sentence appellant was advised by her attorney that the probation department had recommended that probation be denied her and that she would probably be sentenced to Tehachapi; that her attorney did not advise her that she would not be compelled to serve more than thirty days in the county jail.

Thereafter appellant filed additional affidavits which did not materially add to the allegations of her original affidavit. The motion was argued and submitted on said affidavits and denied by the court.

From the judgment and the order denying her motion to vacate said judgment, appellant prosecutes this appeal.

[1] Appellant urges that she was improperly held to answer by the committing magistrate for the reason that said officer certified the defendants to the superior court "without taking any evidence, any stipulation or otherwise * * * that such procedure absolutely invalidates all the proceedings in this case, as there was no evidence, no deposition, nothing except a complaint made by a police officer upon information and belief."

The complaint herein conforms strictly to the provisions of sections 806, 951 and 952 of the Penal Code. Section 8, article I of the Constitution of this state provides: "* * * and upon such plea of guilty, the magistrate shall immediately commit the defendant to the sheriff and certify the case, including a copy of all proceedings therein and such testimony as in his discretion he may require to be taken, to the superior court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court." Section 859a of the Penal Code outlines the procedure to be followed in language identical to that last quoted. Accordingly, no error was made by the magistrate when he committed appellant to the superior court without taking any evidence after she had pleaded guilty to the crimes charged in the complaint, which conformed strictly to the provisions of the code sections which define, indicate the form and the manner in which the commission of an offense shall be charged against a defendant. Secs. 806, 951, 952, Pen.Code. The magistrate followed the procedure laid down by section 859a of the Penal Code in committing and certifying appellant to the superior court, which was all that could be required of him in the circumstances presented by the record herein.

[2] Appellant complains that "the court erred in refusing to vacate and set aside the judgment and sentence herein because of the alleged duress and promises under which any plea was made." Such contention cannot be sustained.

Attached to her motion to vacate and set aside the judgment was appellant's affidavit to the effect that her attorney made certain representations or promises to her that she would be sentenced to not more than 30 days in jail in the event she entered a plea of guilty. Thereafter respondent filed counter-affidavits denying such allegations and averring that appellant had entered her plea of guilty freely and voluntarily. Appellant then filed additional affidavits controverting said counter-affidavits. Respondent also filed additional affidavits by the deputy district attorneys who handled the prosecution, denying that they had discussed the case with or had made any promises to either appellant or her attorney as to what action the court might take in the event that she pleaded guilty. Appellant offered no additional evidence at the hearing, although the court afforded her an opportunity to do so.

Appellant's motion is based in part upon the probation officer's report on file, wherein it is noted that she made a complete confession of her guilt. Moreover, it is shown by the record that appellant assisted the officers in returning approximately $5,000 worth of mechandise to the lawful owners in an effort to make restitution which in effect was an admission of her guilt.

[3-5] The exceptional remedy of a motion to vacate a judgment of conviction "was not designed to enable the guilty to escape punishment, but to purify and keep pure the administration of justice, and the same may be utilized only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes." People v. Gottlieb, 25 Cal.App.2d 411, 415, 77 P.2d 489, 491. Furthermore, the "fact that a defendant did not receive a milder punishment by pleading guilty than that which he thought might be meted out to him if he stood trial, or the fact, as in the instant case, that the defendant might be placed in a position to receive a milder punishment for other crimes if his plea of guilty to a particular offense were set aside, presents no ground for the exercise of the discretion necessary to permit a plea of guilty to be withdrawn. People v. Manriquez, 188 Cal. 602, 206 P. 63, 20 A.L.R. 1441. Neither does it avail appellant anything that he entered his plea solely on the advice of his counsel representing him in the case, because this falls far short of being a fraudulently obtained plea." People v. Gottlieb, supra.

[6, 7] Appellant's appeal from the judgment is not urged in the brief now before this court and it must be assumed that he intended to abandon it. As a matter of fact the judgment herein was entered on September 29, 1941. Appellant gave no oral notice of appeal therefrom and the written notice of appeal from the said judgment was not filed until December 16, 1941; also, her order for a transcript on appeal requests only the preparation of the proceedings had after the entry of said judgment. It follows that said appeal was not taken within the time provided by section 1239 of the Penal Code.

For the reasons stated, the purported appeal from the judgment is dismissed, and the order denying motion to vacate and set aside the judgment is affirmed.

DORAN and WHITE, JJ., concurred.

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53 Cal.App.2d 294

WOODS v. RECHENMACHER, County Clerk.

Civ. 6761.

District Court of Appeal, Third District, California.

July 7, 1942.

1. **Judgment** 🔑275

Under statute requiring entry of judgment in conformity to verdict within 24 hours after rendition thereof, a stay of entry of judgment upon a verdict until determination of an appeal from an order denying motion for judgment notwithstanding the verdict was not authorized where case was not reserved for further argument or consideration, the verdict was not defective and where such stay deprived plaintiff of interest on the judgment and the possible benefit of the lien thereof. Code Civ.Proc. §§ 664, 674.

2. **Judgment** 🔑275

Under the statute requiring judgment to be entered in conformity to verdict within 24 hours after rendition of verdict and which provides for an automatic stay of entry of judgment until decision upon a motion for judgment notwithstanding the verdict, a further stay for the purpose of allowing losing party to secure ruling of an appellate court upon his motion for judgment notwithstanding before proceeding with a motion for new trial is not authorized. Code Civ.Proc. § 664.

3. **Appeal and error** 🔑449

Granting a stay of entry of judgment upon verdict, until determination of an appeal from an order denying motion for

judgment notwithstanding, for the purpose of giving defendant additional time to move for new trial, was not within the inherent power of a court, since the avoidance of the pendency of more than one appeal in a case was not a function of the trial court necessary to its existence and plaintiff had the right to have judgment entered promptly, to draw interest thereon and the benefit of the lien thereof upon property of defendant.

◆

Proceeding in mandamus by Walter Woods against L. Rechenmacher, clerk of the superior court of Placer County, to compel defendant to enter judgment on the verdict of the jury.

Writ granted.

Jas. F. Brennan and Chas. J. Janigian, both of San Francisco and Charles A. Tuttle, of Auburn, for petitioner.

T. L. Chamberlain, Lowell L. Sparks, and Gerald B. Wallace, all of Auburn, for respondent.

ADAMS, Presiding Justice.

This is a proceeding in mandamus to compel the clerk of the Superior Court of Placer County to enter judgment on the verdict of a jury.

In an action brought in the Superior Court of Placer County, California, Woods sought damages for personal injuries. Trial was had before a jury which, on September 13, 1941, returned a verdict in favor of plaintiff for the sum of $5,200. On the same date and before entry of judgment defendants moved the trial court to enter judgment in their favor notwithstanding the verdict, reserving the right to apply for a new trial if said motion was denied. On October 3, 1941, the court made the following order, which was entered in its Minutes:

"It is hereby ordered that defendants' motion for judgment notwithstanding the verdict of the jury be and the same is hereby denied.

"It Is Further Ordered that a stay of proceedings herein be granted so that the entry of judgment be stayed until defendants have an opportunity to perfect an appeal from the order denying their motion for judgment notwithstanding the verdict, if so advised, and in the event that an appeal is perfected, the entry of judgment shall be stayed until the determination of said appeal and the filing of the remittitur with the Clerk of this Court."

On October 10, 1941, Woods filed in this court a petition for alternative writ of mandate to be directed to L. Rechenmacher, county clerk of Placer County, directing her forthwith to enter judgment on the verdict in the said action or show cause why she had not done so.

The facts above stated were set forth in the petition, and it was also alleged that the aforesaid order that entry of judgment be stayed is null and void, that the court had no jurisdiction, power or warrant of law to issue said order; that said order causes unnecessary delay in the final determination of said cause, and prevents the entry of judgment and the running of interest thereon in favor of plaintiff; that plaintiff is of the age of seventy years and may die before judgment be entered, all to plaintiff's irreparable damage; that the respondent clerk has, after a written request of plaintiff so to do, refused and still refuses to enter judgment on said verdict because of said void order; and that said order shows on its face that its only effect is to delay final determination of the cause and that it can serve no other purpose, as all of defendants' rights with respect to said motion can be obtained by motion for a new trial or an appeal if said motion be denied.

Upon order of this court an alternative writ was issued on October 10, 1941. On October 28, 1941, respondent L. Rechenmacher filed a return and answer thereto, in which she based her refusal to enter judgment after verdict upon the aforesaid order of the court, and asserted that said order was within the jurisdiction and power of the court by reason of general law, and inherent power of the court, and section 664 of the Code of Civil Procedure of California. She further alleged that said order was made under the circumstances and for the reason that on October 2, 1941, Charles A. Tuttle, one of the attorneys of record for plaintiff, and Gerald B. Wallace, an associate of one of the attorneys of record for defendants in said superior court action, called at the chambers of the judge of said court and discussed the possible effects of a ruling upon the motion then under submission; that attorney Wallace expressed the view that if the court decided to deny defendants' motion for judgment notwithstanding the verdict, confusion could be avoided if an order were made staying the entry of judgment so that the time for giving notice of intention to move for a new trial would not commence to run, in the event that said defendant concluded to appeal from said order; that if a motion for a new trial were proceeded with and the court should grant said motion there was a possibility of a new trial being held while an appeal was still pending; that the District Court of Appeal had authority to enter judgment in favor of defendants on such appeal is so disposed, and that consequently a new trial would involve useless and needless expense to plaintiff and defendants and would result in inconvenience and uncertainty to all parties concerned; that attorney Wallace presented to the trial judge a proposed draft of an order staying proceedings, which said draft of proposed order was handed to the respondent on October 3, 1941, by said judge, with instructions to make it a part of the order denying said defendants' motion for judgment notwithstanding the verdict; and that said order was forthwith duly entered by respondent in the minute book of the court.

It was also alleged that defendants had filed notice of appeal from the order denying motion for judgment notwithstanding, and at the date of the return and answer the official transcript was in course of preparation.

On November 11, 1941, the transcript on said appeal was filed in this court. On February 2, 1942, by order of the Supreme Court the case was transferred to the District Court of Appeal for the First District, Division Two, which, on April 17, 1942, affirmed the order of the trial court refusing judgment notwithstanding the verdict. Woods v. Walker, 51 Cal.App.2d 307, 124 P.2d 844. On June 16, 1942, a petition to the Supreme Court for hearing therein was denied.

The question presented for determination here is then, whether, under the facts of the case, the trial court had power and authority after verdict by the jury awarding damages to plaintiff to stay the entry of a judgment in conformity to the verdict until the determination of an appeal from its order denying defendants' motion for judgment in their favor notwithstanding the verdict.

Section 664 of the Code of Civil Procedure provides: "When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict (provided that in justices' courts such judgment shall be entered in the docket at once), unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. When a motion for judgment notwithstanding the verdict is pending, entry of judgment in conformity to the verdict shall be automatically stayed until the court has rendered its decision upon the motion."

In the present instance the case was not reserved for argument or further consideration. The stay of proceedings was granted so that the time within which defendants could move for a new trial would not begin to run until said defendants had an opportunity to perfect an appeal from the order denying their motion for judgment notwithstanding the verdict, if so advised, and the coming down of the remittitur from the appellate court. It is not contended that there was any legal obstacle to having a motion for a new trial made and heard pending such appeal or that any hardship would have been imposed upon defendants had the judgment been entered in conformity with Section 664, supra. It is not denied that the stay of judgment for plaintiff deprived him of the right to interest on the amount of his award during the time necessary for a decision on such appeal or that he was not also deprived of the right to the security of a lien upon any real property belonging to defendants as provided by section 674 of the Code of Civil Procedure of California. It is not contended that there was any defect or uncertainty or ambiguity in the verdict of the jury or that it was not responsive to the issues in the case.

An analogous situation was presented in State v. District Court, 50 Mont. 1, 144 P. 564. Section 6800 of the Revised Codes of Montana, 1907 provides (as does § 664, supra) that "When trial by jury has been had, judgment must be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings." In that case, after verdict by a jury awarding plaintiff damages the court ordered the verdict to be filed but "ordered further that no judgment be entered, and that the case be reserved for further argument and consideration, and ordered that in the meantime a stay of proceedings be had." The trial court having refused to vacate this order on demands made by plaintiff, mandamus was sought by the state on the relation of plaintiff against the court and the judge thereof, to compel the vacation of the order staying the entry of judgment, and to order the entry of such judgment. In its return the court set forth that the order was not a final one denying judgment but was one authorized by the code section supra; that the court had requested counsel to argue the question whether the court could, on its own motion, set aside the verdict and grant a new trial; that argument had been had and briefs requested but not filed.

The Supreme Court said that from the return it was clear the trial court, believing the jury had wrongly decided the issues, stayed the entry of judgment pending the discussion and decision of a proposition which had nothing whatever to do with the form of the verdict, with its responsiveness to the issues, or with its adequacy in any respect to support a judgment; that while a court may, under some circumstances, reserve a case for argument or grant a stay, in view of the fact that the prevailing party is prima facie entitled to have judgment entered as directed in section 6800, supra, and that a duty is thereby imposed upon the clerk from which he is absolved pending the stay, it must be that neither reservation nor stay can be alllowed ex gratia or without adequate reason; that generally speaking this is certainly true of a stay after judgment (State v. Clements, 37 Mont. 96, 94 P. 837, 127 Am.St.Rep. 701); and that a stay before judgment is a more serious matter than a stay after judgment. Citing and quoting from Freeman on Judgments, 4th Ed., § 42.

The court further said that the stay complained of was confessedly in aid of a new trial contemplated by the court upon its own motion, but that a stay for such purpose is properly granted only after notice of intention has been given, and that such notice cannot be given until after the entry of judgment (citing §§ 6796 and 6798, Revised Codes of Montana); and that from this it would seem to follow that a stay before judgment for such purpose would be a legal impossibility. It was said also that the "case" was not reserved for argument or further consideration; that the "case" was held up pending argument on a collateral matter, because in Montana, while a court may refuse to receive a verdict which is insufficient, it may not set aside a verdict upon substantial grounds save by granting a new trial, nor grant a new trial save upon motion, etc., as provided in the code. The conclusion was that a case may be reserved for argument under section 6800, supra, only when the judgment does not necessarily follow the verdict or where, after discharge of the jury the verdict is claimed to be unresponsive to the issues or so ambiguous or informal that no judgment proper under the issues could be entered in conformity with it.

Also it was added that as plaintiff was entitled to have judgment in conformity with the verdict from the moment it was entered she was entitled to have such judgment entered nunc pro tunc; and the order of the court was that respondents vacate the order forbidding entry of judgment and direct entry thereof.

Freeman in his work on Judgments, 4th Ed., says in section 42:

"The Code of Civil Procedure in California requires the clerk to enter judgment in conformity with the verdict within twenty-four hours after the rendition of the verdict, unless the court orders the case reserved for further consideration, or grants a stay of proceedings. If there is no doubt as to what judgment is proper, the better practice is to enter it at once. The judgment may as well be set aside as the verdict. Therefore such proceedings as may be appropriate to securing a new trial, or any other right of the losing party, can be prosecuted as advantageously upon granting a stay of proceedings upon the judgment as upon the verdict. The immediate entering of judgment authorizes the making up of the judgment roll, and thus secures a lien on the judgment debtor's real estate. To this security he is at once justly entitled. If the court delays in granting it to him, he may during the stay of proceedings be deprived of the fruits of his litigation."

Cited by Freeman is Hutchinson v. Bours, 13 Cal. 50, in which case, after verdict, a motion was made for stay of proceedings to enable plaintiff to move for a new trial. No judgment was entered. Some months thereafter a motion for a new trial was overruled and entry of judgment on the verdict was ordered. The main error assigned on appeal was that judgment was entered in vacation; but before proceeding to determine that point the court said at page 51 of 13 Cal., "we think it well, in order to secure uniformity of practice to suggest that we consider it better, in all cases where there is no question as to the proper judgment to be entered on the verdict, for the Court to direct judgment to be entered at once, without waiting for a motion for a new trial or any proceedings to set aside the verdict. The judgment can be as well set aside as the verdict, while there may be some embarrassments, as in this case, attending the postponement of the entry, and the plaintiff ought to have the benefit of the security, which is sometimes very important, afforded by the lien of the judgment. A suspension of all proceedings under the judgment fully protects the losing party from all loss or injury if, from any cause, the verdict be set aside or the judgment vacated."

Also see 14 Cal.Jur. section 37, 924, citing Hutchinson v. Bours, supra.

[1, 2] Conceding that by virtue of section 664, supra, a court is authorized to stay entry of judgment under some circumstances, we are of the opinion that the circumstances of this case did not justify such action. The case was not reserved for further argument or consideration, nor is it contended that there was anything defective in the verdict which would raise any doubt as to what judgment was proper. It does not appear that any real confusion would have arisen if the orderly processes of the law had been followed, even though a motion for a new trial were heard pending appeal from the order denying judgment notwithstanding the verdict. On the other hand it is not denied that plaintiff is injured by the stay as he is deprived of his right to interest until judgment is entered, and is also deprived of the possible benefit of the lien of his judgment. Section 664, supra, stays entry of judgment pending the decision of the court upon a motion for judgment, notwithstanding the verdict; further stay of entry of judgment for the mere purpose of allowing a losing party to secure the ruling of an appellate court upon his motion for judgment notwithstanding before proceeding with a motion for a new trial is not, we believe, authorized thereby.

[3] Respondent argues, however, that authority to order such a stay is within the inherent powers of a court—that courts have such inherent powers as are "essential to their existence and to the due administration of justice"; that presumptively whatever judicial procedure is essential to enable courts to exercise their functions is authorized under their inherent powers, and that to enable the court in the instant case "to exercise its function of having only one appeal pending at a time" in the case of Woods v. Walker it had inherent power to stay the entry of judgment.

But it cannot be said that the avoidance of the pendency of more than one appeal in a case is a "function" of the trial court, essential to the existence of the court. And in view of the right conferred upon plaintiff by the statutes of this state to have judgment upon the verdict in his favor entered promptly, to draw interest on the amount of his judgment until satisfaction of same, and to have the benefit of a lien upon the property of defendants for his security, it cannot be said that the granting of the stay in this case was necessary to or tended to promote the due administration of justice.

It is therefore ordered that a peremptory writ of mandate issue commanding respondent forthwith to enter judgment for plaintiff upon said verdict of the jury, nunc pro tunc as of October 3, 1941.

THOMPSON, J., concurred.

53 Cal.App.2d 257

REARDON et al. v. MELBOURNE.

Civ. 2822.

District Court of Appeal, Fourth District, California.

July 2, 1942.

1. Courts 🔑476

Where superior court acquires jurisdiction of specific performance action, the court can render any proper money judgment for amount within exclusive jurisdiction of the municipal court, even though superior court decides the specific performance issue against the plaintiffs.

2. Courts 🔑476

Where amended complaint sought money judgments totaling less than $2,000

against two defendants, and complaint hinted at but did not state a cause of action against first defendant for specific performance of contract for sale of realty, and plaintiffs admitted they had no such cause of action and consented for judgment of nonsuit in favor of first defendant, superior court did not have jurisdiction to proceed with the action and enter money judgment against second defendant, since case was exclusively within jurisdiction of the municipal court.

3. Courts ⚿476

A plaintiff will not be permitted to confer jurisdiction on superior court by adding to plaintiff's legitimate cause of action properly belonging in the municipal court, allegations of an imaginary cause of action falling within jurisdiction of the superior court, especially when the imaginary cause of action is abandoned before trial.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Thomas M. Reardon and another against L. A. Melbourne and another for commissions for procuring purchaser for realty, and for other relief. From an adverse judgment, the named defendant appeals.

Reversed.

Joseph A. Brown, of San Francisco, for appellant.

Thomas M. Hamilton, of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment in favor of Thomas M. Reardon against L. A. Melbourne for $162.50.

Plaintiffs' amended complaint attempts to state four causes of action.

In the first cause of action it is alleged that Reardon is a duly licensed real estate broker; that on January 21, 1940, Reardon and Melbourne entered into a contract concerning the sale of real property in San Diego and that Melbourne signed a memorandum in writing agreeing to pay Reardon $162.50 commission if he found a buyer at the price of $3,250; that Reardon procured his co-plaintiff, Joseph C. Ventura, as a buyer, "who is ready, willing, and able to purchase the said property and has tendered the purchase price"; that Melbourne refused to pay Reardon the commission of $162.50.

The second cause of action incorporated the allegation of the first by reference and alleged that when Melbourne agreed to pay Reardon the commission he was acting in his own behalf and not as agent and wrongfully held himself out as acting for and on behalf of the real owner of the real estate.

The third cause of action incorporated therein by reference paragraphs I, II, and III of the first cause of action which alleged residence of plaintiffs in San Diego, that Reardon was a licensed real estate broker and that Melbourne signed the written memorandum to pay the commission. It was further alleged that the other defendant, Martha J. Reichmuth, was the owner of the real property; that she "entered into a contract in writing to sell the said real property in the City of San Diego, State of California, for the sum of $3,250.00; that the plaintiff, Joseph C. Ventura, contracted and agreed to buy the said real property for the said sum; that he is ready, willing and able to buy the said property, has tendered a purchase price" and that defendant Reichmuth refused to sell it; that Ventura has been damaged by such refusal by being deprived of the rentals at the rate of $40 per month "and that he is entitled to specific performance of the said contract."

The fourth cause of action incorporated by reference the allegations of the first cause of action and alleged that in agreeing to pay Reardon a commission Melbourne "was acting as the agent lawfully authorized of defendant, Martha J. Reichmuth"; that the commission is due and owing Reardon from her.

The prayer prays judgment against Melbourne or Reichmuth in the sum of $162.50; for judgment in favor of Ventura against Reichmuth for damages for loss of rent in the sum of $40 per month from March 5, 1940; that Ventura have judgment against Reichmuth that she "specifically perform her contract" and convey the real property to him.

Defendants demurred both generally and specially to all counts of the complaint.

On March 11, 1941, the trial court entered judgment of nonsuit "with prejudice" in favor of Reichmuth. This judgment contains the following recital: "* * * and plaintiffs having in open court admitted that they had no cause of action against the defendant, Martha J. Reichmuth, and plaintiffs having consented in open court that a judgment of nonsuit be entered against them in favor of Martha J. Reichmuth. * * *"

On March 12, 1941, judgment was entered in favor of Reardon against Melbourne in the sum of $162.50. Findings were waived, but the court did find in the judgment that "the allegations of the second cause of action in plaintiffs' amended complaint are true."

Melbourne urges as a ground for reversal of the judgment that the court had no jurisdiction of the subject matter of the action and that his demurrer should have been sustained. The demurrer should have been sustained, especially as to the third count in which there is apparently some attempt made, though a vague and futile one, to state a cause of action for specific performance. 23 Cal.Jur. 495, § 53, et seq., and cases cited.

[1] Reardon attempts to support the judgment by urging that the court had jurisdiction because the action involved the ownership of real property and had as one purpose the specific enforcement of a contract to convey real property; that once having acquired jurisdiction the court could render any proper money judgment for an amount within the exclusive jurisdiction of the municipal court though it decided the specific performance issue against plaintiffs, citing Morrissey v. Morrissey, 191 Cal. 782, 218 P. 396. As a general rule his argument is well supported by the authorities.

We will assume, without holding, contrary to the contentions of Melbourne, that the causes of actions and parties were properly joined. § 378 et seq., Code Civ. Proc.; § 427, Code Civ. Proc.

The jurisdiction of the trial court must depend on the purported cause of action for specific performance, for the maximum amount of money judgments sought against both defendants was far short of $2,000, which, in the absence of the purported equitable cause of action, would place jurisdiction exclusively in the municipal court.

To bring this case without the general rule, we have here a pleading that does not state any cause of action for specific performance. Further, we have the plaintiffs admitting in open court "that they had no cause of action against the defendant, Martha J. Reichmuth," and consenting to judgment in her favor.

[2, 3] We do not believe that jurisdiction can be conferred on the superior court by any such proceeding. Plaintiffs' pleading did not state an equitable cause of action. It only hinted at one. Plaintiffs admitted they had no such cause of action. Having none they should not have attempted to plead one. If such a proceeding were approved a plaintiff could confer jurisdiction on the superior court by simply adding to his legitimate cause of action, properly belonging in the municipal court, allegations of an imaginary cause of action falling within the jurisdiction of the superior court. This should not be permitted especially when the imaginary cause of action is abandoned before trial.

The rule on motions for change of venue because of non-residence of the defendants in the county in which the action is pending should be applicable here. If a resident defendant is joined and he is palpably an unnecessary party against whom no cause of action exists the fact of his being joined will not prevent the nonresident defendants from having the place of trial changed to the county of their residence. 25 Cal.Jur. p. 87, § 21.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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53 Cal.App.2d 268

ZEHNDER et al. v. SPAULDING et al.

Civ. 13633.

District Court of Appeal, Second District, Division 1, California.

July 7, 1942.

1. Negligence 🔑136(8)

Uncontroverted conclusion that injured person took no precautions for his safety makes contributory negligence of injured person a question for the court.

2. Negligence 🔑136(9)

Contributory negligence of injured person is a "question of fact" for jury, where inferences from evidence concerning vigilance exercised by injured person are debatable.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Appeal and error ⚷1008(1)

Whether motorist who on approaching intersection looked to the right from a point 20 to 25 feet from intersection curb line and could see 200 feet to the right, acted as a reasonable man in not again looking to the right before proceeding across intersection where he was struck by an automobile approaching from the right, and whether he exercised reasonable care in keeping a proper lookout, were "questions of fact" for court with whose findings appellate court cannot interfere.

4. Automobiles ⚷244(43)

Evidence that motorist on approaching street intersection in sparsely settled section of city looked to the right from a point 20 to 25 feet from intersection curb line, that he could see for a distance of 200 feet and saw no automobile approaching, and that motorist then looked to his left and did not again look to his right and proceeded across intersection at 15 miles per hour and was struck by an automobile approaching from the right, sustained finding that motorist was not contributorily negligent.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by John E. Zehnder and another against Raymond R. Spaulding and others for injuries to plaintiffs when their automobile collided with an automobile driven by named defendant. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Hubert W. Swender, of Los Angeles, for appellants.

A. W. Brunton, of Los Angeles, for respondents.

YORK, Presiding Justice.

This appeal, which is prosecuted from a judgment awarding the sum of $2,000 damages to plaintiffs for injuries sustained by them in a collision between their automobile and one driven by defendant Raymond R. Spaulding, a minor, is presented to this court upon an engrossed bill of exceptions. From said bill of exceptions and the statements of fact contained in the briefs, it appears that said collision occurred under the following circumstances:

On May 25, 1941, the respondent John E. Zehnder, accompanied by his wife, respondent Alice Zehnder, was driving a De Soto automobile in a southerly direction along Haskell Avenue, an unpaved highway twenty feet in width running north and south through a sparsely-settled section of San Fernando Valley in the city and county of Los Angeles. As the De Soto approached the intersection of Haskell Avenue with Lassen Avenue, a paved highway running in an easterly and westerly direction, the paved portion thereof being twenty feet in width, the view to respondents' right was completely obscured by a row of trees growing along the westerly side of Haskell Avenue until they reached a point twenty to twenty-five feet north of the northerly curb line of said Lassen Avenue. Traveling at the rate of fifteen miles per hour, respondents at this point looked to their right and were able to see westerly along Lassen Avenue a distance of 200 feet. They saw no automobile on the highway within said distance of 200 feet, but they did observe a pedestrian walking in a westerly direction on Lassen Avenue about 100 or 150 feet west of its intersection with Haskell Avenue. Respondents then looked to their left in an easterly direction toward Lassen Avenue. However, because there was a high growth of weeds along said easterly side of Haskell, they were unable to see what traffic, if any, was approaching the intersection from the east until the front wheels of their automobile were approximately on the north edge of the paved portion of Lassen Avenue. When it appeared that no traffic was approaching the intersection from the left or east, respondent John E. Zehnder shifted into low gear and proceeded into the intersection at a speed of fifteen miles per hour. It is admitted that respondents did not again look to their right until just an instant before the moment of impact between their De Soto and a Willys automobile which was being driven in an easterly direction on Lassen Avenue by the appellant Raymond R. Spaulding. The impact of the two cars occurred in the south half of Lassen Avenue, the Willys striking the De Soto at about the location of the front seat resulting in the breaking off of the front left wheel which caused the De Soto to skid on its axle or frame in an easterly direction along the southerly edge of the paved portion of Lassen Avenue a distance of approximately forty-nine feet.

Appellant Raymond R. Spaulding testified that he did not see respondents or their automobile until the moment of the impact.

Appellants urge that the court erred as a matter of law in making its findings of fact to the effect that respondent John E. Zehnder was operating his automobile "in a prudent manner" at the time of the accident, and that said respondent was not guilty of contributory negligence . In this connection, appellants argue that respondents' "action in looking to their right while at a distance of from 20 to 25 feet from the intersection curb line, and where their vision was limited to a distance of only 200 feet up Lassen avenue, is tantamount to not looking at all; at least it is not looking on *entering* the intersection, and constitutes contributory negligence as a matter of law." In support of their contention, appellants quote the following excerpt from the case of Holibaugh v. Ito, 21 Cal.App.2d 480, 486, 69 P.2d 871, 874; "* * * it is the duty of the driver of a vehicle which is approaching an intersection of highways where other vehicles are liable to pass, to look *both* ways before *entering* such intersection." (Italics added.)

The record reveals as a matter of fact that respondents did look both ways before they crossed the twenty-foot paved portion of Lassen Avenue. Traveling at fifteen miles per hour they looked to the right westerly along Lassen when they were within twenty or twenty-five feet of the intersection, and when the front wheels of their car were on the north edge of the pavement on Lassen Avenue, they looked to the left or east. Respondent John E. Zehnder then shifted into low gear and proceeded to cross the said twenty-foot paved section of Lassen Avenue and, having safely negotiated the first ten feet thereof, was struck when his car reached the second ten feet or the south half of the paved section of Lassen Avenue. When respondents looked to the right they had a clear view of Lassen Avenue for a distance of 200 feet to the west, at which time appellants' car was not in sight. From that point to the moment of impact, estimating the width of the shoulder on the north edge of Lassen Avenue at ten feet, respondents' car traveled at most not over fifty feet, during which time, as heretofore stated, respondents looked both to the right and to the left.

[1, 2] It is only "When a person takes no precautions at all for his own safety and is injured, and this conclusion is uncontroverted, [that] contributory negligence is a question to be decided by the court. White v. Davis, 103 Cal.App. 531, 542, 284 P. 1086; Stephens v. Kaufmann, 137 Cal.App. 328, 331, 30 P.2d 536. If evidence is introduced relative to the degree or requisite vigilance, and the inferences therefrom are honestly debatable, it becomes a question of fact for the jury to determine. Gore v. Market Street Ry. Co. [4 Cal.2d 154], 48 P.2d 2; Salomon v. Meyer, 1 Cal.2d 11, 15, 32 P.2d 631; Anderson v. Market St. Ry. Co., 116 Cal.App. 282, 285, 2 P.2d 529. In the instant case, whether respondent looked in the direction from which appellant was approaching, whether the point from which observation was made was prudently selected, whether respondent should have seen appellant's car within a distance of sixty feet, whether respondent should have looked north and south, or north alone, and whether due vigilance was observed continuously, were disputable questions of fact upon which reasonable minds might legitimately debate and honestly reach different conclusions. The question was properly submitted to the jury, and its finding under all the circumstances of the case is conclusive upon appeal." Lavin v. Fereira, 10 Cal.App.2d 710, 712, 52 P.2d 518, 519.

[3] In the instant case whether respondents, particularly the driver of the car, John E. Zehnder, exercised reasonable care in keeping a proper outlook and whether he acted as a reasonable man in not again looking to the right before he proceeded across the intersection were questions of fact for the court to determine and, having resolved them in favor of respondents, this court is powerless to interfere. It is noteworthy that, according to the bill of exceptions, the only evidence produced on behalf of appellants was to the effect that appellant Raymond R. Spaulding did not see the respondents or their automobile until the moment of impact.

[4] In the circumstances presented by the record herein, there was no error on the part of the trial court in making the findings of fact complained of.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concurred.

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53 Cal.App.2d 214

PEOPLE v. BURNESS.

Cr. 3562.

District Court of Appeal, Second District, Division 3, California.

July 1, 1942.

Rehearing Denied July 14, 1942.

Hearing Denied July 30, 1942.

1. Indictment and Information 🔑196(5)

If defendant needed more particularity of averment to enable him to answer charge in information, his remedy was by demurrer, and where he failed to demur, he would be deemed to have "waived" the alleged defect. Pen.Code, §§ 1004, 1012.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Criminal law 🔑507(5)

One who either stole automobile or received wheels and tires from the automobile was not an "accomplice" of the one to whom he sold the wheels and tires, within meaning of statute requiring corroboration of an accomplice. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

3. Criminal law 🔑507(5)

The seller of stolen property is not an "accomplice" of the buyer within meaning of statute requiring corroboration of an accomplice. Pen.Code, § 1111.

4. Witnesses 🔑319

In prosecution for receiving stolen wheels and tires, wherein defendant denied on cross-examination that he had ever had a different type of automobile wheels at his place of business, it was error to introduce testimony of witness who purchased defendant's place of business, that after the purchase defendant took away a different type of automobile wheels, with the remark that it would be better to take the wheels away while the "heat was on," where there was no evidence that a different type of wheels had been stolen, or that they had any connection with the issues being tried.

5. Witnesses 🔑319

A witness may not be impeached on an immaterial or collateral matter.

6. Criminal law 🔑338(7)

The prosecutor cannot introduce irrelevant evidence falling short of crime and designed merely to degrade and prejudice a defendant in the minds of the jury.

7. Criminal law 🔑1186(4)

Where the District Court of Appeal was unable to conclude that defendant would have been convicted of receiving stolen property had certain evidence not been erroneously admitted, conviction was reversed, and cause was remanded for a new trial. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Gilbert Burness was convicted of receiving stolen property, and he appeals.

Reversed, and cause remanded for new trial.

Robert T. Linney and Buel R. Wood, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

SCHAUER, Presiding Justice.

Defendant, upon trial by jury, was found guilty of the crime of receiving stolen property. His motion for new trial was denied and from this ruling, as well as from the judgment pronounced on the verdict, he appeals. Three points are urged: (1) that the information does not state a public offense; (2) that defendant was convicted on the uncorroborated testimony of an accomplice; and (3) that the trial court erred, to the prejudice of the defendant, in admitting over objection evidence tending to show a separate offense. Neither of the first two points is tenable but the third one presents an error which requires a new trial.

Material Facts.

For all of the evidence tending directly to establish the commission of the offense and defendant's connection therewith the plaintiff relies on the testimony of admitted thieves. The witness Boyle testified that prior to his arrest (some months before defendant's trial) he had been regularly engaged in stealing automobiles and disposing of the parts and accessories; that he had stolen a "few hundred;" that on the night of February 27, 1941, he stole a 1941 Chevrolet coupe (identified by stipulation as the property of one Melvin L. Williams). On the same night he removed from that car five green-painted wheels, together with their mounted U. S. Royal tires and tubes, and, by prearrangement with one Estes, placed such wheels and tires "in a garage in the 1700 block on Magnolia in the alley." He stated that in or about the month of February, 1941, and on one or more other occasions he had accompanied Estes to defendant's place of business, denominated the Broken Drum Wrecking Company, located on San Fernando Boulevard in Los Angeles County. While there, on the first occasion, he heard Estes ask defendant "how many tires he wanted the next time and whether he would want any generators or anything else and how soon he could use some more." Defendant said he wanted some but the witness did not recall how many or what was ordered. Such witness further stated that on the occasion in February, 1941, he and Estes "delivered some tires and wheels."

The witness Estes testified in substance that he had been engaged for about twenty months in either stealing automobiles or in receiving and disposing of the parts and accessories of stolen cars. He said that he had made "twelve to fifteen hundred" sales of his "merchandise" and of that number that thirty-five or forty had been transactions with the defendant. He stated that his first deal with defendant was in June or July, 1939, concerning which time, speaking of tires and wheels, he testified, "I told him what I had and he asked me how hot they were and I said 'they are hot from two or three days back' and he said 'All right, bring them out and I will take a look at them.'" From then on, he said, until the witness' arrest in March, 1941, he saw the defendant "every week or ten days" and on each occasion either sold or delivered merchandise to him or collected for it or discussed proposed deals. He testified specifically that on the morning of February 28, 1941, he took from the "garage in the 1700 block Magnolia Street" five Chevrolet wheels with tires and tubes, and sold and delivered them to the defendant; that the wheels were painted green and the tires were U. S. Royal Cords, size 16-600; that the defendant paid him $25 for the merchandise. He described the transaction as follows: "I got out and went in and seen him. He said 'What have you got this time?' And I said 'Tires and wheels.' * * * He said 'Bring them in' and then he said 'Put them in that tire shed right there.' * * * He says 'I guess you want $5.00 each for these the same as yesterday?' And I said 'Yes, sir.' * * * He gave me $10.00 * * * said he would give me the rest of the money in about a week or ten days."

Sufficiency of the Pleading.

[1] As to the first point, defendant contends that the information is insufficient in that it does not describe with adequate particularity the property alleged to have been unlawfully received by defendant. The pleading certainly is not a model to be commended and by the expenditure of a slight amount of legal skill and care could have been substantially improved, but its imperfection lies in the uncertainty of its description rather than in failure to state any essential fact. The pertinent language alleged that defendant feloniously received "five wheels and tires, which was then and there of the personal property of Melvin L. Williams." It is true that defendant was not apprised by this pleading as to whether the wheels and tires had any connection with each other; as to whether the wheels were spinning wheels, emery wheels, bicycles, or some other or others of a vast number of types; or as to whether the tires were of steel or rubber, casings or tubes, or of other description. But if the defendant needed more particularity of averment to enable him to answer the charge his remedy was by demurrer, Penal Code, §§ 1004, 1012, and having failed to demur he must be deemed to have waived the defect. People v. Mead, (1904) 145 Cal. 500, 503, 78 P. 1047; People v. Horvath, (1913) 23 Cal. App. 306, 307, 137 P. 1069; People v. Schroeder, (1919) 43 Cal.App. 623, 625, 185 P. 507; People v. Price, (1927) 81 Cal. App. 668, 670, 254 P. 640.

Vendor of Stolen Property is not Accomplice of Vendee

[2, 3] In support of point two defendant urges that the witness Estes was an accomplice of defendant and that his testimony was not corroborated within the requirements of section 1111 of the Penal Code that "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." The definition of accomplice in the last sentence of the section quoted shows that defendant's position on this point is untenable. While the witness Estes may be regarded either as an accomplice of Boyle in stealing the automobile or as himself becoming guilty of receiving stolen property in his receipt thereof from Boyle, such offenses were complete before he contacted the defendant as to this particular property. By purchasing and receiving such property from Estes the defendant became guilty of an offense separate and distinct from that committed by Estes when the latter received it from Boyle. Under no construction of the evidence can the defendant's purchase and receipt of the property from Estes be regarded as an effort by defendant to assist Estes in his unlawful receipt of the same merchandise from Boyle. Although the action of each tended to prevent the owner from again possessing his property such action in each case was obviously motivated by the desire to secure gain for himself alone. The defendant did not share or participate at all in the original receipt, or in the possession, of the property by Estes and Estes did not share or participate in any way in the possession of such property by defendant. Having sold and delivered the merchandise to defendant, Estes was no longer interested in it. The vendor of stolen property is not an accomplice of his vendee. See People v. Williams, (1935) 7 Cal.App.2d 600, 603, 46 P.2d 796; People v. Layman, (1931) 117 Cal.App. 476, 480, 4 P.2d 244; In re Morton, (1918) 179 Cal. 510, 513, 514, 177 P. 453. The sufficiency of the evidence to support the conviction is not challenged except on the basis that Estes is an accomplice of defendant. As upon the view above expressed such relationship did not exist we cannot sustain defendant's second point.

Error in Receiving Irrelevant Evidence With Prejudicial Implications

Defendant's third point requires a further statement of facts. As a witness in his own behalf he testified that he had been in the automobile wrecking business for sixteen years; that he had never had in his possession any of the tires or wheels described by the plaintiff's witnesses; that he had never purchased anything from the witness Estes and that he had never known or even seen either Estes or Boyle until they appeared as witnesses against him. He stated particularly that he had been absent from his place of business during the months of June, July and August in the years 1939 and 1940. He also testified, "I never had any tires on my place except what came off automobiles that I bought, and I didn't pay much attention what make they were or what condition they were. I just go out and buy the automobile. If it has new tires on it why I am lucky." On cross-examination the defendant stated, "I used to buy wheels from the wheel dealers. What year they were and what make they were I couldn't tell you * * * I had lots of Chevrolet wheels * * * no 1940 or 1941 models."

At this stage of the proceedings the deputy district attorney injected a series of questions which were neither material nor relevant to any issue before the court. He asked: "And you had four or five Zephyr wheels there, didn't you, 1941?" to which the defendant replied, "I don't remember paying any attention to Zephyr wheels. I don't think there were any wheels later than 1938 or 1939." The prosecuting attorney continued, "Just prior to your arrest didn't you pick up those Zephyr wheels, and state, 'I am going to keep these until the heat blows down,' and then subsequently bring them back?" An objection to that question was sustained, but the deputy district attorney persisted as follows:

"Q. As I understand it your testimony is that you don't recall having any Zephyr wheels in the place of business of the Model 1941 at the time you sold the place? A. To my knowledge up until the time I sold the place there were never any Zephyr wheels on the place.

"Q. The day after your arrest did you go over to the place of business and pick up four Zephyr wheels? A. The day after my arrest I was in jail until late in the afternoon.

"Q. Well, did you or didn't you? A. I did not."

Thereafter the deputy district attorney produced as a witness, one Levy, who was one of the persons to whom defendant had sold his place of business in March, 1941. Over the timely and proper objections of the defendant, the witness Levy was permitted by the court to be interrogated concerning the presence of some Zephyr wheels at the wrecking house and an asserted conversation with the defendant relative thereto. The witness stated that there was a set of Zephyr wheels on the premises when he and his partner took over the business. He testified further, "Mr. Burness [defendant] came into the place after he was released and said he thought it would be better to get that set of Zephyr wheels away from the place while the heat was on. He picked up those wheels and took them away from there and had them out for about three weeks. Then I demanded the wheels back or the money for the wheels and he brought them back."

[4-7] The admission of the foregoing testimony relative to the Zephyr wheels was clearly error. Certainly it cannot be justified as impeachment. A witness may not be impeached on an immaterial or collateral matter. 27 Cal.Jur. 107, 152; People v. Chin Mook Sow, (1877) 51 Cal. 597, 600; People v. Worthington, (1894) 105 Cal. 166, 171, 38 P. 689; People v. Cole, (1900) 127 Cal. 545, 550, 59 P. 984; People v. Smith, (1922) 189 Cal. 31, 35, 207 P. 518; People v. Westcott, (1927) 86 Cal. App. 298, 305, 260 P. 901. It is not competent for the prosecutor to introduce irrelevant evidence falling short of crime and designed merely to degrade and prejudice the defendant in the minds of the jury. 8 Cal.Jur. 59; People v. Nelson, (1928) 90 Cal.App. 27, 34, 265 P. 366. There was not the slightest proof that the Zephyr wheels were stolen property or that they had been acquired by defendant from the witness Estes or that they had any connection whatsoever with the issues being tried. Furthermore the situation presented by the record here is not similar to a case in which stolen property has been found in the possession of a defendant and in which he seeks to establish that he acquired possession of such property innocently. In such cases evidence of other offenses may sometimes be admissible to show plan, intent, or guilty knowledge (see People v. De Vaughn, (1934) 136 Cal.App. 746, 750, 751, 29 P.2d 914; People v. Stollmack, (1937) 18 Cal.App.2d 471, 474, 475, 64 P.2d 162), but here there was no such issue. If any merchandise was sold and delivered to the defendant by the witnesses Estes and Boyle it was definitely stolen property. The question is, was the property sold and delivered by them to the defendant? On this point the evidence is squarely conflicting. The two admitted thieves say they did have such transaction; defendant denies any such transaction and denies even having seen or heard of Boyle or Estes before the day of his arrest. The stolen property was not found in his possession. While no motive appears for the making of a false charge by the witnesses the fact is obvious that so far as the circumstances in evidence are concerned they could as easily have lodged their charges against an innocent dealer as against a guilty one. The evil character of such witnesses is established by their own testimony and on their testimony, substantially unaided by circumstances, depends proof of defendant's guilt. Against their testimony were the positive denials of defendant, corroborated in part by other witnesses who were unimpeached and who placed the defendant outside the state at certain of the times when the prosecution witnesses said they had dealt with him at his place of business. In such a situation the error in admitting the gratuitously injected testimony of the witness Levy relative to the Zephyr wheels and his conversation with defendant concerning the same becomes manifestly prejudicial. By such error the defendant was prevented from having the fair trial to which every accused person is entitled. In such a case the provisions of section 4½ of article VI of the Constitution do not justify an affirmance of the judgment (People v. Duvernay, (1941) 43 Cal.App.2d 823, 829, 111 P.2d 659.) While the evidence is legally sufficient to support the judgment, we are unable to conclude that defendant would have been convicted had the error not occurred. Accordingly the judgment must be reversed (People v. Wilson, (1913) 23 Cal.App. 513, 524, 138 P. 971; People v. Degnen, (1925) 70 Cal.App. 567, 606, 234 P. 129; People v. Curtis, (1939) 36 Cal. App.2d 306, 327, 328, 98 P.2d 228.)

The judgment and the order denying a new trial are reversed and the cause is remanded for a new trial.

SHINN and PARKER WOOD, JJ., concurred.

53 Cal.App.2d 230

PEOPLE v. GUSTAFSON.

Civ. 6779.

District Court of Appeal, Third District, California.

July 1, 1942.

Hearing Denied Aug. 27, 1942.

1. **Taxation** 🔑695

Property conveyed to state by tax deed is subject to right of redemption, notwithstanding that by statute the deed conveyed to state absolute title to property, with certain exceptions. Pol.Code, § 3787.

2. **Taxation** 🔑679(3)

The title acquired by state or instrumentality thereof at tax sale is not the same as that vesting in private purchaser, since object of purchase is not acquisition of property but collection of taxes. Pol.Code, § 3787.

3. **Taxation** 🔑695

It is the settled policy of the law to give delinquent taxpayer every reasonable opportunity compatible with rights of state to redeem his property and to make his burden as light as possible, and the return to tax rolls of property which has been sold for taxes in order that it may again support general governmental functions is in the public interest.

4. **Taxation** 🔑679(3)

The statute providing that detriment caused by wrongful occupation of real property in cases not embraced in certain designated sections of the codes, was value of use of property for time of such occupation, did not authorize state's recovery of value of use and occupation of premises by owner subsequent to sale of property to state for owner's nonpayment of delinquent county taxes, since owner's possession was not ipso facto rendered unlawful by tax deed to state. Civ.Code, § 3334.

5. **Taxation** 🔑679(3)

Title acquired by state through tax deed did not authorize state to exact payment for use and occupation of property from former owner left in possession, especially where such possession continued without objection by the state.

6. **Taxation** 🔑679(3)

A former owner of tax deeded property has the right to remain in possession until the sale of the land by the state.

7. **Taxation** 🔑679(3)

The authority granted to controller in statute relating to leasing of and collection of rents from tax delinquent property deeded to state was permissive, as was indicated by the use of the word "may" and by the alternative given to controller, and the former owner could be left in undisturbed possession, and no lease or agreement to pay rent need be exacted of him and no accounting for rents, issues, and profits need be required of him. Pol.Code, § 3773.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

8. **Taxation** 🔑679(3

The statute relating to authority of controller to lease and collect rents from tax delinquent property deeded to state did not authorize controller to exact payment for use and occupancy of such property where no agreement existed and where no demand for possession was ever made on former owner. Pol.Code, § 3773.

9. **Taxation** 🔑615

Statutes providing for conveyance to state and title to property that is tax delinquent should be given a construction favoring the delinquent taxpayer. Pol.Code, § 3785.

10. **Taxation** 🔑679(3)

The quoted phrase in statute authorizing controller to receive and collect "rents, issues and profits" from tax delinquent property deeded to the state, meant only such rents, issues, and profits as might arise from leases of property or perhaps such net profits as might arise from a business carried on upon the premises, and did not authorize controller to collect from former owner in possession the value of the former owner's use and occupation. Pol.Code, § 3773.

See Words and Phrases, Permanent Edition, for all other definitions of "Rents, Issues, and Profits".

11. Statutes ⚿185

Words of statute cannot be extended by implication.

12. Taxation ⚿679(3)

In construing statute relating to collection of rents, issues, and profits from tax delinquent property deeded to state, the phrase "rents, issues and profits" has a well-understood meaning and refers to rents collected by party in possession or net profits accruing to him from such property, and not to rental value or value of use and occupation. Pol.Code, § 3773.

13. Taxation ⚿679(3)

The statute relating to collection of rents, issues, and profits from tax delinquent property deeded to state was not intended as a money making scheme for the benefit of the state, but to encourage redemptions, providing only that, if any profits accrue therefrom, the state and not the delinquent taxpayer may be the beneficiary. Pol.Code, § 3773.

14. Taxation ⚿679(3)

The statute relating to leasing of and collection of rents from tax delinquent property deeded to state did not authorize suit by state for reasonable value of use and occupancy of tax deeded land by the former owner left in possession. Pol.Code, § 3773.

15. Taxation ⚿679(3)

If the state to which tax delinquent property has been deeded is entitled to exact payment for use and occupancy of property for period prior to owner's redemption, statute providing that installment payments are compensation for the property would apply to the whole period of delinquency rather than the periods during which payments are made. Pol.Code, §§ 3773, 3817a.

16. Estoppel ⚿62(2)

A state as well as an individual may be "estopped" where the necessary elements or grounds of estoppel are present, and it may be estopped when acting in its proprietary capacity as distinguished from its governmental capacity, and by acts of public officials done in exercise of powers expressly conferred by law and by their acts or omissions when acting within scope of their authority.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

17. Taxation ⚿679(3)

The controller, electing for over three years not to exact a lease or contract to pay rent from former owner of the tax delinquent premises deeded to state or to dispossess him or to exact an accounting for rents, issues, and profits, "waived" the right to exact payment for use and occupancy of the premises. Pol.Code, § 3773.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Stanislaus County; Gustav B. Hjelm, Judge.

Action by the People against Lester K. Gustafson, as executor of the last will and testament of John E. Gustafson, deceased, for reasonable value of use and occupancy by deceased of certain lots subsequent to their sale to the state for nonpayment by deceased of delinquent county taxes. From a judgment for the defendant after demurrer to plaintiff's complaint was sustained without leave to amend, the plaintiff appeals.

Affirmed.

Hearing denied; GIBSON, C. J., and SHENK and TRAYNOR, JJ., dissenting.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and A. A. Kragen, Deputy Atty. Gen., for appellant.

Whitehurst & Logan, of Patterson, for respondent.

ADAMS, Presiding Justice.

This is an appeal from a judgment of the Superior Court of Stanislaus County entered in favor of defendant after demurrer to plaintiff's complaint was sustained without leave to amend.

This action was instituted by the State of California against Lester K. Gustafson, as executor of the last will and testament of John E. Gustafson, deceased, to recover the sum of $570 alleged to be the reasonable value of the use and occupancy by John E. Gustafson of lots 395 and 396 in Patterson Colony, Stanislaus County, subsequent to the sale of same to the state for nonpayment by said Gustafson of delinquent county taxes. The complaint alleged that the property was deeded to the state on June 29, 1939, but that Gustafson continued to occupy same from December 6, 1937, to December 6, 1940; that on the latter date the state demanded of him the said sum of $570, alleged to be the reasonable value of the use and occupancy of said property during the aforesaid period of occupancy; that on December 7th Gustafson instituted and commenced the payment of delinquent taxes in installments, pursuant to the provisions of section 3817a of the Political Code of the State of California, and that said plan was still in full force and effect; that said John E. Gustafson died testate about December 25, 1940, that Lester K. Gustafson was appointed and qualified as executor of his will, that a claim was duly presented to said executor for the said sum of $570, but that said claim was rejected.

To said complaint defendant demurred on the grounds that it did not state facts sufficient to constitute a cause of action; that plaintiff was guilty of laches in that no action to recover possession of said property was instituted for a period of over three years while Gustafson was occupying the property, and that it had permitted decedent to institute the payment of taxes in installments without making or tendering a lease, and after permitting decedent to continue in the occupancy of the premises. Waiver of the right to demand anything for use and occupancy was also set up.

Demurrer was sustained without leave to amend and plaintiff appeals from the judgment in favor of defendant entered thereafter.

Appellant contends that after the deed of Gustafson's property to the state was executed the state became the absolute owner of said real property and that by virtue of such ownership it could require that Gustafson pay to it the reasonable value of his use and occupancy; also that section 3773 of the Political Code of this state, as amended in 1925, specifically gives the state the right to exact from a former owner in possession the reasonable value of his use and occupancy even though no lease is exacted of him, and when he has not been notified in advance of the demand that he would be required to make such payment.

Respondent contends that neither the ownership acquired by the state by virtue of its deed, nor the provisions of section 3773, supra, give the state such right, but that if they do, the institution of an installment redemption plan under section 3817a of the Political Code destroys it; also that by its delay in making a demand upon Gustafson and by its failure to institute an action for possession of the property, the state has waived any right it might have, and that it is estopped to urge it.

The questions presented then, appear to be, first, whether by virtue of its tax deed, and independent of the provisions of section 3773 of the Political Code, the state can compel a former owner who remains in undisturbed possession of tax deeded property without notice that he will be required to pay for his use and occupancy, to pay the reasonable value of such use and occupancy; second, whether section 3773 of the Political Code authorizes the state to exact payment for such use and occupancy under such circumstances; third, whether, if section 3773, supra, gives such right, the institution of redemption proceedings under the installment plan provided for in section 3817a, supra, destroys same; and fourth, whether in this case, the state by its delay in making a demand upon Gustafson, has waived any right it may have had to exact payment for the use and occupancy of the land.

[1, 2] While section 3787 of the Political Code provides that a tax deed conveys to the state the absolute title to the property described therein, with the exceptions stated, such property is nevertheless subject to the right of redemption. The Supreme Court said, in Anglo California Nat. Bank v. Leland, 9 Cal.2d 347, at page 353, 70 P.2d 937, at page 939, that "The title acquired by the state, or an instrumentality thereof, at a tax sale is not the same as that vesting in a private purchaser, since the object of the purchase is not the acquisition of the property, but rather the collection of the taxes. 37 Cyc. 1355, and Board of Com'rs of Tippecanoe County v. Lucas, Treasurer, 93 U.S. 108, 23 L.Ed. 822." Also, see Blackwell on Tax Titles, 5th ed., § 964.

[3] Appellant cites no cases holding that by virtue of a tax title, alone, a state can compel a former owner left in undisturbed possession to pay for his use and occupancy. Furthermore it is the settled policy of the law to give a delinquent taxpayer every reasonable opportunity compatible with the rights of the state, to redeem his property, and to make his burden as light

as possible; (Dougery v. Bettencourt, 214 Cal. 455, 462, 6 P.2d 499; Lachmund v. Johnson, 47 Cal.App.2d 377, 380, 117 P.2d 920); and the return to the tax rolls of the property which has been sold for taxes in order that it may again support general governmental functions is in the public interest. Anglo California Nat. Bank v. Leland, supra, and cases therein cited.

[4] Appellant relies upon section 3334 of the Civil Code which provides that the detriment caused by the wrongful occupation of real property in cases not embraced in certain designated sections of the codes, is deemed to be the value of the use of the property for the time of such occupation, etc.; and it cited Richmond Wharf & Dock Co. v. Blake, 181 Cal. 454, 185 P. 184; Samuels v. Singer, 1 Cal.App.2d 545, 553, 36 P.2d 1098, 37 P.2d 1050, and Cullet Corp. of America v. Rosenberg, 306 Ill. App. 267, 28 N.E.2d 351. But in none of these cases was the property involved tax deeded property, and they are not in point. In the case before us Gustafson cannot be said to have been in possession unlawfully. The execution of the deed of his property to the state did not ipso facto render his possession unlawful (Sears v. Willard, 165 Cal. 12, 14, 130 P. 869; Teich v. Arms, 5 Cal.App. 475, 479, 480, 90 P. 962); and no attempt to dispossess him appears to have been made.

[5] Therefore, we are not inclined to accept the proposition that, solely by virtue of the title acquired through a tax deed, the state can exact payment for the use and occupancy of the property from the former owner left in possession, especially where, as here, such possession has continued without objection by the state. If the state has power to exact such payment it must be by virtue of statutory enactment authorizing such action.

This brings us to the second question above set forth, to-wit: whether, under the circumstances of this case, section 3773 of the Political Code authorizes the state to exact from a former owner in possession, the reasonable value of his use and occupancy of the property.

That section provides in part:

"Notwithstanding any other provisions of law to the contrary, the State, by and through the Controller, shall have the sole and exclusive power and authority *to lease and rent*, and to receive and collect *all rents, issues and profits* arising in any manner from property heretofore or hereafter deeded to the State pursuant to the provisions of section 3785 of this code, which power and authority shall accrue from and after the date of recording of the deed to the State.

"The Controller, or any person designated by him, *may* exact from the former owner of said property, or any person having any interest therein, or any person in the possession, actual or constructive, of said property, or any part thereof, an accounting for said rents, issues and profits, and *may*, at any time after the recording of the deed to the State as aforesaid, demand and receive possession of the property so conveyed, and such possession shall be surrendered to the Controller or to any person designated by him. On the request of the Controller made to the Attorney General or to the district attorney of the county in which any part of the land is located, an action of unlawful detainer or of ejectment shall be brought in the name of the people against any persons *unlawfully* occupying the property.

"The Controller or any person designated by him is hereby authorized and empowered to lease and rent such lands, or any part thereof, in the name of the Controller, and for that purpose in the name of the Controller, and under his authority, to agree upon the terms, conditions, rentals and covenants of such leases, to execute, acknowledge, deliver and record the same, to collect *the rentals, issues, profits or other consideration accruing or arising under such leases, and give receipts and acquittances therefor,* to consent to the assignment or subletting or cancellation of such leases, to give, serve, and post notices and demands concerning the leased premises, including notices and demands under the forcible entry and unlawful detainer acts, to terminate and cancel leases in cases of violation of the terms, conditions and covenants thereof on the part of the lessees, to demand and receive possession of the leased premises, to institute and prosecute actions and proceedings for the recovery of possession of the demised premises, or of the rents, issues and profits thereof, including actions of forcible entry or unlawful detainer or other actions or proceedings concerning the leased premises, including actions to prevent waste or concerning injuries to the premises, or for the removal of appurtenances or fixtures, or the destruction thereof, to authorize repairs necessary to preserve improvements on the lands, and, in the name of the Controller and under his authority, to do and perform such other matters and things as may be necessary in the premises in the matter of leasing lands deeded to the State under the provisions of section 3785 of this code. For the enforcement of the provisions of this paragraph of this section, the Attorney General shall, upon request of the Controller, commence an action on behalf of the State. * * *

"All moneys received by the State Controller for the rental of the tax deeded properties shall be placed in the State Treasury to the credit of the tax deeded land rental fund and shall not be credited on the amount necessary to be paid in redemption of the property." (Italics added.)

Under this section the Legislature has conferred power upon the state to "lease and rent" tax deeded property, and to receive and collect all "rents, issues and profits" arising from the same. Also the controller may exact from the former owner or any person having any interest therein, or any person in possession, actual or constructive, an accounting for rents, issues and profits; demand and receive possession of such property; and secure the institution of proceedings in unlawful detainer or ejectment against any persons *unlawfully* occupying the property.

It might be noted in passing that if the state merely by virtue of its ownership of tax deeded property, prior to the enactment of the foregoing section, had possessed the power to exact from the former owner in possession, payment for his use and occupancy, it could as well be argued that, by virtue of such ownership it also had the power to lease and rent such property and to exact an accounting for rents, issues and profits therefrom; and if it had such power before, it was unnecessary to confer same in section 3773 of the Political Code.

In the instant case the state did not lease or rent the property in controversy, nor did it seek to exercise the right conferred by the statute to receive or collect rents, issues or profits therefrom, if any there were. The controller did not attempt to exact from the former owner any accounting nor did he demand possession nor institute any proceedings in unlawful detainer or ejectment. The present action is not a suit for accounting. For all that appears the former owner was left in undisturbed possession for over three years, after which time a demand was made upon him to pay the reasonable value of the use and occupancy for a period prior to the demand.

[6, 7] Aside from the right enjoyed by a former owner of tax deeded property to remain in possession until a sale of the land by the state, as held in the cases cited, supra, it is inferable from section 3773, supra, also that he may be left in undisturbed possession, and that no lease or agreement to pay rent need be exacted of him, and no accounting for rents, issues and profits be required of him. The authority granted to the controller by this section is permissive as is indicated by the use of the word "may," and by the alternative given to him. And to have required that the controller lease or rent tax deeded property, or that he collect the rentals, issues or profits therefrom, might well have been to demand the impossible, as no lessee might be found and no rents, issues or profits arise.

[8, 9] Assuming but not deciding that the power to "lease and rent," conferred upon the state by said section, would have authorized the state to exact from decedent a lease or agreement to pay rental, to demand possession in the event of his refusal to enter into such lease or agreement, and to effect his removal by proceedings in ejectment or unlawful detainer upon his refusal to surrender possession, the right which the state had to lease and rent and to receive and collect all rents, issues and profits arising from the property, does not compel the conclusion that the controller may exact payment for use and occupancy where no agreement exists and when no demand for possession was ever made. As hereinbefore stated, the primary purpose of statutes providing for the conveyance to the state of title to property that is tax delinquent, is the collection of taxes, and not the acquisition of the property or of other income therefrom. Such statutes should, therefore, be given a construction favoring the delinquent tax payer.

Appellant urges that the right of the state to exact payment for "use and occupancy" flows from that provision of section 3773, supra, that "the State, by and through the Controller, shall have the sole and exclusive power and authority

* * * to receive and collect all rents, issues and profits" from property which is deeded to the state pursuant to the provisions of section 3785, supra; that this language gives to the controller the greatest right that could be given to collect anything from the premises; that the Legislature could not have used any language which would have allowed to the controller greater power to collect from the occupant of tax deeded land either agreed rent or the reasonable value of his use and occupation of the land.

[10] But the statute does not in terms confer the right to collect from the former owner in possession the value of his use and occupation, and the language taken as a whole indicates that the authority conferred upon the state "to receive and collect all rents, issues and profits" has no such broad meaning as that contended for by appellant, but means only such rents, issues and profits as may arise from leases of the property or, perhaps such net profits as might arise from a business carried on upon the premises. The power conferred upon the controller by the section is "to collect the rentals, issues, profits or other consideration accruing or arising under such leases" as he is authorized to execute. Throughout the section emphasis is placed upon rents and leases.

[11] Words of a tax statute cannot be extended by implication. If the Legislature had intended that the controller should have the right to recover from the former owner in possession the value of his use and occupancy of the tax deeded property, as well as the right to "lease and rent" and "to receive and collect" all "rents, issues and profits" arising from such property, no reason appears why it should not have said so in terms.

In section 707 of the Code of Civil Procedure, which provides that a purchaser from the time of sale until a redemption, and a redemptioner from the time of his redemption until another redemption, is entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof, not only is the right to recover for use and occupancy conferred, but such right is distinguished from the right to receive rents.

[12] Furthermore, the phrase "rents, issues and profits" has a well understood meaning and refers to rents collected by the party in possession, and/or the net profits accruing to him from said property, and not to the rental value or the value of use and occupation. Amberg v. Claussen, 186 Okl. 482, 98 P.2d 927; Smith v. Howell, 91 Or. 279, 176 P. 805; Fifty-Ninth St. Real Estate Co. v. Murphy, 95 Misc. 191, 159 N.Y.S. 203; In re Stevens, 111 App.Div. 773, 98 N.Y.S. 28, 31; Equitable Life Insurance Co. v. Brown, 220 Iowa 585, 262 N.W. 124; Hopkins v. Remy, 64 N.J.Eq. 12, 53 A. 676, 677; Oram v. Peirce, 73 N.J.Eq. 391, 67 A. 1053, 1056; 54 C.J. Sec. 6, p. 385.

In Amberg v. Claussen, supra [186 Okl. 482, 98 P.2d 930], an action upon a supersedeas bond which stipulated that the obligor should "pay the rents and profits collected from, or rental value" of the premises, the court held that the obligee had the option to sue for rents and profits actually collected or the rental value of the property, saying that "rental value" and "value of use and occupancy" meant substantially the same but that "rents and profits" collected were not the same as rental value.

In Smith v. Howell, supra [91 Ore. 279, 176 P. 811], the right to hay cut from land by a foreclosure purchaser pending redemption was in issue. The court held that title to said hay was in the purchaser, subject to an accounting for rents, issues and profits, and said that the term "rents, issues, and profits," applies only to the net profits and such as are in the nature of rents. Citing 7 Words & Phrases, p. 6090; also citing In re Vedder's Will, 2 Conn. Sur. 548, 15 N.Y.S. 798, to the effect that "rents and profits" of real estate mean "the sum annually yielded" by the same.

[13] Also that the right to "receive and collect all rents, issues and profits" conferred by section 3773 of the Political Code is clearly distinguishable from a right to exact payment for use and occupancy, is further evidenced by the provision of the section that the controller or any person designated by him, may exact an accounting for said rents, issues and profits—obviously meaning "rents, issues and profits" received by some one other than the state. The statute is not intended as a money making scheme for the benefit of the state but to encourage redemptions, providing only that if any profits accrue therefrom the state and not the delinquent taxpayer may be the beneficiary.

[14] Our conclusion is, therefore, that the language of section 3773 of the Political Code does not authorize a suit by the state for the reasonable value of the use and occupancy of tax deeded land by the former owner left in possession.

The foregoing conclusion renders unnecessary a determination of the third question, to-wit: whether the institution of redemption proceedings on the installment plan provided by section 3817a of the Political Code by the former owner of tax deeded land, who has remained in possession, terminates any right the state may have had to sue for the reasonable value of the prior use and occupancy of the premises.

Respondent argues that in initiating redemption proceedings in the instant case Gustafson agreed to pay the full amount he would have been required to pay if the property had been redeemed in a lump, plus interest on all unpaid balances, also all current taxes accruing during the period of redemption; that the state is getting all that it would have received if there had never been any delinquency, and penalties and interest as well; that therefore it would be inequitable for the state also to exact payment from him for the use of the land during a part of the period for which it is being paid taxes, penalties and interest in full.

Appellant relies upon the provision of section 3817a that payments under the section are not a redemption or partial redemption and do not affect the state's interest in the real estate, and that payments "are compensation for the use of the real estate"; and it argues that use of the real estate applies solely to the use for the period covered by each payment under the installment plan and has no reference to any prior period; that any other construction would result in inequities since one delinquent tax payer may have resided on his land for a long period without initiating an installment payment plan, while another may have initiated such a plan promptly; that the Legislature could not have intended that the same amount should be compensation for differing periods of occupancy; and that if respondent's theory be correct an occupant of land who might have received income of thousands of dollars from tax deeded property could wipe out the obligation to the state by a comparatively small payment to the county and, after making one payment, could default in the installment plan and be free and clear of all obligations to the state.

This argument of appellant leaves out of consideration the fact that the man who delays redemption pays interest for his longer period of delinquency; it confuses the right conferred upon the state by section 3773, supra, to rent or lease the land and to collect the rents, issues and profits therefrom, with the right contended for to sue the former owner in possession for his use and occupancy; and it loses sight of the primary purpose of legislation which is to lighten the burden of the taxpayer. If the state could exact payment for use and occupancy from a former owner who elects to pay his delinquencies on the installment plan it could exact such payment from one who redeemed his property by payment of the whole redemption amount in a lump sum; and such taxpayer, though his obligation to the county had been cancelled and the title of the state to his land terminated, would find himself still burdened with an obligation to the state for his prior period of occupancy, and this though he may never have received one cent of income from the property during the period of such occupancy. If he had in fact entered into a lease or had agreed to pay rent for the premises, or had there been "rents, issues and profits" arising therefrom of which he had been the beneficiary, a different situation would be presented and it might be argued more forcefully that installment payments of delinquencies were not to supersede rentals agreed to be paid for any period prior to their institution, or rents, issues and profits received by him for such period.

[15] Whether the state could, after the institution of such a payment plan, collect agreed rentals unpaid by the former owner in possession for a period prior to redemption, or exact an accounting for rents, issues and profits accruing during such period is not in issue in this case; but if the state were entitled to exact payment for the use and occupancy of the property for a period prior to redemption we are of the opinion that the provisions of section 3817a, supra, that installment payments are compensation for the property would apply to the whole period of delinquency rather than for the periods during which the payments were being made. The effect of that provision that installment payments are not a redemp-

tion or a partial redemption and do not affect the state's interest in the real estate, is to continue the title in the state until complete redemption is effected, so that if such installment payments are not completed no complications as to title may arise. The provision of section 3773, supra, that moneys received by the controller for the rental of tax deeded property shall not be credited on the amount necessary to be paid in redemption, is not inconsistent with this conclusion. If the taxpayer elects to pay rental, or rental is paid by another, no injustice results from providing that such rentals shall not be credited upon the redemption amount due the county.

The foregoing lends force to our conclusion that section 3773, supra, does not authorize a suit for use and occupancy.

As to the question of waiver appellant contends that estoppel cannot be invoked against the state by reason of failure to act on the part of its officials, and that the doctrine of laches cannot be invoked against the sovereign. These are broad general statements to which there are exceptions.

[16] A state, as well as an individual, may be estopped where the necessary elements or grounds of estoppel are present (City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002; 31 C.J.S., Estoppel, § 138, p. 405); it may be estopped when acting in its proprietary capacity as distinguished from its governmental capacity (31 C.J.S., Estoppel, § 140, p. 413); and it may be estopped by the acts of its public officials done in the exercise of powers expressly conferred by law, and by their acts or omissions when acting within the scope of their authority. 31 C.J.S., Estoppel, § 142, p. 417.

[17] As hereinbefore noted, section 3773, supra, authorizes but does not require the leasing or renting of tax deeded property by the controller; it leaves to his discretion the determination of whether he shall exact a lease or contract to pay rent from the former owner, whether he shall dispossess him, and whether he shall exact an accounting for rents, issues and profits; and where, as here, he has elected for a period of over three years to do nothing it would not be deemed inequitable to hold that he had waived the right, if such he had, to exact payment for the use and occupancy of the premises. Such determination is not necessary for a decision in this case, however; and for the reason above stated, that the controller does not have the right to sue a former owner left in possession of tax deeded property for his use and occupancy of same, the judgment is affirmed.

THOMPSON, J., concurred.

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53 Cal.App.2d 222

PHILBRICK, Director of Motor Vehicles, et al., v. STATE PERSONNEL BOARD et al.

Civ. 6673.

District Court of Appeal, Third District, California.

July 1, 1942.

1. Statutes 🔑233

Generally the state and its agencies are not bound by general words of statute limiting rights and interests of citizens unless such public authorities are included within the limitation expressly or by necessary implication.

2. Limitation of actions 🔑11(1)

Generally limitation statutes are held not to bind the state and its agencies unless they do so expressly or by necessary implication.

3. Statutes 🔑233

Generally, statutes are meant to regulate acts and rights of citizens and not the government itself, and therefore general words of a statute do not include the government or affect its rights unless that construction is clear and indisputable upon the text of the statute.

4. Limitation of actions 🔑11(1)

The state and its officials were not "persons" within statute requiring action by any person having cause of action based on Civil Service Law to be brought within one year after cause of action arose, and therefore could maintain mandamus proceeding against the personnel board regardless of whether the proceeding was instituted within one year after cause of action arose. St.

1937, p. 2097, §§ 91-95; St.1939, p. 2507, § 52.

See Words and Phrases, Permanent Edition, for all other definitions of "Person."

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Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Mandamus proceeding by Howard R. Philbrick, as Director of Motor Vehicles, etc., and others against the State Personnel Board of the State of California and others, to require the board to strike certain names from official roster of persons holding position under Civil Service Act and from a departmental re-employment list and to certify to petitioners, names and addresses of three persons standing highest on the eligible list who indicated their willingness to accept appointment to such position. From an adverse judgment, defendants appeal.

Affirmed.

Freitas, Duffy & Keating, of San Rafael, and Ivan C. Sperbeck, of Sacramento, for appellants.

Earl Warren, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment of the superior court of Sacramento county, ordering the issuance of a peremptory writ of mandate requiring the State Personnel Board of the State of California, its respective members and its executive officers to strike from the official roster of persons holding positions under the State Civil Service Act maintained by them, the name of respondent Benjamin Hartwell, and a certain entry with respect thereto; to strike the name of said Benjamin Hartwell from the departmental reemployment list for the Department of Motor Vehicles maintained by them for the class of squad captain, California Highway Patrol, and to certify to petitioners the names of three persons standing highest on the eligible list maintained by them for the class of squad captain, California Highway Patrol, who had indicated their willingness to accept appointment to the position of squad captain, California Highway, Patrol, at Fresno, California.

The petition for the writ was filed on February 15, 1940. The allegations thereof, all of which with one exception not pertinent here, the trial court found to be true, were: That at all times since January 18, 1940, a vacancy had existed in the California Highway Patrol at Fresno, California, a state civil service position; that on or about that date petitioners submitted to the State Personnel Board (hereinafter called the Board) a statement of the duties of the position, the necessary and desired qualifications of the persons to be appointed, and a request that the names of persons eligible for appointment to the position be certified to petitioners; that the Board thereafter allocated said positions to the class of squad captain, California Highway Patrol, in the personnel classification plan of the State of California, and on January 29, 1940, certified to petitioners the name and address of respondent Benjamin Hartwell for appointment thereto; that Hartwell had no civil service status and no eligibility for such certification by reason of facts set forth; that, notwithstanding such ineligibility, the Board had placed his name on the Departmental Reemployment List, and that this action was arbitrary and in abuse of discretion because of Hartwell's lack of eligibility, and also because any cause of action to have his name placed on the list which Hartwell might have had at some previous time was barred by various statutes of limitation and by his laches at the time his name was placed on the list by the Board; that since January 18, 1940, Hartwell's name had been the only one on the departmental reemployment list, that no other names had been on either the promotional eligible list or the reemployment list, but that at all times there had been names of persons available on the eligible list for said class, willing to accept appointment to such vacancy at Fresno; and that petitioners had, prior to the commencement of this action, demanded of the Board the relief sought to be obtained by the writ. It was prayed that the Board be required to strike the name of Hartwell from the official roster of persons holding positions under the State Civil Service Act and from the departmental reemployment list for the Department of Motor Vehicles maintained by them for the class of squad captain, California Highway Patrol, and that it certify to petitioners the names and addresses of three persons standing highest on their eligible list of such class of squad captain, who had indicated their willingness to accept appointment to such position.

Respondents therein demurred generally to the petition and set up also that the relief prayed for was barred by section 52 of the State Civil Service Act, Chap. 753, Stats. 1937, p. 2092, as amended, and particularly that it was barred on and after September 17, 1939, and on and after January 3, 1940. They also filed an answer which admitted certain allegations of the petition, denied others, and also alleged that on December 9, 1938, there existed a vacancy in the position of squad captain in Fresno and elsewhere in the state, that on or about said date petitioners had submitted to the Board a statement of the duties of said position and the necessary qualifications of persons to be appointed thereto and a request for the certification of the names of persons eligible for appointment thereto, and that the Board had certified the name of Benjamin Hartwell to them on January 3, 1939. As to petitioners' allegations regarding the ineligibility of Hartwell for certification, same were denied, and it was denied that the action of the Board in placing his name on the departmental reemployment list was arbitrary or an abuse of discretion. They also set up in the answer that the relief prayed for by petitioners was barred on and after September 17, 1939, and on and after January 3, 1940, by section 52 of the State Civil Service Act, supra.

Trial by jury having been waived the issues of fact tendered by the foregoing pleadings were tried by the court sitting without a jury. Findings of fact and conclusions of law were filed, respondents' demurrer was overruled, and judgment was entered ordering that a peremptory writ of mandate issue, requiring respondents to strike the name of Benjamin Hartwell from their official roster of persons holding positions under the State Civil Service Act, and from their departmental reemployment list for the Department of Motor Vehicles, for the position of squad captain, California Highway Patrol, and that they certify to petitioners the names and addresses of three persons on their eligible list for the said class of squad captain.

The pertinent facts found by the court are that since March 3, 1939, there had existed a vacancy in the civil service position of squad captain at Fresno; that on January 18, 1940, the petitioners requested certification of names by the Board to fill this vacancy; that in response to such request the Board, on January 29, 1940, certified the name of Hartwell for appointment to such position; that on January 18, 1940, Hartwell's name was, and at all times since had been, the only name on the departmental reemployment list for the class of squad captain, but that there were names of persons available for appointment on the eligible list for that class; that petitioners refused to appoint Hartwell to the position, demanding that the Board strike his name from the departmental reemployment list (which takes precedence over an eligible list, §§ 91-95, State Civil Service Act, Stats.1937, chap. 753, p. 2097), and certify names from the eligible list for appointment to the position.

As to the civil service status of Hartwell the court found that he was ineligible and that the action of the Board in placing his name on the departmental reemployment list for the class of squad captain in the California Highway Patrol, was arbitrary, wholly unsupported by the facts and the evidence, and in excess of the jurisdiction of the Board.

In regard to certain matters set up in the answer to the petition, the court also found that since the 9th day of December, 1938, there had existed a vacancy in the position of squad captain at San Rafael, California (not at Fresno as alleged in the answer), that on December 29, 1938, petitioners had requested the Board to certify names of persons to fill this vacancy, and that in response thereto said Board had certified Hartwell's name; but that no appointment had been made at that time, and that on October 25, 1939, certification for the appointment to this position at San Rafael had been withdrawn and cancelled by the Board.

This appeal is taken upon the judgment roll alone, and the single point raised by appellants is the statute of limitations, to-wit: Section 52 of the Civil Service Act as amended by statutes of 1939, chapter 898, p. 2507, which reads as follows:

"No action or proceeding shall be brought by any *person* having or claiming to have a cause of action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in this State or the administration thereof unless such action or proceeding be commenced and served within one year after such cause of action or complaint or ground for issuance of any writ or legal remedy first arose, nor shall any *such person* be compensated for the time subsequent to the date when such cause of action or proceeding arose unless such action or proceeding is filed and served within ninety days after the same arose; provided, that any such complaint or legal remedy or wrongs or grievances arising prior to August 27, 1937, shall be exempt from the provisions of this section. The time for filing or commencing any action or proceeding as provided in this section shall not be considered to run during any time that the matter involved is before the board pursuant to petition of the person involved, and final action has not been taken thereon by the board, including appeals taken pursuant to subdivision (j) of section 172." (Emphasis ours.)

Appellants' contention is that petitioners' cause of action first arose in 1938 when the Board placed Hartwell's name on the departmental reemployment list for the class of squad captain in the California Highway Patrol, or, in any possible event, not later than January 3, 1939, when the Board certified his name to petitioners in response to their request for certification of names for the position of squad captain at San Rafael; that petition for writ of mandate was not filed until February 15, 1940, more than one year after the certification of Hartwell for squad captain at San Rafael January 3, 1939, and more than one year after the Board's order of September 17, 1938, and the restoration of Hartwell's name to the reemployment list on October 25, 1938; and that therefore, under the undisputed facts, the instant proceeding is barred by section 52, supra.

Respondents herein contend that section 52, supra, has no application to proceedings brought by the state or by state officials acting in their official capacity; that the word "person" in the said section does not include the state or its agencies, and that the state is not bound by general statutes of limitation; also that while *a* cause of action arose when Hartwell's name was originally certified to fill the position at San Rafael, that that was a different cause of action than the one here sued upon; that the right to receive periodically the names of eligibles for appointment to vacancies as they successively occur is a continuing right, and that the time limitation upon the right to sue for the certification of names for appointment to fill the position at Fresno began to run, if at all, from the time when the filling of that position became necessary and certification of names was requested and refused.

No authorities are cited by appellants in support of their contentions, and they filed no brief in reply to that filed by respondents herein. Also the findings of the trial court do not show that when Hartwell was certified to respondents on January 3, 1939, any request was made for another and different name. They do show that this certification was withdrawn and cancelled by the Board on or about October 25, 1939, within one year after it was issued.

The questions presented for decision here are, then, does the word "person" as used in section 52, supra, include the state and its agencies, and therefore respondents herein, so that the statute of limitation therein contained applies in the instant case, and, if it does so apply, did the time within which petitioners could commence this action begin to run when Hartwell was ordered restored to the civil service list by the Board on September 17, 1938, or when his name was entered on said list on October 25, 1938, or when he was certified by the board to fill a vacancy as squad captain at San Rafael on January 3, 1939, or when he was certified by said Board to fill the position of squad captain at Fresno on January 18, 1940?

[1] In the interpretation of a legislative enactment it is the general rule that the state and its agencies are not bound by general words limiting the rights and interests of its citizens unless such public authorities be included within the limitation expressly or by necessary implication. C. J. Kubach Co. v. McGuire, 199 Cal. 215, 217, 248 P. 676; Skelly v. Westminster School District of Orange County, 103 Cal. 652, 656, 37 P. 643; Balthasar v. Pacific Elec. Ry. Co., 187 Cal. 302, 202 P. 37, 19 A.L.R. 452; Whittaker v. County of Tuolumne, 96 Cal. 100, 30 P. 1016; Mayrhofer v. Board of Education, 89 Cal. 110, 26 P. 646, 23 Am.St.Rep. 451; Marin Municipal Water District v. Chenu, 188 Cal. 734, 207 P. 251; Riley v. Stack, 128 Cal. App. 480, 483, 16 P.2d 110; Berton v. All Persons, etc., 176 Cal. 610, 617, 170 P. 151.

[2] Accordingly general statutes of limitation are held not to bind the state and its agencies unless they do so express-

ly or by necessary implication. Z. Russ & Sons Co. v. Crichton, 117 Cal. 695, 49 P. 1043; Davidow v. Griswold, 23 Cal.App. 188, 198, 137 P. 619.

The fact that the state by an express statute has sometimes consented to be bound by certain statutes of limitation in the same manner as in actions by private parties, as for instance, by section 345 of the Code of Civil Procedure of California, only serves to emphasize the rule that it is not so bound unless the statute expressly or by necessary implication so provides. Said section 345 has no application here.

[3] Section 52, supra, does not expressly provide that the state or its agencies are to be bound by the limitations thereof. Therefore the question arises whether, by necessary implication, it includes them. We believe that it does not. It was said by Associate Justice Story of the United States Supreme Court, in United States v. Hoar, C.C., Fed.Cas.No.15373, 2 Mason 311, 314, that in general, acts of legislatures are meant to regulate and direct the acts and rights of citizens, and that in most cases, the reasoning applicable to them applies with very different and often contrary force to the government itself; that, therefore, general words of a statute ought not to include the government or affect its rights unless that construction be clear and indisputable upon the text of the act.

[4] In certain cases the courts of this state have held that by necessary implication certain statutes of limitation apply to the state and its agencies. People v. City of Los Angeles, 93 Cal.App. 532, 269 P. 934, and Miller v. Johnson, 4 Cal.2d 265, 48 P.2d 956, are illustrative. But we think that there is not in said section 52, supra, any such clear and definite expression of an intention to limit the state and its agencies as would remove the provision from the general rule. C. J. Kubach Co. v. McGuire, supra; Balthasar v. Pacific Elec. Ry. Co., supra. The implications are rather to the contrary. The section provides that "no action or proceedings shall be brought by any *person* having or claiming to have a cause of action * * * unless such action or proceeding be commenced and served within one year after such cause of action * * * first arose, nor shall any *such person be compensated* for the time subsequent to the date when such cause of action or proceeding arose unless such action or proceeding is filed and served within ninety days after the same arose." It further provides that time for filing shall not be considered to run during the time that the matter involved is before the Board pursuant to petition of the person involved and before its final action, including appeals taken pursuant to subdivision (j) of section 172. Presumably subdivision (k) of section 172 rather than subdivision (j) was intended, since the former does not pertain to appeals, and the latter does; but both such subdivisions deal with employees. The inference from the whole of section 52, supra, is, therefore, that the section was intended to apply only to the claims of individuals, particularly salary claims of employees or those who have been separated from the service.

Our conclusion being that the provisions of section 52 of the Civil Service Act do not apply to the state and its agencies, and that it is not, therefore, binding upon petitioners (respondents herein), it is unnecessary to determine whether petitioners' cause of action arose on September 17, 1938, the date of the order of the Board ordering Hartwell's name entered upon the civil service roster (which order the trial court found to be invalid), or on January 3, 1939, the date of the certification of Hartwell's name to fill a vacancy in the position of squad captain at San Rafael (which certification was withdrawn and cancelled by the Board on October 25, 1939), or on January 29, 1940, the date of the certification of Hartwell's name to fill the vacancy in the position of squad captain at Fresno.

The judgment is affirmed.

THOMPSON, J., concurred.

53 Cal.App.2d 103

MIRICH v. BALSINGER.

Civ. 13459.

District Court of Appeal, Second District, Division 1, California.

June 30, 1942.

Hearing Denied Aug. 27, 1942.

1. Physicians and surgeons 🔑18(1)

Complaint alleging that surgeon negligently performed plastic operation on patient's nose so that patient's nostrils commenced to shrink together, and that subsequent operations did not correct the condition, established cause of action sounding in "tort", notwithstanding allegations concerning engagement of surgeon to perform operation and representations allegedly made by him concerning probable outcome thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Tort".

2. Physicians and surgeons 🔑18(4)

Complaint charging negligence in performance of plastic operation on patient's nose was not insufficient because certain acts of negligence were alleged on information or belief.

3. Pleading 🔑16

Pleadings are meant to be self-serving and they may be based on hearsay.

4. Physicians and surgeons 🔑14(4)

The law demands of physician only that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in his locality, and that he use reasonable and ordinary care and diligence in treating the patient.

5. Physicians and surgeons 🔑18(8)

Whether professional conduct of a physician in a particular case measures up to required standards is a question for experts and can be established only by their testimony, but where expert testimony in relation thereto is in conflict it is primarily for triers of fact to resolve if possible such conflict in favor of or against the physician.

6. Appeal and error 🔑1010(1)

Whenever conclusion of trial court sitting without jury is supported by substantial evidence, the reviewing court is without authority to interfere therewith even though it may appear to the reviewing court that the evidence would justify a contrary conclusion.

7. Appeal and error 🔑994(3)

It is not the function of the District Court of Appeal to determine credibility of witnesses nor to evaluate their testimony.

8. Physicians and surgeons 🔑18(8)

In malpractice action it is not necessary to demonstrate conclusively and beyond possibility of doubt that negligence of physician resulted in injury to patient, and substantial evidence which reasonably supports judgment for patient is sufficient.

9. Physicians and surgeons 🔑18(8)

Evidence sustained judgment for patient on ground that surgeon, in performing plastic operation on patient's nose, negligently cut unnecessarily from nasal passages of the nose an excessive amount of tissue and negligently cut out a part of the lining membrane which caused complete and permanent shrinkage of the frontal nasal passages of the nose.

10. Appeal and error 🔑971(2)

The competency of an expert witness to give an opinion is for the trial court in exercise of a sound discretion.

11. Appeal and error 🔑971(2)

The ruling of trial court on question of competency of witness to testify as an expert will not be overturned on appeal except where there is actual want of evidence to support it or a clear abuse of discretion in ruling on evidence proffered on the subject.

12. Evidence 🔑546

In malpractice action based on alleged negligence in performing plastic operation on patient's nose, determination that a plastic surgeon and a physician who had specialized in otolaryngology possessed qualifications necessary to entitle them to express opinions concerning cause of patient's condition, and whether defendant surgeon exercised proper degree of skill and care, was not abuse of discretion.

13. Physicians and surgeons 🔑18(4)

A patient could maintain action for malpractice in performing plastic operation on patient's nose after failure of subsequent operations to correct the condition created by the first operation, without alleging negligence in regard to the subsequent operations.

14. Physicians and surgeons 🔑18(8)

In malpractice action based on alleged negligence in performing plastic operation on patient's nose, the fact that patient did not consult another surgeon until a year had elapsed from time of first operation on nose, and therefore plaintiff's expert witnesses had not made examination soon after the operation, did not impair the patient's right to recover.

15. Evidence ⚷553(2, 3)

Counsel has right to frame hypothetical question on theory of questioning party and in accordance with facts fairly deducible from the evidence, and the question need not include a statement of all the evidence in the case.

16. Evidence ⚷555

That an opinion of an expert is not founded on all facts of the case goes to the weight of the evidence and not to its competency or materiality.

17. Evidence ⚷555

That opinion of expert that treatments of surgeon were improper is based on result of recovery does not deprive the trier of facts of the right to predicate a finding of negligence upon such expert testimony.

18. Evidence ⚷546

In malpractice action based on alleged negligence in performing plastic operation on patient's nose, wherein plaintiff's witness testified that he had made study of causes of atresia, undertaken course of plastic surgery under national authority on the subject, and had watched various plastic surgeons work, permitting witness to answer hypothetical question concerning standard of care exercised by hypothetical plastic surgeon referred to in the question and to give opinion as to cause of atresia from which patient was suffering was not abuse of discretion because of fact that witness was not himself a plastic surgeon.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Doreen Mirich, a minor, etc., against W. E. Balsinger for malpractice. From an adverse judgment, defendant appeals, and from order denying motion for new trial defendant attempts to appeal.

Attempted appeal from order denying motion for new trial dismissed, and judgment affirmed.

A. Brigham Rose, of Los Angeles, for appellant.

Phillip W. Silver, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff instituted this action against defendant, a plastic surgeon, to recover damages for alleged malpractice. Trial before the court sitting without a jury resulted in a judgment for plaintiff. A motion for a new trial was denied. From the judgment and the order denying the motion for a new trial this appeal is prosecuted by the defendant doctor.

By her complaint plaintiff alleged that the defendant held himself out to the general public as a physician who specialized in plastic surgery; that he further represented to plaintiff, a minor, and to her mother, that he could beautify and improve the appearance of plaintiff's nose by performing certain nasal plastic surgery thereon; that the defendant was employed to perform this plastic surgery and that pursuant to such employment he did on July 13, 1939, perform a plastic operation upon plaintiff's nose. The complaint further alleged that this operation was performed so negligently and carelessly that following such operation the nostrils of plaintiff's nose commenced to "shrink together," thereby making it impossible for plaintiff to breathe at all through her nose. It was further alleged that on February 5, 1940, defendant performed a second operation upon plaintiff's nose in an attempt to correct the shrinkage of the nostrils; that following the second operation, however, plaintiff's nostrils again "shrank together," obstructing practically in its entirety any breathing through the nostrils. The pleading further charged upon information and belief that the defendant in the first operation negligently and carelessly cut out unnecessarily from the nasal passages an excessive amount of tissue and did carelessly, negligently and unnecessarily cut out a part of the lining membrane, all of which caused a complete and permanent shrinkage of the frontal nasal passages.

In her complaint plaintiff further alleged that because of the negligence and carelessness of defendant she was compelled to suffer unnecessarily the pain and anguish of being required to have two tubes in her nostrils; that she likewise suffered various complications, and is informed and believes that it will be necessary for her to submit herself to several further operations, including a grafting process, to cure the condition.

By his answer the defendant denied that he made any representations to plaintiff or her mother; admitted that he was employed to perform plastic surgery upon the plaintiff; that he did perform the operations set forth in plaintiff's complaint; but denied that he was guilty of any of the negligence charged in the complaint. By way of affirmative defense plaintiff's answer alleged that the defendant gave the plaintiff certain instructions, the observance of which was essential and necessary to effect a proper recovery, but that plaintiff negligently, carelessly and willfully refused and failed to follow or adhere to such instructions, and that any injury sustained by plaintiff was the proximate result of her own negligence, carelessness and wrongful conduct.

The trial court found that all the allegations of plaintiff's complaint were true, save and except as to the amount of damages allegedly sustained by her. It was further found that the denials and affirmative defense set forth in defendant's answer were not sustained by the evidence. The court expressly found "that said defendant in the first operation, previously mentioned negligently and carelessly did cut out unnecessarily from the nasal passages an excessive amount of tissue and did carelessly and negligently and unnecessarily cut out a part of the lining membrane, all of which caused a complete and permanent shrinkage of the frontal nasal passages."

We find in the record evidence given by the minor plaintiff that on July 10, 1939, defendant doctor stated to her and her mother that he could make plaintiff's nose smaller, the tip narrower, and also make her nostrils larger, and further, that when he performed the operation he would also correct the difficulty in breathing from which the plaintiff suffered; that the operation was performed July 13, 1939, following which the nose was packed, tubes were inserted, and a cast placed on it. With reference to certain instructions given her by defendant doctor, plaintiff testified that she rigidly adhered thereto. She further testified that at the expiration of six weeks after the operation, during which time she had visited the doctor at various intervals, she first observed an unusual condition about her nose, in that "it became pinched at the tip. The nostrils became very small. The nose was crooked and appeared to be brought over to one side"; that the defendant informed plaintiff that when he returned from Chicago he would perform a second operation to correct the existing condition; that such operation was performed by defendant, and that prior thereto plaintiff's nostrils were "practically closed up." She also testified that following the second operation she was required by defendant doctor to have certain tubes inserted in her nostrils, which tubes were removed at the expiration of three weeks, after which the nostrils became very small. She testified that on each occasion when the defendant removed the tubes from her nostrils the latter would again become small. She gave further testimony as to the pain and suffering she endured when the tubes were inserted in the shrunken nostrils; that in April following the operation, when the tubes were removed for the last time, the nostrils became small again and practically closed on the right side, with a small opening on the left; that the defendant agreed to perform a cauterization upon the plaintiff, pursuant to which agreement he again operated on her nose and opened her nostrils. Thereafter defendant instructed plaintiff to obtain X-ray treatments, which she did, receiving four such treatments. Following the last X-ray treatment, the tubes were removed by defendant from plaintiff's nose and it began to shrink again. Thereupon defendant informed her that the X-ray doctor either had not given her enough X-ray treatments or had not given her the right kind of such treatments. Thereupon defendant stated to plaintiff that the only thing he could do was to operate again and for her again to take X-ray treatments; but plaintiff refused to submit to a fourth operation. Her testimony showed further that after the last X-ray treatment she was able to breathe only through the left side of her nose, but not enough to breathe comfortably, and that this condition became increasingly worse. At the date of the trial plaintiff's nostrils were "all closed up."

Defendant doctor testified in his own behalf that the minor plaintiff's mother brought her to him in regard to correcting the shape of the daughter's nose and with reference to the possible curing of her impaired breathing, which was due to a deflection of the septum. Defendant testified that he informed the mother that he thought the shape of the nose could be corrected. The witness then described in detail how he performed the first operation. As to the second operation, the doctor testified that in the performance thereof he cut between a sixteenth and a thirty-second of an inch of skin on each side of the nose. The third operation, he testified, was performed to dissect the scar tissue and thereby release the lateral walls of the nostrils.

It was conceded by both parties that the accumulation of excessive scar tissue was what caused the contraction of the lateral walls of the nostrils. It was the contention of the plaintiff, however, that this excessive accumulation of scar tissue was brought about by the negligence and carelessness of defendant doctor in cutting out unnecessarily from the nasal passages an excessive amount of tissue and part of the lining membrane, resulting in a complete and permanent shrinkage of the frontal nasal passages; while the defendant, as appears from his testimony, attributed the condition which developed in the plaintiff's nose—called an atresia—to the fact, as he said, that "the patient had an inherent condition of scar tissue formation," which he defined as "an inherent characteristic of certain persons to production of scar tissue." In answer to a question as to whether such a tendency on the part of plaintiff to produce scar tissue would not have manifested itself after the first operation as well as after the second and third, defendant doctor testified: "That is not true in experience at all. I have operated various times for, say, a face lift, surface cutting and the patient does not always react the same at any two different times. You may have a scar at one time and dissect that out in another operation, getting perfect results. Or you may have it vice versa, you may have a good result one time and next time you operate the same patient and you may have scar tissue form."

There appears to be no conflict in the evidence to the effect that an atresia of the nose following Rhino plastic surgery is attributable in the main to one of the following causes: (1) loss or absence of the vestibular lining (which the plaintiff maintains was the reason for the condition in her case); (2) infection; (3) presence of a syphilitic condition or occasionally following cases of smallpox. In the instant case it is also conceded that neither infection nor any of the diseases responsible for atresia was present.

Dr. William S. Kiskadden, a plastic surgeon produced as a witness by the plaintiff, testified that he examined her in August, 1940, at which time she was suffering from what was commonly termed an atresia and occlusion of the nostrils; that operative work would have to be undertaken to correct this condition. It was his opinion that the scar tissue which he felt was causing this occlusion would have to be cut away and new tissue grafted into place to supplant the scar tissue that had presumably formed; that two or more operations would be necessary in this case. In answer to a hypothetical question, this witness testified that in his opinion the atresia probably was due to the fact that some of the lining membrane of the nose had been lost or did not exist. Dr. Harold M. Holden, a plastic surgeon testifying on behalf of the plaintiff, stated that he examined her in July, 1940. at which time she was suffering from atresia of both nostrils. In response to a hypothetical question which covered the various operations performed upon plaintiff by defendant and the results thereof, this witness gave it as his opinion that the only thing that would create an atresia would be the removal or destruction of part of the vestibular lining of the nostril. He further stated that in his opinion the hypothetical surgeon who had performed the operation mentioned in the question, in cutting out the amount of tissue that he did, had not exercised that degree of skill and care required of a plastic surgeon specializing in plastic surgery, measured by the standard of skill and care ordinarily possessed and exercised by a reasonably prudent and skillful plastic surgeon specializing in plastic surgery in the community in which the operation was performed.

Dr. Saul S. Robinson, a witness produced by the plaintiff, testified that he specialized in dermatology; that on June 13, 1940, he saw the plaintiff at his office, at which time her nostrils were open; that he administered to her four X-ray treatments, which he considered sufficient, because of the possibility that a greater number might result in X-ray burn. Another physician and surgeon, Dr. Sol Malis, called on behalf of the plaintiff, testified that he met her professionally on August 19, 1940. In answer to a hypothetical question propounded to him, this witness testified that in his opinion the cause of the atresia was the accumulation of scar tissue. Assuming as he did, in answering the hypothetical question, that the atresia was occasioned by the removal of excessive tissue from the nose, he gave it as his opinion that due care was not exercised by the surgeon who performed that operation in cutting out the amount of tissue that he did, when measured by the standard of skill and care ordinarily exercised by a reasonably prudent and skillful surgeon practicing in the same community. This witness based his opinion on the history of the case, the operation, the formation of an atresia, coupled with the bilaterality of the atresia formation, which he stated was "very important." When asked why, he answered, "Things may happen in surgery by the most skillful men from time to time. That the same thing should happen on both sides and to about the same degree, I came to the conclusion it was not one of accident, but one of negligence." In the opinion of this witness, scar tissue would form six weeks to three months after such an operation if proper technique is not followed in the excision of tissue. In addition to the reasons heretofore given, the witness also based his opinion in answer to a hypothetical question upon the results that ensued from the operation as well as because of the elimination of the heretofore narrated other causes of atresia.

The defendant produced as a witness Dr. Joseph Ginsberg, who testified that he had examined the plaintiff some months before the giving of his testimony. He testified that at the time of his examination there existed a total occlusion of both nostrils. It was his opinion that there was nothing the operating doctor could do to control the type of scar tissue development that manifested itself in this case. He said, "That no one can determine, and very often scars that look very lovely after the patient is dismissed after appendectomies and plastic operations suddenly become hypertrophic, large, broad, after two or three months have passed." This witness further testified that the growth of scar tissue was due to the incision and the patient's reaction to such incision.

Dr. Samuel Ayres, Jr., testifying as an expert witness on behalf of the defendant, gave it as his opinion that there was no way in which a physician situated as was the defendant in this case could determine in advance whether the scar tissue resulting from the operation would be hypertrophic or large in accumulation. Similar testimony was given by another physician who qualified as an expert.

Dr. Edward H. McManus, testifying on behalf of the defendant, in answer to a hypothetical question based upon the technique of the operation performed in the instant case, stated that he was of the opinion that the defendant doctor herein exhibited and exercised the required skill and care ordinarily possessed and exercised by the average reputable surgeon practicing plastic surgery in the City of Los Angeles under the same or similar conditions. He further testified that the growth of fibrous or scar tissue is beyond the control of the operating physician, and, as he said, "You may do the most beautiful work, the patient may be pleased, and six or eight weeks after the operation they may come to your office with the most terrific scars you have ever witnessed." He gave it as his opinion that some people develop scar tissue and others do not, and referring to the plaintiff in the instant case, said, "This young lady evidently is prone to develop scar tissue." It was also the opinion of this witness that the removal of the lining membrane of the nose will not cause an atresia.

[1-3] Appellant first challenges the sufficiency of the complaint on the ground that it cannot be ascertained from such pleading whether plaintiff is suing because of (1) breach of warranty to beautify her; (2) negligence in the performance of a contract to beautify her; (3) negligence in the performance of the first operation; or (4) negligence in connection with the second operation. The claim of uncertainty cannot be sustained. The complaint specifically alleged negligence in the performance of the first operation. These averments clearly established the cause of action as one sounding in tort, the gist of which is the alleged carelessness and negligence of the surgeon in the performance of the operation. Other allegations as to the engagement of defendant physician to perform the operation and representations allegedly made by him as to the probable outcome of the operation as well as the effect thereof upon the plaintiff's features, are to be considered as mere matters of inducement to the main cause of action and not as allegations charging a breach of a contractual obligation. Hall v. Steele, 193 Cal. 602, 226 P. 854; Harding v. Liberty Hospital Corp., 177 Cal. 520, 171 P. 98; Marty v. Somers, 35 Cal.App. 182, 169 P. 411; Kershaw v. Tilbury, 214 Cal. 679, 8 P.2d 109; Wetzel v. Pius, 78 Cal.App. 104, 248 P. 288. Equally

without merit is appellant's contention that because certain acts of negligence are alleged upon information or belief, the pleading is insufficient. The only source open to plaintiff in ascertaining the causes which produced her ailment and condition that allegedly followed the operation was medical advice from other physicians consulted by her. In any event, pleadings are meant to be self-serving, and basing them upon hearsay is expressly authorized. Davis v. City of San Diego, 33 Cal.App.2d 190, 193, 91 P.2d 640.

[4-6] Appellant next urges as a ground of reversal that there is no substantial evidence in the record to sustain and support the trial court's findings that the defendant negligently and carelessly cut unnecessarily from the nasal passages of the plaintiff's nose an excessive amount of tissue, and did carelessly, negligently and unnecessarily cut out part of the lining membrane, all of which caused a complete and permanent shrinkage of the frontal nasal passages of plaintiff's nose. In this regard it is contended by appellant that at most the evidence merely established a post-operation result which does not ordinarily occur, but that its occurrence in the instant case was not shown by the evidence to have been the result of any negligence. We are not unmindful of the fact that the difficulties and uncertainties in the practice of medicine and surgery are such that no practitioner can be required to guarantee results, and that all the law demands is that he shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in his locality, and that he use reasonable and ordinary care and diligence in treating the patient. Whether the professional conduct of a physician in a particular case measures up to the required standards is a question for experts and can be established only by their testimony; but where, as here, the expert testimony in relation thereto is in conflict, it is primarily for the triers of fact to resolve if possible such conflict in favor of or against the physician. Whenever the conclusion arrived at by the trial court is supported by substantial evidence, contradicted or uncontradicted, an appellate tribunal is without authority to interfere therewith, even though it may appear to the reviewing court that the evidence would justify a contrary finding and conclusion. Hall v. Kaufman, 37 Cal.App.2d 264, 99 P.2d 339; Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; Boens v. Bennett, 20 Cal.App.2d 477, 483, 67 P.2d 715.

[7-9] We have heretofore set forth the evidence given by expert witnesses in answer to hypothetical questions based upon the evidence adduced. The trial court, as indicated by its findings, chose to believe and adopt the testimony given by expert witnesses adverse to the defendant's theory and contentions. We therefore cannot disturb the conclusion arrived at, because it is not our function to determine the credibility of witnesses nor to evaluate their testimony. Kiernan v. Herbert M. Baruch Corp., 20 Cal.App.2d 289, 66 P.2d 748. What we have just said does no violence to the views expressed by us in Adams v. Boyce, 37 Cal. App.2d 541, 99 P.2d 1044, cited by appellant. It must also be remembered that in malpractice cases it is not necessary to demonstrate conclusively and beyond the possibility of a doubt that the negligence of the physician resulted in the injury to the patient. Were such the rule, it would rarely be possible to recover in a case of negligence in the practice of a profession which admittedly is not an exact science. It is therefore not required in the trial of such cases that the negligence of the defendant as the proximate cause of the injury be established with such absolute certainty that any other conclusion is excluded. Substantial evidence which reasonably supports the judgment is sufficient. Dimock v. Miller, 202 Cal. 668, 671, 262 P. 311.

[10, 11] Appellant's contention that the court erred in determining that Drs. Holden and Malis possessed the qualifications necessary to entitle them to express their opinions as to the cause of plaintiff's ultimate condition and as to whether defendant doctor had exercised the proper and requisite degree of skill and care, cannot be upheld. It is for the trial court to determine, in the exercise of a sound discretion, the competency of an expert witness to give his opinion in evidence. Fairbank v. Hughson, 58 Cal. 314. The determination of the competency of a witness to testify as an expert is in itself in the nature of a trial of a question of fact addressed to the judge alone, and as in other decisions on questions of fact by a trial judge, his ruling thereon, being a matter of discretion, will not be overturned on appeal save and except when there is an actual want of evidence to support it or a clear abuse of discretion in ruling upon the evidence proffered upon the subject. When there is any substantial evidence to

support the ruling of the trial judge, it will be upheld. Dr. Holden testified that he was a plastic surgeon, specializing in plastic surgery, licensed to practice in the State of California, and that he had a certificate from the American Board of Otolaryngology, which certificate recognized him as a specialist in his profession. He testified that he had degrees of Doctor of Dental Surgery, Master of Arts, Doctor of Philosophy and Doctor of Medicine; that he was connected with Cedars of Lebanon, Hollywood, and St. Vincent's hospitals; that he first began to practice in Tampa, Florida; that he practiced continuously in Illinois for ten years and in Los Angeles continuously from 1938 to 1939; that he had performed upwards of three thousand operations. While on the Pacific Coast he had performed about four hundred plastic operations; that he had observed two other plastic surgeons in Los Angeles at work; that his knowledge of what the average surgeon practicing plastic surgery in Los Angeles does is based upon what he does himself and upon what he observed these other two physicians do.

[12] Concerning the qualifications of Dr. Malis, he testified that he was a physician and surgeon, first admitted to practice medicine in 1924, and that he specialized in otolaryngology (ear, nose and throat); that he was a graduate of the University of Manitoba, Canada; that he was connected with Cedars of Lebanon Hospital, Queen of Angels Hospital, Mt. Sinai Hospital, Lincoln Hospital, French Hospital and the County Hospital. That he was recognized by the American Board of Otolaryngology by examination which took place in 1929 and again in 1931. That the American Board of Otolaryngology was composed of men picked from the nation, recognized of years standing, teachers and professors, and that this board meets once in two years to examine candidates for this specialty; that he had been so examined and accepted in 1929 and in Los Angeles in 1930, and ever since then had been recognized as a specialist in the treatment of diseases of the nose. That after he arrived in the United States he did post-graduate work at Columbia University and the New York Post-Graduate Hospital. Following that post-graduate work he was a resident surgeon in Newark Eye and Ear Infirmary for one year in 1929. That he had been doing surgery for sixteen years; that most of his cases were intranasal surgery. He testified that he had made a study of the causes of atresia of the nose; that he had seen many cases of atresia; that he had kept up with medical science and learning; that he had undertaken a course in plastic surgery under Professor Vincent Shehan, who was a national authority on plastic surgery. The evidence just recited clearly demonstrates that there was no abuse of discretion in the ruling of the trial judge permitting the witness in question to testify, and we are therefore without authority to disturb such ruling. Johnson v. Western Air Express Corp., 45 Cal.App.2d 614, 630, 631, 114 P.2d 688. The qualifications of another expert witness produced by respondent remain unchallenged by appellant.

[13, 14] An issue is also made by appellant of the fact that no negligence was charged in connection with the second and third operations, and further, that the medical experts who testified at the trial had not made an examination of the plaintiff until over one year after the first operation. Allegations of negligence in regard to the second and third operations were unnecessary, as the evidence reveals that the atresia came into existence after the first operation and before the second, and that all operations after the first were to correct a continuing condition of atresia. If the defendant was shown to have negligently performed the first operation and thereby brought about the condition complained of, it is manifest that further negligence need not be pleaded as to the subsequent operations. Nor does the fact that plaintiff did not consult another physician until a year had elapsed from the time of the first operation impair her cause of action. The fact that she had confidence in the defendant and continued under his care during this period of time without consulting another physician cannot excuse him in any way. Obviously, expert testimony of a physician who examined the plaintiff soon after the first operation was to be desired; however, the testimony of the expert witnesses who examined the plaintiff one year afterward, when her condition was a continuing one, was the best evidence possible under the circumstances and adequate for the purpose. Any other ruling would penalize the plaintiff for her faith in the defendant and place him in an advantageous position to which he is not entitled. In an analogous situation in the case of Trombley v. Kolts, 29 Cal. App.2d 699, 85 P.2d 541, this court held that where the evidence showed that the rela-

tion of physician and patient continued until about four months prior to the commencement of the action, there was a continuing obligation on the part of the physician to treat the patient in a proper manner, and the statute of limitations did not begin to run until the termination of the relation of physician and patient.

[15-17] Finally, appellant insists that the trial court committed prejudicial error in overruling objections made to the form and contents of the hypothetical questions propounded to certain expert witnesses produced at the trial by respondent. In support of this claim it is urged that in propounding the hypothetical questions to Drs. Holden and Malis, the operative technique testified to by appellant doctor as having been used by him was ignored, and that conjectural factors selected by respondent's counsel and not included in the evidence was incorporated in the questions. We have painstakingly read the long hypothetical questions and their repetition here would unduly prolong this opinion; but we are persuaded that appellant's claim is without merit. Taking into consideration the testimony given by appellant doctor on the witness stand and in his deposition which was received in evidence, we are convinced that every hypothesis contained in the questions had some evidence to sustain it. The questions certainly were neither unfair nor misleading. In propounding a hypothetical question, counsel has a right to frame it upon the theory of the questioning party and in accordance with the facts fairly deducible from the evidence. The question need not include a statement of all the evidence in the case. Coyne v. Pacific Mutual Life Ins. Co., 8 Cal.App.2d 104, 111, 112, 47 P.2d 1079. That an opinion is not founded upon all the facts of the case goes to the weight of such evidence and not to its competency or materiality. McCollum v. Barr, 38 Cal.App. 411, 176 P. 463; Reardon v. Richmond Land Co., 21 Cal.App. 357, 131 P. 894; 10 Cal.Jur. 966, § 223. Nor does the fact that the opinion of an expert that the treatments of the physician were improper is based upon the result of recovery deprive the court or jury of the right to predicate a finding of negligence upon such expert testimony. Kershaw v. Tilbury, supra, 214 Cal. at page 692, 8 P.2d 109. Certainly no prejudice resulted to appellant from the form or contents of the hypothetical questions.

[18] Appellant next challenges the qualifications of Dr. Malis and the admissibility of his opinion, for the asserted reason that the witness was not a plastic surgeon. Our attention is not directed to any rule, nor do we know of any, which militates against a physician trained in one school of medicine from testifying in a proper case concerning a treatment by a physician and surgeon trained in a different school. While such objection might be made in a malpractice case where the charges of negligence were directed against some special course of treatment to be tested by the teachings and doctrines of a particular school, it can have no applicability to a case like the instant one, where the general charges of negligence relate to matters within the knowledge and observation of every physician and surgeon, particularly so, where, as here, the witness testified that he had made a study of the causes of atresia; that he had seen many cases of it; that he had kept up on medical science and learning; that he had undertaken a course of plastic surgery under Professor Vincent Shehan, a national authority on the subject; and that he had watched various plastic surgeons work, including Drs. Smith, Kiskadden, Updegraff, Holden and Ginsberg. Manifestly, the court was guilty of no abuse of discretion in permitting this witness to answer the hypothetical question propounded to him covering the standard of care exercised by the hypothetical plastic surgeon referred to in the question and giving his opinion as to the cause of the atresia from which the plaintiff was suffering. Abos v. Martyn, 31 Cal.App.2d 705, 713, 88 P.2d 797; Ellinwood v. McCoy, 8 Cal.App.2d 590, 593, 47 P.2d 796; Hutter v. Hommel, 213 Cal. 677, 681, 3 P.2d 554.

The attempted appeal from the order denying the motion for a new trial is dismissed.

For the reasons herein stated, the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

53 Cal.App.2d 136

PERLICK et al. v. PACIFIC DISCOUNT CORPORATION et al.

Civ. 12841.

District Court of Appeal, Second District,
Division 3, California.
June 30, 1942.

1. Pawnbrokers and money lenders 🔑6

Where loans were made by corporation which was licensed personal property broker engaged in business of aviation financing and aviation sales, in 1938 and 1939 before effective date of statute prescribing maximum rate of interest to be charged by personal property brokers, the loans were not subject to usury laws. Const. art. 20, § 22, as amended in 1934; Gen.Laws 1939 Supp.Act 5825.

2. Fraud 🔑10, 11(1)

Where plaintiffs obtained loan from defendants who did not occupy confidential relation toward plaintiffs, in order to pay airplane repair bill, statement of defendants that only way they could be secured for repayment of loan was by transfer of title of airplane to lending corporation which would give back option to repurchase, was statement of an "opinion" concerning a legal question and did not constitute "fraud" on the plaintiffs, since plaintiffs were not justified in relying on the statement.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud" and "Opinion".

3. Trover and conversion 🔑24

A transferee of title to an airplane who held title in trust for purchaser had a "qualified" or "limited interest" in the airplane and as such was entitled, together with the purchaser, to maintain an action for conversion of the airplane.

See Words and Phrases, Permanent Edition, for all other definitions of "Limited Interest" and "Qualified Interest".

4. Set-off and counterclaim 🔑28(1)

Where plaintiffs recovered judgment for conversion of airplane by defendants to whom title to airplane had been transferred as security for loan, the defendants were entitled to credit for unpaid balance of the loan.

5. Chattel mortgages 🔑39

Evidence sustained finding that transaction between plaintiffs and defendants, to whom airplane was transferred, was a loan transaction whereby the defendants were secured by lien on the airplane evidenced by bill of sale and option to repurchase, and was not a sale of the airplane to the defendants.

6. Chattel mortgages 🔑249

If defendants who had lien on airplane to secure loan were entitled to foreclose the lien, their remedy was foreclosure by a proper legal proceeding.

7. Chattel mortgages 🔑169

Where the defendants who had lien on airplane to secure loan did not foreclose lien by proper legal proceeding, action of defendants in moving the airplane and removing therefrom and selling flying instruments, was a "conversion" of the airplane.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

8. Evidence 🔑462

In action for conversion of airplane, parol evidence was admissible to show that bill of sale to airplane, executed in defendant's favor, and option to repurchase given to plaintiff represented a security transaction rather than an absolute transfer of title with right to repurchase, where the evidence was admitted not to alter the written instruments, but to show the purpose for which they were executed.

9. Chattel mortgages 🔑176(5)

Where loan secured by lien on airplane was made at high rate of interest by defendants and on four successive days defendants refused to accept full payment of principal and interest due, and defendants broke glass in door of airplane, detached door, carried away and sold important flying instruments, removed airplane from hangar, had it stored in another hangar, and refused to release it on demand after adequate tender of full payment of loan, plaintiffs who brought action for conversion of the airplane were entitled to recover exemplary damages. Civ.Code, § 3294.

10. Trespass 🔑56

Where trespass is committed from wanton or malicious motives, or reckless disregard of rights of others, or under circumstances of great hardship and oppression the rule of "compensation" is not adhered to and the measure and amount of damages are for the jury alone. Civ.Code, § 3294.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation".

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Robert E. Perlick, and another, against the Pacific Discount Corporation, and others, for conversion of an airplane. From an adverse judgment, defendants appeal.

Judgment modified and as modified affirmed.

Helgoe & Hart and Bartlett & Kearney, all of Los Angeles, for appellants.

Biby & Biby, John E. Biby, and Peter D. Knecht, all of Los Angeles, for respondents.

PARKER WOOD, Justice.

In this action for conversion of an airplane judgment was for plaintiffs for $7,000 actual damages against the three defendants and $3,000 exemplary damages against the two individual defendants.

The trial court found that plaintiff Smith purchased a Beechcraft racing airplane in August, 1937, by transferring to the seller certain shares of stock which had a book value of $12,500; that plaintiff expended more than $6,000 in reconditioning the plane; that in August, 1938, Smith transferred the title to the plane to plaintiff Perlick in trust for Smith; that on December 21, 1938, plaintiffs were indebted to certain persons in the amount of $2,200 for repair work on the plane; on that day plaintiffs requested defendants to loan them said amount for the purpose of paying the creditors and stated to defendants that one of the creditors was threatening to sell the plane unless he was paid immediately; that defendants said they would loan said sum for 90 days provided plaintiffs would pay $220 interest and that the only way they could do that would be for Perlick to transfer the title to the plane to defendant, Pacific Discount Corporation, and to take an option to repurchase the plane for $2,420; that thereupon defendants prepared a bill of sale (in the usual form) which was signed and executed by Perlick whereby the title to the plane was transferred to defendant Pacific Discount Corporation; that thereupon defendants prepared a writing whereby defendant Pacific Discount Corporation gave Perlick the right to purchase the plane from said defendant at any time within 90 days from said December 21, 1938, for $2,420, and said writing was executed by Pacific Discount Corporation and Perlick; that said corporation paid $2,200 to Perlick by several checks payable to Perlick in the various amounts due from Perlick to different creditors; that a few days prior to the expiration of the 90-day period plaintiffs told defendants that plaintiffs would not be able to pay said $2,420 at the expiration of said period and defendants said they would extend the time if plaintiffs would pay for the use of said $2,420 at the same rate charged for the use of $2,200 which additional charge for 30 days would be $40.33; that defendants did not at any time prior to April 27, 1939, have possession of or the right to control said plane; that plaintiffs did not, nor did either of them, sell said plane to defendants, and said transfer of title was for the purpose of securing the repayment of said $2,200 and the charge for the use of said money; that on April 24, 25 and 26, 1939, plaintiffs tendered payment of said $2,460.33 to Pacific Discount Corporation, being $2,200 principal and said further sums of $220 and $40.33, but said tenders were refused; that on April 27, 1939, plaintiffs tendered payment of $2,500 to said defendant, but the same was refused; that defendants Groenendyke and Huntington were the president and secretary, respectively, and the managers of said corporation; that on April 26, 1939, and for more than six months prior thereto, plaintiffs were the owners of said plane and were in actual and lawful possession of the same; that on April 26, the defendants without the knowledge or consent of either of the plaintiffs and without any right so to do, entered the hangar where plaintiffs had the plane stored, forcibly broke the door of said plane and removed the plane to another hangar of their own selection, and thereby converted said plane to their own use; that defendants removed certain instruments from said plane and disposed of them without the knowledge or consent of plaintiffs; that on April 27, 1939, plaintiffs demanded the release of said plane but such demand was refused; that the value of the plane on April 26, 1939, was $7,000, and this sum was the amount of loss to plaintiffs as the result of the acts of defendants; that such acts of said defendants, Groenendyke and Huntington, were wilful, wanton, malicious, fraudulent, and in reckless disregard of plaintiffs' rights and they took an unfair and inequitable advantage of plaintiffs.

The trial court made a conclusion of law that the rate of interest charged was usurious.

The defendants appeal and assert that the judgment is erroneous for the reasons (1) that the question of usury is not involved; (2) that defendants were not guilty of fraud; (3) that judgment should not have been for Perlick for either actual or exemplary damages; (4) certain findings were contradictory; (5) the evidence was insufficient to support the finding that plaintiff did not sell the airplane to defendants; (6) the evidence was insufficient to support the finding that defendants converted it; (7) parol evidence should not have been received to vary the terms of the bill of sale and option agreement; and (8) there was no justification for exemplary damages.

These points will be considered in the order above stated.

[1] (1) Defendant Pacific Discount Corporation was in the business of aviation financing and aviation sales. It was a licensed personal property broker. Section 22, article XX, of the state Constitution (relating to interest rates), adopted in 1934, which was in effect at the time of the transactions herein, provided in paragraph 3 thereof that the restrictions therein relative to the rate of interest that might be charged should not apply to any duly licensed personal property broker. Although said section authorized the Legislature to prescribe the maximum rate of interest to be charged by such brokers, such an enactment had not been made at the time of the transactions herein. Therefore, since the adoption of said section of the Constitution (until 1939 when the Legislature prescribed such rates, Deering's Gen.Laws, 1939 Supp., Act 5825) there was no statutory or constitutional provision of law limiting the amount of interest which a personal property broker may charge. Wolf v. Pacific Southwest Discount Corp., 1937, 10 Cal.2d 183, 184, 74 P.2d 263; Matulich v. Marlo Investment Co., 1936, 7 Cal.2d 374, 60 P.2d 842. Appellants' contention that usury is not involved in this case is correct.

[2] (2) The finding that appellants were guilty of fraud in stating to respondents that the only way they could be secured for the repayment of the loan would be for respondents to transfer the title to the plane to defendant corporation and for it to give back an option to repurchase, cannot be sustained. Such statement was an opinion concerning a legal question, defendants did not occupy a confidential relation toward appellants, and the circumstances were not such as to justify respondents in relying upon the statement. Bank of America v. Sanchez, 1934, 3 Cal. App.2d 238, 242, 38 P.2d 787.

[3] (3) It was not error to include Perlick as one in whose favor judgment was rendered. The plane was transferred to Perlick in August, 1938. He did not pay any consideration for it and it was not a gift from Smith. The court found that Perlick held the title to the plane in trust for Smith and was in possession of the plane. Smith prosecuted the action himself and through his trustee Perlick. Perlick had a qualified or limited interest, as trustee, in the plane and as such was entitled to maintain the action. In Goldberg v. List, 1938, 11 Cal.2d 389, at page 394, 79 P.2d 1087, at page 1090, 116 A.L.R. 900, it was stated, "the reason for the rule permitting recovery by the owner of a qualified or limited interest of the full value of personal property converted, rests * * * upon the fact that the owner of the qualified interest in addition to his own loss sustains a liability toward one owning a superior interest, which will need to be satisfied."

[4] (4) Appellants claim the finding that respondents were damaged $7,000 for the value of the plane is contradictory to the finding that appellants loaned plaintiff $2,200; that the result is that appellants have judgment for the value of the plane and no credit has been given for the $2,200 received; that it is impossible to determine which finding controlled the judgment of the court. In plaintiffs' (respondents') complaint they admit the $2,200 is due to defendant corporation and offer to do whatever the court deems equitable. The trial court did not allow credit for said sum or interest thereon for the reason, apparently, that it considered that usury was involved but, as shown herein, the usury law did not apply in this case. Respondents concede that the allowance was not made; we think it should have been made.

[5] (5) The evidence was sufficient to support the finding that plaintiff did not sell the plane to defendants.

Perlick testified that in August, 1938, he told Groenendyke he wanted to get money to get the ship out for the race;

Groenendyke said he could not loan money on an X license ship (meaning a plane used for experimental and racing purposes); similar conversation was had in October, 1938, and at many times thereafter; about two days before December 21, 1938, Groenendyke and Huntington told him they could loan $2,000 on the plane; on December 21st, he told Huntington that he hated to borrow on the airplane and pay what it would cost to borrow in that way but it would be better than losing the plane; after the contract was prepared for a loan of $2,100, Perlick said he thought it would not cover the bills and he might need more, and Huntington said, "Well we can let you have some more," a hundred dollars more; Huntington said the only way they could do it would be to draw up a bill of sale with a 90-day option to repurchase for $2,420 and that the difference of $220 would be the charge for the 90 days; the bills were paid by checks drawn by defendant corporation payable to Perlick for the various amounts of the bills and were indorsed by Perlick to the different creditors; after January, 1939, he talked to Groenendyke a number of times about money he had coming to take care of the loan; shortly before March 20, 1939, he told Groenendyke that a person wanted to refinance the plane but since the plane was stored and covered with insurance he (Perlick) thought it seemed foolish to draw up a new contract with another finance company when defendants were in the business and could let the loan ride; during another conversation about the same time, when Smith was present, Smith said he wanted to be sure not to lose the plane, that he could arrange to get the money and take care of the loan if it had to be paid but it would be a convenience if it could be carried along, and Groenendyke said that would be all right.

Smith testified that he talked with Groenendyke by telephone about November 1, 1938, and Groenendyke said that Perlick was trying to make a loan on the plane, that there was some possibility of it being worked out and that the same rates as previously mentioned would apply; Smith said if they cared to make a loan at 10 per cent or 12 per cent to go ahead with it, but not at 20 per cent, and Groenendyke said he would not consider it; that his next talk with Groenendyke was at the hangar in the presence of Perlick on March 15th, when Smith asked if he would extend the loan and he said he didn't see any reason why it could not be extended, that they didn't need the money and were willing to let it ride.

Witness Holley, an employee of Smith, testified that he had a conversation with Groenendyke in April, 1939, wherein Holley asked him what was owed and when Groenendyke gave him the figures he (Holley) wrote them on a paper (an exhibit) the way Groenendyke gave them to him,—$2,200, $220 charges and $40.33 interest that was overdue.

The fact that the $40.33, which was charged at the time of the conversation regarding an extension for 30 days, is precisely the same amount as interest would be on $2,420 for 30 days at 20 per cent per annum is an indication that the transaction was a loan.

Defendant Groenendyke testified that he was in the aviation financing and sales business; that in October, 1938, Perlick asked for a loan on the plane and he told Perlick he could not make a loan on an X license; the subject was discussed with Perlick to the same effect several times later; about December 15th, Perlick mentioned a loan of $2,000 but it was refused and at that time Groenendyke talked with Smith by telephone but did not remember anything being said about interest and interest was never mentioned in any of the conversations with Perlick; on December 20th, Perlick told him the plane was to be sold the next day by the sheriff for a mechanic's lien on the plane unless he was able to make a loan on the plane, and Groenendyke said they were unable to make the loan but would purchase the plane for $2,200 and give Perlick an option to repurchase it after a 90-day period for $2,420; that they could not loan on the X license because it was an experimental plane and had no resale value; the idea of buying it and selling it was to make a profit; that he told Perlick the $220 was 10 per cent and the regular commission on a sale; that although they had purchased the plane and were the owners they would charge 10 per cent commission to the person to whom the sale was made rather than the one (themselves) for whom it was made; on December 21st, Perlick said he would accept the offer, nothing was said about a loan or interest; didn't recall any conversation with Smith before the transaction; bill of sale and option were prepared by Huntington; Perlick said it was a high rate of interest and it was better for him to pay it than to lose the plane, but they pointed out to Perlick that it was not interest but commission; after the transaction they told the airport to hold the plane in the name of defendants; they never had a key to the plane and the plane was locked; they had no examination made of the plane by a mechanic before purchasing it; they did not pay delinquent taxes other than as a part of the $2,200 loaned; did not have the motor turned over to protect it while it was in dead storage; that he (Groenendyke) wrote a letter on March 24, 1939, as president of the Pacific Discount Corporation to Perlick which stated: "Your contract on Beechcraft * * * became due and payable March 21, 1939. We have called several times regarding paying off the balance due, but to date have been stalled along from day to day. You must realize that under the terms of the agreement that if this ship was not picked up before the 21st of March the property automatically becomes ours. We realize that you have needed a few extra days to settle this matter and have granted them to you, but we must have this situation cleared in full by Monday, the 27th of March. We are only too willing to work with you, but feel that we have granted as much time as we possibly can. Hoping to have your check in full by or before Monday, March 27, we remain Sincerely, * * *."

Defendant Huntington testified in substance the same as Groenendyke.

Witness Mrs. Pierce, employed as secretary by defendants, testified that Huntington called her into his office on December 21st, when Perlick was there and said Perlick was selling the plane to the defendant corporation.

This evidence warranted the court in holding that the transaction was not a sale. The letter of March 24th, from Groenendyke above set forth demanding payment and stating if payment was not made "the property automatically becomes ours" and "hoping to have your check in full" is strong refutation of the present claim of appellants that the transaction was a sale and supports the finding that it was a loan whereby defendants were secured by a lien on the plane evidenced by a bill of sale and an option to repurchase.

In Teater v. Good Hope Dev. Corp., 1939, 14 Cal.2d 196, at page 209, 93 P.2d 112, at page 119, it was stated in quoting another case with approval: " 'It is the general rule that where the purpose and effect of the transaction is to create a lien on specific property as security for the payment of a debt it constitutes a mortgage, irrespective of the language used by the parties.' "

In Bonestell v. Western Auto-Motive Finance Corp., 1924, 69 Cal.App. 719, at page 723, 232 P. 734, at page 735, it was said: "The whole transaction, though couched in the form of a bill of sale * * * and a conditional agreement of sale * * * was simply a device to secure the repayment of the sum of * * * loaned by the appellant * * *." See, also, Mercantile A. Corp. v. Pioneer C. I. Co., 1932, 124 Cal.App. 593, 597, 12 P.2d 988, citing last case above mentioned.

In Paladini v. Durchman, 1932, 216 Cal. 212, 214, 13 P.2d 731, 732, it was stated: "We are satisfied that the purported 'bill of sale' legally constitutes nothing more than a chattel mortgage given as security for the repayment of the money * * *."

The case of Blodgett v. Rheinschild, 1922, 56 Cal.App. 728, 732, 206 P. 674, 675, states: "* * * if plaintiff ever had any right to the possession of the automobile it was only because he had a mortgage lien on the car, created by defendant's execution of the bill of sale and the so-called 'lease.' "

(6) The evidence was sufficient to support the finding that defendants converted the airplane.

In addition to the above mentioned evidence, and more particularly upon the subject of conversion, there was testimony as follows:

By Perlick: That payment of the amount due, $2,460.33, was tendered defendants on April 24, 25 and 26, 1939, but was not accepted although no objection was made as to the form of the tender; on April 26th, Huntington said the plane was no good and Smith replied the plane was worth $20,000 to him and that he had a check there to pay everything against the plane; after that conversation Perlick and Smith left Huntington's office and went to the plane and found that the glass in the door of the plane had been broken, the door taken off and six principal flying instruments had been removed; Perlick kept the plane key at home, no request was ever made to deliver the key to the defendants; the plane was removed to another hangar by defendants without his knowledge or consent.

By witness Morgan, janitor at the hangar: That Groenendyke told him in April, 1939, to get a broom and pick up some glass by Perlick's ship.

By Groenendyke: That the tenders were not accepted because the option had run out; there was no extension after March 27th, only a verbal extension of the option for two days; Huntington and Groenendyke caused the plane to be moved. The plane was locked at the time. They ordered the window cut in order to move the plane and the window was smashed or cut; did not tell Morgan, the janitor, to sweep up the glass; they sold the instruments.

By Huntington: In substance the same as Groenendyke.

[6, 7] As above shown, defendants had a lien upon the plane to secure their loan. Possession of and title to the plane remained with Perlick. If appellants were entitled to foreclose the lien their remedy was to foreclose it by proper legal proceedings. Bonestell v. Western Auto-Motive Finance Corp., 1924, supra, 69 Cal. App. 719, 726, 232 P. 734. There was no proper proceeding to foreclose the lien. Moving the plane and selling the instruments mentioned was a wrongful assumption of dominion over the plane and was a conversion of it. Blodgett v. Rheinschild, 1922, supra, 56 Cal.App. 728, 738, 206 P. 674; Metheny v. Davis, 1930, 107 Cal. App. 137, 139, 290 P. 91.

[8] (7) It was proper under the issues here presented to receive parol evidence to show that the bill of sale and option were made and given by way of security rather than as an absolute transfer of title with the right to repurchase. Sterman v. Ziem, 1936, 17 Cal.App.2d 414, 419, 62 P.2d 160; Paladini v. Durchman, 1932, supra, 216 Cal. 212, 13 P.2d 731. Under such circumstances parol evidence was admitted, not to alter the terms of the written instruments, but to show the purpose for which they were executed. Barber v. Motor Inv. Co., 1931, 136 Or. 361, 298 P. 216, 217.

[9] (8) There was justification for the award for exemplary damages. The plane was of substantial value as shown by the testimony of witnesses qualified to give an opinion upon that subject. Witnesses for the plaintiffs testified the value was as follows: Three witnesses said $13,000, one said $12,000, another $10,000 and another $9,000. Witnesses for defendants testified the value was as follows: One witness said $2,500, another $1,800, and another said between $3,000 and $4,000. According to the testimony the average life in flying hours of the kind of engine in this plane was 3,000 hours and the plane had been flown about 196 hours. When the loan herein was made, at a high rate of interest—about 40 per cent per annum, defendants knew that Perlick was about to lose the plane by reason of lien foreclosure proceedings; they refused on four successive days to accept full payment of principal and interest; defendants, without the knowledge or consent of plaintiffs and at a time when they knew plaintiffs were able and anxious to pay the loan in full in order to release the lien against the plane, broke the glass in the door of the plane, detached the door, carried away and sold six important flying instruments of the approximate value of $720, removed the plane from the hangar where the plaintiffs had it stored to another hangar of defendants' selection; no proper proceedings were had by defendants to obtain possession of the plane or foreclose thereon; on April 27, 1939, after having taken the plane unlawfully they refused, upon demand that the plane be returned, to release it although $2,500 which was more than the full amount due them was tendered by a cashier's check. The defendants Groenendyke and Huntington were guilty of oppression, implied malice, reckless disregard of plaintiffs' rights and taking unfair advantage of plaintiffs.

It is provided in section 3294 of the Civil Code that, "In an action * * * not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff * * * may recover damages for the sake of example * * *."

[10] The case of Dorsey v. Manlove, 1860, 14 Cal. 553, 556, states: "where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the rule of compensation is not adhered to, and the measure and amount of damages are matters for the jury alone."

In the case of Prentice v. Zumwalt, 1932, 124 Cal.App. 646, 13 P.2d 379, the defendant took possession unlawfully of plaintiff's farm machinery. Over plaintiff's strenuous protest it was loaded and hauled away.

While it was being loaded plaintiff tendered payment in full and it was refused. Defendant had purchased plaintiff's note secured by a mortgage on the machinery and, in taking possession of the machinery under a provision in the mortgage, was attempting to attach it and collect a balance he claimed to be due on other farm machinery voluntarily returned to defendant by plaintiff because it was not satisfactory. The court said at page 652 of 124 Cal.App., at page 381 of 13 P.2d, "A refusal to surrender the possession of the property when an adequate valid tender was made, rendered the defendant liable for all damages which accrued therefrom." It was stated further on that page, "These circumstances furnish adequate evidence of implied malice and oppression."

In Booth v. People's Finance, etc., Co., 1932, 124 Cal.App. 131, 12 P.2d 50, the defendants took possession of plaintiff's automobile unlawfully while it was parked in front of defendants' office and plaintiff was preparing to pay defendants the balance due on the automobile. The court said at page 145 of 124 Cal.App., at page 55 of 12 P.2d, "but, the taking being held wrongful, the refusal of the defendants to accept payment of the remainder of the purchase price of the automobile furnishes some basis for supporting the verdict of punitive damages, even though it may be slight." That case also states (page 144 of 124 Cal.App., page 55 of 12 P.2d), "The conduct of the defendant * * * subsequent to the taking of possession of the automobile, and his refusal to redeliver the same, and also his actions when the plaintiff sought to make settlement of the entire balance * * * does furnish some basis for holding that the defendant * * * exhibited a malicious purpose." The "conduct" and "actions" of defendant mentioned in that quotation refer to his refusal to redeliver and to accept payment, and to a statement by him that, "That's the way I treat people who fight me." (This referred to a replevin action by plaintiff against defendant.)

In the present case the basis for exemplary damages was not a slight basis of a refusal to accept full payment, but included four refusals to accept full payment, acts of secretly and forcibly breaking into the locked plane, detaching, carrying away and selling important flying instruments of substantial value, wrongfully and secretly removing the whole plane to a hangar of their own selection and refusing to release it upon demand after adequate tender of full payment.

As above stated a credit of $2,460.33, the amount of the loan and interest, should be allowed appellants. The judgment is modified accordingly.

As so modified the judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

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53 Cal.App.2d 130

SATTINGER v. GOLDEN STATE GLASS CORPORATION.

Civ. 12790.

District Court of Appeal, Second District, Division 3, California.

June 30, 1942.

Hearing Denied Aug. 27, 1942.

1. Corporations 🔑320(4)

A corporation was "necessary party" to action by its president, who owned third of its stock, as director thereof, to remove, and recover damages in corporation's behalf from, two other directors, who were its vice president and secretary and owned remaining stock. Civ.Code, § 310.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

2. Corporations 🔑519(3)

In action against corporation for attorney's fees, evidence *held* sufficient to support trial court's finding that two of defendant's three active directors entered into oral contract for defendant's employment of plaintiff as attorney to represent it in third director's pending action against contracting directors and corporation to remove and recover damages in corporation's behalf from such directors.

3. Corporations 🔑397, 407(1)

Two of corporation's three active directors, owning all of its stock, had authority, without resolution of board duly assembled, to employ attorney in corporation's behalf to represent it in third director's pending action against corporation and such other directors to remove them and recover damages from them in corporation's behalf.

4. Appeal and error 🔑984(5)
Attorney and client 🔑140

In fixing attorneys' fees, trial court is vested with wide discretion, and its award of such fees will be disturbed on appeal only when palpable abuse of such discretion is manifest.

5. Attorney and client 🔑141

The superior court's award of $5,100 fee to corporation's attorney for attending hearings in director's action against corporation and other directors to remove them and recover damages from them in corporation's behalf, preparing and presenting petitions for writs of prohibition and mandamus, preparing cross-complaint against plaintiff, and devoting 12 days to trial, six partial days in connection with plaintiff's deposition, and seven days in preparing pleadings, findings, etc., *held* not abuse of discretion as excessive.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action by O. C. Sattinger against the Golden State Glass Corporation for attorney's fees. Judgment for plaintiff, and defendant appeals.

Affirmed.

Glen Behymer and Newby & Newby, all of Los Angeles, for appellant

O. C. Sattinger in pro. per., and Frank M. Gunter, both of Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff, an attorney at law, obtained judgment against defendant for $5,100 for legal services rendered. Defendant appeals and asserts that the judgment was erroneous for the reasons (1) there was no evidence to support the finding of employment of plaintiff by defendant, (2) the evidence as to estoppel was admitted without any pleading alleging the facts constituting the estoppel, and (3) the amount of the judgment was excessive.

An action was pending in the superior court at Los Angeles entitled "G. C. DeGarmo, Plaintiff, v. A. Goldman, N. E. Shenberg, and Golden State Glass Corporation, Defendants," wherein the plaintiff therein as one of the directors of the corporation defendant was seeking to remove the two other directors, Shenberg and Goldman, and to recover damages from them in behalf of the corporation. A receiver pendente lite of said corporation had been appointed.

The plaintiff herein testified that on the day after the receiver was appointed he was called to the office of an attorney at which place defendants Shenberg and Goldman were present, and plaintiff asked how and when he would be paid in connection with his employment by and representation of the corporation in the then pending case; that the attorney said in the presence of Shenberg and Goldman that they had no money to pay him at that time but when the receivership was vacated in the trial court the corporation would pay him; that if it became necessary to appeal or obtain an extraordinary writ he would be paid at the time the decision became final; the plaintiff also asked about payment for services in the trial of the case and any work other than in the receivership matter, and the attorney said the corporation could not pay for that work at that time either but he would be paid from time to time; the attorney asked Shenberg and Goldman if they were agreeable to the matter as outlined to plaintiff and they nodded assent and one said he was "agreeable."

Defendant Goldman testified that such conversation did not take place in his presence; that nothing was mentioned regarding compensation. On cross-examination he testified that he was discharged by the receiver, was out of the employment of the corporation for a year, but he was in such employment at the time of the trial at a salary of $350 a month; that he verified the petition for writs of prohibition and mandamus which plaintiff prepared and filed, which verification included a statement that "N. Shenberg * * * A. Goldman, secretary of the corporation, and as the only two directors of said corporation who are not plaintiffs in said action, employed petitioner, Oscar C. Sattinger, to represent said corporation * * * and to oppose said order to show cause and take all necessary steps * * * and discharge said receiver." (The petition for writ of prohibition was to prevent the enforcement of orders made in appointing the receiver. The petition for writ of mandamus was to require the trial court to recognize plaintiff as attorney for the corporation.)

There were two plaintiffs, Mr. DeGarmo and Mr. Crane, in the action referred to, when the complaint was filed and when the trial court refused to recognize the plaintiff in the present action (Mr. Sattinger) as attorney for the corporation. It seems that one of the reasons plaintiff was not recognized by the trial court as such attorney was that two directors were plaintiffs and two were defendants and that since the two defendants did not constitute a majority of the directors they did not have authority to employ an attorney for the corporation. Later Mr. Crane made a motion to be released as a party to the action upon the ground that he had been made a party without his knowledge or consent, and the motion was granted. (It appears that the stock which stood in his name was held by him as trustee for Mr. DeGarmo.)

Soon after plaintiff started to act as attorney for the corporation, Mr. DeGarmo, as president of the corporation, wrote a letter to plaintiff stating that the board of directors had not employed plaintiff, that Shenberg and Goldman had no authority to employ him, and that he had no right to represent the corporation.

Plaintiff testified further that, in connection with the receivership matter, he attended the various hearings in the superior court and the District Court of Appeal and prepared and presented the petition for said writs of prohibition and mandamus in the Supreme Court; that the writs were issued, the receivership was vacated and he was permitted to appear as attorney for the corporation; that he devoted twenty-eight days to the receivership phase of the case and that the reasonable value of his services in such matter was $5,000; that in connection with the main case he prepared a cross-complaint against plaintiff DeGarmo to recover fees and salary paid to DeGarmo by the corporation; that he devoted twelve days in the trial of the case, and six partial days, about one-half of each day, in connection with the deposition of Mr. DeGarmo, and seven days in preparation of pleadings, findings, etc.; that the reasonable value of his services in the main case was $2,100.

Mr. DeGarmo, an attorney at law, plaintiff in the case referred to, an owner of one-half of the voting stock and one-third of the capital stock of the corporation, testified that the services rendered by plaintiff Sattinger were of no value; that the reasons for such opinion were: that when the receiver was appointed the organization remained intact except Goldman was discharged; that before the receivership matter was determined finally the case had been tried on its merits, the receiver discharged and the assets turned over to DeGarmo as president; that Shenberg walked out (the judgment removed him); that as to the trial the corporation was not concerned, no relief was asked against it, only the removal of the two directors was sought; that attorneys other than Mr. Sattinger conducted the trial for the defense, except that plaintiff did ask leave to file the cross-complaint and there was some argument about it.

[1] The corporation was a necessary party in said action. Civ.Code, § 310. The plaintiff in that action was president of the corporation and owned one-third of the capital stock of the corporation. The defendants, Shenberg and Goldman, were vice-president and secretary, respectively; each owned one-third of the capital stock and they were the actual operators of the business.

[2] The finding of the trial court in the action now before us that "the plaintiff and defendant entered into an oral contract with N. E. Shenberg and A. Goldman acting for the said defendant, * * * whereby defendant employed the plaintiff as its attorney to represent it," is supported substantially by the evidence, as shown by the evidence hereinabove referred to concerning the conversation relative to plaintiff's services and compensation. Although Goldman said he was not present, the trial court found to the contrary.

[3] Under the circumstances here presented Shenberg and Goldman had authority to employ an attorney in behalf of the corporation. Golden State Glass Corporation v. Superior Court, 1939, 13 Cal.2d 384, 396, 90 P.2d 75. In the case just cited the defendant corporation herein, the plaintiff herein, Shenberg and Goldman were petitioners in the Supreme Court for a writ of mandamus to require the superior court to recognize the plaintiff herein as attorney for said corporation in the action concerning which plaintiff is now suing for attorney's fees. The writ of mandamus was granted and the plaintiff herein was permitted to appear as attorney for said corporation. The Supreme Court stated at page 396 of said case in 13 Cal.2d at page 81 of 90 P.2d:

"Petitioners' contention that the trial court should have recognized Sattinger as attorney for the corporation must also be sustained. The commencement of the litigation by DeGarmo made necessary the appointment of an attorney for the corporation. At that time it had four directors, but only DeGarmo, Shenberg and Goldman actively participated in the direction of the corporate affairs. By the uncontradicted affidavits of Goldman and Shenberg it appears that Crane acquired his two shares of stock in 1936 for the purpose of representing DeGarmo's interest during his absence on a long vacation trip. The agreements between DeGarmo, Shenberg and Goldman which are set forth in the complaint recite that these three men are the sole owners of the stock of the corporation. Unquestionably, Crane has no interest in the defendant corporation and the record includes an affidavit quoting Crane as saying that the action was filed without his knowledge or consent.

"Under such circumstances the superior court should have recognized the attorney employed by the two directors owning two-thirds of the corporate stock and in actual control of the corporation's business affairs."

There was no resolution of the board of directors employing plaintiff. Appellant states that the board of directors must be duly assembled when contracts are authorized in order to bind the corporation. In the mandamus proceeding, just cited, involving this issue, the Supreme Court stated further at page 396 of 13 Cal.2d, at page 81 of 90 P.2d: "In Streeten v. Robinson, 102 Cal. 542, 36 P. 946, 947, where the vice-president, then actually managing the business of the corporation, employed an attorney without approval of the board of directors this court held such action proper, the court saying: 'The authority of the president or other head of a corporation to employ an attorney when the exigencies of his company require it has been frequently recognized. (Citing cases.)'"

As above stated, the trial court found that the parties entered into a contract whereby plaintiff was to render legal services for defendant. Appellant contends that irrespective of what was said or done by Shenberg and Goldman at the time of making the alleged contract, Shenberg and Goldman did not have authority legally to employ plaintiff as attorney for the defendant corporation. The testimony upon which the trial court found that such contract was made was in substance a recital of the same circumstances as those stated in said opinion of the Supreme Court, in the mandamus proceeding, as the basis for its decision that Shenberg and Goldman were authorized legally to employ plaintiff as attorney for the corporation. It must therefore be recognized in this case, irrespective of whether the fact is res judicata, that said opinion of the Supreme Court, based upon practically the identical circumstances involved herein, is directly in point as to the law applicable in the present case upon the issue concerning the authority of Shenberg and Goldman to bind the corporation.

[4, 5] Appellant claims that the amount awarded as attorney fees was excessive. The substance of the testimony concerning the legal services rendered and the reasonable value thereof has been stated hereinabove. In the case of the City of Los Angeles v. Los Angeles-Inyo Farms Co., 1933, 134 Cal.App. 268, 274, 25 P.2d 224, 227, it was stated, "The rule is established that, in fixing the fees of attorneys, the court is vested with a wide discretion and the court's award of an amount for such fees will be disturbed only when it is manifest that there has been a palpable abuse of such discretion." There was no abuse of discretion in this case.

It is to be noted that the purport of the testimony of Mr. De Garmo was, in part, that the legal services of plaintiff were of no value because the two defendant directors were removed by the judgment of the trial court. It is to be noted further, that since that testimony was given the Supreme Court reversed the judgment of the trial court in that case. DeGarmo v. Goldman, et al., 1942, 19 Cal.2d 755, 123 P.2d 1.

By reason of the ruling herein as to the sufficiency of the evidence to support the finding of employment, it will not be necessary to discuss respondent's claim of res judicata or estoppel, or appellant's contention that evidence as to estoppel should not have been admitted without a pleading thereon.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

53 Cal.App.2d 186

KOBIDA v. HINKELMANN.

Civ. 11733.

District Court of Appeal, First District, Division 1, California.

July 1, 1942.

1. Trusts 🔑43(1)

A voluntary trust may be proved by parol evidence, but the evidence must be clear, satisfactory, and convincing. Civ.Code, § 2221, subds. 1, 2.

2. Appeal and error 🔑1009(4)

Whether oral evidence introduced to establish a voluntary trust is clear, satisfactory and convincing, must be determined by the trial court, and where such determination is not wanting in evidentiary support, a reviewing court must accept such determination as conclusive. Civ.Code, § 2221, subds. 1, 2.

3. Appeal and error 🔑989

In passing on the question whether trial court's finding is justified by the evidence, it is necessary that a reviewing court take into consideration all of the evidence, rather than certain disconnected portions thereof.

4. Trusts 🔑44(1)

In action to establish against deceased's estate an alleged oral trust whereby for a period of 16 years son allegedly turned over to deceased his earnings pursuant to an agreement that deceased would save and invest the money for the son's use and on demand return it to him together with the earnings thereof, evidence was sufficiently clear and convincing to establish a trust. Civ.Code, §§ 2221, subds. 1, 2, 2222.

5. Trial 🔑395(1)

In action to establish against deceased's estate an alleged oral trust, judgment for plaintiff was sufficiently supported by findings covering the matter of creation of the trust, and amount of trust funds for which deceased was responsible to son at time of her death, and that the full amount thereof was on deposit in her name or invested in securities held by her at time of her death. Civ.Code, §§ 2221, subds. 1, 2, 2222.

6. Trusts 🔑352

The trustee of an express trust, by converting the corpus of trust into cash and depositing the cash in his own name in bank, cannot thereby relieve himself of his duty to render an account of his trust and relegate beneficiary to the position of a "general creditor" of himself or of his solvent estate, and on such trustee's death, leaving a solvent estate with no creditors, beneficiary is not required to present a claim against the estate, but may proceed in equity against the fund of the trustee with which the trust moneys were intermingled. Civ. Code, §§ 2221, 2222.

See Words and Phrases, Permanent Edition, for all other definitions of "General Creditor".

7. Trusts 🔑358(1)

Though a cestui cannot follow trust funds unless he can trace them into the specific property involved, the degree of identification required in an action between the cestui and the trustee is far less than where the trustee is insolvent, and the rights of creditors are involved.

8. Trusts 🔑352

Where the money of a trustor can be traced into a particular fund or deposit, though it be mingled with other money, the beneficiary may enforce the trust.

9. Trusts 🔑365(2)

Where by the terms of oral trust mother was to hold money for son and keep it invested for him until he asked for the return thereof, and if he did not ask for its return before her death, it would be left to him at that time, and son did not ask for a return of the money during the mother's lifetime, and she made no provision for its return to him on her death in April, and the son instituted an action against her administrator to establish and enforce the trust the following September, action was not barred by "laches" or limitations, since limitations did not start to run until trust was repudiated.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Roy Kobida against Adolf Hinkelmann, as administrator of the estate of Amalia Hinkelmann, deceased, to establish and have enforced an alleged express oral trust involving personalty. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment affirmed.

Kenneth L. White, of San Francisco, and J. W. O'Neill and Donahue, Richards & Hamlin, all of Oakland, for appellant.

Grennan & Ripley, of Oakland, for respondent.

KNIGHT, Justice.

Defendant appeals from a judgment in plaintiff's favor in an action to establish and have enforced against the estate of Amalia Hinkelmann, deceased, an alleged express oral trust involving personal property. The plaintiff, Roy Kobida, is the surviving son of the decedent and Joseph Kobida, who predeceased her. The mother died intestate in April, 1939, leaving surviving her as heirs at law the plaintiff, aged 42 years, another son two years younger than plaintiff, and her second husband, Adolf Hinkelmann, who was appointed administrator of her estate and is the defendant herein. The complaint in the present action was filed in September, 1939, and is based on allegations to the effect that for a period of 16 years beginning in 1912 plaintiff turned over his earnings to his mother pursuant to an agreement with her that she would save and invest the money for his use and benefit and on demand return the same to him together with the earnings thereof; that the following property inventoried in her estate represented the accumulations and investments of said trust moneys: savings accounts in banks and other depositaries amounting to $7,350, of which $1,700 was in United States Postal Savings Certificates; three unsecured promissory notes of the total appraised value of $1,410; and two trust deeds securing the payment of promissory notes, one for the appraised value of $9,160 plus interest given by Godfrey and Louise Mezirka, and the other for the face value of $4,500 given by John and Theresa Weber. The answer put in issue the material allegations of the complaint and pleaded the statute of limitations. The trial court found that a trust existed as claimed by plaintiff; that plaintiff's mother at the time of her death "held certain property consisting of money and other evidences of investment in trust for the plaintiff;" that at the time of the trustee's death plaintiff was beneficiary to the extent of $6,000 and gave judgment in his favor for that amount.

[1-4] Section 2221 of the Civil Code provides that "* * * a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty: 1. An intention on the part of the trustor to create a trust, and, 2. The subject, purpose and beneficiary of the trust." And it is well settled that such trusts may be proved by parol evidence, but that the evidence must be "clear, satisfactory and convincing." See Taylor v. Bunnell, 211 Cal. 601, 296 P. 288, and 23 A.L.R., note, p. 1500. In the case of Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947, 952, the term "clear and unequivocal" is used. As first ground of appeal defendant contends that the evidence in the present case does not measure up to the required legal standard. It has been held repeatedly, however, that whether the evidence in any given case is of the character mentioned must be determined by the trial court, and that where such determination is not wanting in evidentiary support a reviewing court must accept such determination as conclusive. 25 Cal.Jur. p. 248; Taylor v. Bunnell, supra; Brison v. Brison, 90 Cal. 323, 334, 27 P. 186; Mead v. Mead, 41 Cal.App. 280, 285, 182 P. 761; Bollinger v. Bollinger, 154 Cal. 695, 703, 99 P. 196; Harris v. Harris, 136 Cal. 379, 384, 69 P. 23. Furthermore, it is held that in passing upon the question of whether the finding of the trial court is justified by the evidence, it is necessary to take into consideration all of the evidence, rather than certain disconnected portions thereof. Brison v. Brison, supra. Viewed in the light of these rules, the record in the present case shows that the trial court's findings in plaintiff's favor on all material issues are amply sustained by evidence consisting not alone of the plaintiff's testimony, but of the testimony of disinterested witnesses and strong corroborative documentary proof.

A fair picture of the background of the family may be had from the following facts, as they appear from the evidence: Plaintiff's father and mother were Czechoslovakians. In 1906 they moved from Chicago to Oakland with their two sons, Roy being then about 12 years old. Thereafter they made Oakland their permanent home. They were illiterate, hard working, thrifty people. For many years Joseph Kobida, the husband and father, worked as a mechanic for the Southern Pacific Company. He died in 1929, leaving two pieces of residential property he and his wife had acquired, and a $2,400 bank account standing in his name, all of which was turned over to her as community property. The mother was queer in some ways, but especially shrewd and thrifty. She was able to read and write very little English, but understood the value of money, and how to earn and save it. The family lived in a small home on an ordinary sized city lot, and besides doing her own housework, Mrs. Kobida found time to earn money in various ways. She did housework for other people, raised goats and sold the milk, raised chickens and sold the eggs, and made and sold wine. She also carried on a personal loan business with neighbors, for amounts ranging up to $500, at high rates of interest. She usually wore old and quaint clothing, and around her own premises frequently went barefooted. Plaintiff left school at the age of twelve. His ability to read was limited, but he was very industrious and apparently inherited his mother's propensities for hard work and frugality. Except for the time he served as an enlisted soldier over seas during the world's war, he lived home almost continuously until 1928; and the evidence shows that his mother had a very deep devotion for him and that he always had unbounded confidence in her judgment and integrity in taking care of and investing his earnings.

With respect to the matter of the creation of the trust plaintiff testified most positively that the understanding he had with his mother about the money he gave her was that she was "taking care" of his money for him, "saving" it for him; that she "invested it" for him; and told him the money would be his whenever he wanted it; that she would say, "now, this money that you are giving me, I am saving it for you and you can have it anytime you want it;" that he did not ask her at any time for the return of any of the money because he did not need it, and if he did not take it, it would come to him when she died. To quote from his testimony: "* * * it was always known that of course when I turned this money over to her, why, she would take care of it for me.

"Q. She was to take care of it for you and leave it to you when she died? A. No, if she died, I would expect it, yes.

"Q. You did not expect it before, did you? A. I didn't have occasion to expect it before. I did not have no need for it." Again, "I always expected the money when she died, but I could get it whenever I wanted it, but I had no occasion to ask for it at any time.

"Q. The only reason you never asked your mother for any money or for the money prior to the time of her death, was because you did not have any occasion for it and did not need it? A. I did not need it, I did not have occasion to."

In strong corroboration of plaintiff's testimony there was introduced in evidence in his behalf a bank book issued by the San Francisco Bank, showing that on January 9, 1931, she opened an account in the name of "Mally Kobida Trustee for Gejza Kobida," and deposited therein $9,346.25. "Mally Kobida" or "Molly Kobida" were the names by which she was generally known; and "Gejza" was apparently one of plaintiff's given names, and she usually referred to him as "her Gejza." Plaintiff further testified that his mother showed him bank books issued to her in her name as trustee for him, and that she told him the money deposited therein was his; that she also showed him Postal Savings Certificates amounting to $1,700, saying the money was his; and that she discussed different investments with him but used her own judgment in making them. And in further corroboration of plaintiff's testimony he produced three disinterested witnesses, all friends and neighbors of Mrs. Kobida, who testified in effect that she had told them that she was saving plaintiff's money for him; that the money she loaned out was not only her money but her son's money. One witness testified that Mrs. Kobida had told her that Roy was a good boy to her, that he gave her all his earnings and she invested them for him; that she had $9,000 in a San Francisco bank that she wouldn't touch because it was Roy's. Another witness called by plaintiff testified that when she asked Mrs. Kobida why she was so saving, she replied that this is for her and her Gejza. She also told the witness that she went over to San Francisco because she made money for herself and her Gejza.

As to the various sums of money plaintiff turned over to his mother, his testimony was in substance as follows: He went to school about a year after they came to California. He had been working at odd jobs in Chicago, and after moving to Oakland continued to work after school and during vacations. From 1912 until he enlisted in the army in 1917 he worked at various jobs as laborer, apprentice and mechanic, earning $22 or $25 a week on some jobs, and as much as $6.40 a day with overtime on others. He lived at home all during this period, except on a couple of jobs where he lived at the job. He testified that he gave his mother all his earnings, and she gave him back what money he needed for spending money. When he worked away from home temporarily, either his board was deducted by his employer from his check, or his mother gave him the money to pay it. She bought his clothes, and once gave him about $75 to buy an automobile. While he was overseas with the army he had $15 a month (approximately half of his pay) sent to his mother, and when he received his bonus of $1,400 he turned it over to her. After the war he worked again at different places as a mechanic, earning as high as $7 a day with overtime, and continued to turn over all his wages to his mother, and she gave him back what spending money he wanted, amounting to about $3 a week. For a period of five or six months he engaged in the automobile repair business with his brother, during which time he did not give his mother any money. After this venture he went back to work as a mechanic for the Moore Shipyards, the Victory Motor Company, the Durant Motor Company and others, and again earned at times over $7 a day. Out of these earnings he gave his mother about $25 a week; but about this time concluded to go into business for himself, so he opened a savings account in his name and in 1925 went into business for himself. However he continued to give his mother $25 a week for himself, and an additional $18 a week as salary for his father when he helped him; and he made these $25 weekly payments to her up to 1928, when he married and ceased living at home.

The trial court found that the amount due plaintiff and held in trust for him by his mother at the time of her death was $6,000; and while it does not appear just how the trial court arrived at that amount, the evidence clearly shows that $6,000 was withdrawn by her from the $9,346.25 trust account in the San Francisco Bank, and by her invested in the Mezirka loan. The circumstances relating thereto, as explained by plaintiff, were these: Early in 1939 his mother held a second mortgage on the Mezirka property, upon which there was then due $2,800. The Bank of Italy held the first mortgage, given originally to secure a loan of $10,000, which had been reduced to $6,000. The bank called the loan, and in order to protect the second mortgage plaintiff's mother acquired the first mortgage; and a new note was given to her for $9,260, secured by a deed of trust. The trust account with the bank shows a $6,000 withdrawal on January 16, 1939, which left a balance therein of $279.17; and the new Mezirka note and trust deed bear date January 30, 1939. Plaintiff testified definitely and positively that his mother withdrew the $6,000 from the trust account for the purpose of investing the money in the Mezirka loan; that before doing so she talked the matter over with him and he advised against it; and that afterwards she told him that she had done so on the advice of Hinkelmann. The trust account further shows that previously and on July 9, 1935, plaintiff's mother withdrew $3,000 therefrom, which plaintiff testified went into the Weber loan. In this connection the evidence shows that the mortgage is dated March 23, 1936; that it was made out originally to "Molly Kobida and Roy Kobida, her son," but that sometime subsequently a line was drawn through the words "and Roy Kobida, her son." When, why or by whom this was done the evidence does not explain.

It is quite obvious that the foregoing evidence is legally sufficient to sustain the trial court's conclusion that plaintiff established all of the elements of a voluntary trust as they are specified in sections 2221 and 2222 of the Civil Code; and that at the time of the death of plaintiff's mother at least $6,000 of plaintiff's money was on deposit or invested in securities standing in her name. Defendant argues that plaintiff's testimony was "equivocal;" and in this connection it may be conceded that on cross-examination some conflicts were developed on minor matters. But under the authorities above cited, the question of whether the evidence in any given case is "clear, satisfactory and convincing" is for the trial court to determine; and none of the points urged by defendant in this behalf would justify the rejection of the trial court's determination as being unsupported. Defendant would have the word "unequivocal" as used in the decision in Lefrooth v. Prentice, supra, construed as meaning "without conflict;" but necessarily such narrow construction would preclude the beneficiary in all cases from obtaining relief in the trial court if the evidence presented a conflict on any point; and such is not the law. Obviously the court in the Lefrooth case intended to use the word "unequivocal" in a sense synonymous with "clear, satisfactory and convincing," the term used in the other decisions in dealing with issues of this kind. Nor do we agree with defendant's contention that plaintiff's testimony as to "the manner in which the trust is to be performed" was irreconcilable. He testified that he could have the money any time he asked for it, and that he would receive it from his mother when she died; but one of these statements is not necessarily false, as defendant contends. It is clear from an examination of plaintiff's whole testimony that he meant he could have the money back any time he asked for it, but that if he did not need it, or did not ask for it, it would come to him on his mother's death; that he did not need the money, so let it remain in trust, knowing it would all be his when she died.

[5-8] Defendant's second major point is that the findings are insufficient to support the judgment. While they are not as definite or comprehensive as they might have been, there is no such fatal defect therein as would warrant a reversal on that ground. They cover the matter of the creation of the trust, the amount of trust funds for which the trustee was responsible to plaintiff at the time of her death, and show that the full amount thereof was then on deposit in her name or invested in the securities held by her at the time of her death. Defendant apparently takes the position that where a deceased trustee has mingled trust funds with his own and subsequently invested the mingled funds in property which is taken in his own name, the beneficiary is relegated to the status of a general creditor who must proceed against the decedent's estate by way of filing a claim with the representative of the estate, unless he can trace the trust funds to some definite property of which the trustee died possessed. Defendant argues, therefore, that since the trial court here found that the decedent "held certain property consisting of money and other evidences of investment in trust for the plaintiff" without specifying the particular property in which the trust funds were invested, the findings are legally insufficient to support a judgment based on a trust, and that therefore plaintiff may not recover the amount of the trust funds, because admittedly he did not file a claim against the estate. In support of this position defendant quotes from and relies on the cases of Lathrop v. Bamptom, 31 Cal. 17, 89 Am. Dec. 141, and Estate of Arms, 186 Cal. 554, 199 P. 1053, also Orcutt v. Gould, 117 Cal. 315, 49 P. 188, which is based on the Lathrop case. However, the decisions in the Lathrop and Arms cases are extensively reviewed in the later case of Noble v. Noble, 198 Cal. 129, 243 P. 439, 43 A.L.R. 1235, and the decision therein is construed and approved in Mitchell v. Dunn, 211 Cal. 129, 294 P. 386, 388, and in those cases it is clearly pointed out that the rule here contended for by defendant has no application where the estate of the decedent trustee is solvent. Here there is no claim made that the estate is insolvent; in fact the record shows to the contrary. Quoting from the headnotes in Noble v. Noble, supra, that case holds that "The trustee of an express trust, by the mere process of converting the corpus of the trust property into cash and depositing the same in his own name and to his personal credit in his bank, cannot thereby relieve himself of his duty to render an account of his trust and relegate the beneficiary to the position of a general creditor of himself or of his entirely solvent estate; and upon the death of such trustee, leaving a solvent estate with no creditors, the beneficiary is not relegated to the position of an ordinary creditor, and is not required to present a claim against the estate, but may proceed in equity against the fund of the decedent with which the trust moneys were intermingled." In reviewing the decision in that case and conforming to the doctrine laid down therein the court in Mitchell v. Dunn, supra, said: "We are aware of the rule that a cestui cannot follow trust funds unless he can trace them into the specific property involved. It does not suffice merely to show possession of trust funds by the trustee and the purchase of the property; it is clear that the identity of the funds must be traced. Estate of Arms, 186 Cal. 554, 199 P. 1053; Woodside v. Hewel, 109 Cal. 481, 42 P. 152. However, the degree of identification in an action between the cestui and the trustee is far less than in a case where the trustee is insolvent and the rights of creditors are involved. Whatever confusion may have existed in this regard in the decisions of this state was entirely set at rest by the case of Noble v. Noble, 198 Cal. 129, 243 P. 439, 43 A.L.R. 1235. That case held that in a contest between the cestui and the administrator of a deceased defaulting trustee, where the trustee had commingled trust and personal funds, the cestui had a special lien on the entire estate of the deceased solvent trustee, even though the trust funds could not be traced into any definite property. The court very carefully distinguished the cases

involving the rights of creditors, and held that a different rule applied in such cases. The rule is now settled in this state that, when the money of the trustor can be traced into a particular fund, or deposit, though it be mingled with other money, the beneficiary may enforce the trust. Newport v. Hatton, 195 Cal. 132, 150, 231 P. 987." The law as laid down in the decisions in the two cases last quoted from is obviously here controlling.

[9] Defendant's final contention relates to the question of the application of the doctrine of laches and the statute of limitations. The evidence shows, however, that under the terms of the trust plaintiff's mother was to hold the money and keep investing it for plaintiff until he asked for the return thereof; that if he did not ask for it before her death it would be left to him at that time. He testified that he did not ask for it during her lifetime; and she made no provision for its return to him upon her death. She died in April, 1939, and the present action was instituted the following September. Therefore there was no question of laches, and the statute of limitations did not start to run until the trust was repudiated by failure to make provision for the return of the trust funds upon her death.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

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53 Cal.App.2d 149

BELL et al. v. BAYLY BROS., INC., OF CALIFORNIA et al.

Civ. 12914.

District Court of Appeal, Second District, Division Three, California.

June 30, 1942.

Hearing Denied Aug. 27, 1942.

1. Appeal and error 🔑866(1)

In reviewing a judgment entered after a motion for nonsuit was granted, appellate court must view the evidence most favorably to plaintiff.

2. Corporations 🔑207½
Limitation of actions 🔑43

Where plaintiffs sued as stockholders to enforce the rights of a corporation, the suit was in equity but the nature of the corporate right sought to be enforced was not affected in so far as the running of the statute of limitations was concerned.

3. Limitation of actions 🔑55(5)

Where officer of corporation who was also a member of stockholders' protective committee, without authority, assigned to committee corporation's stock in oil and gas company held by corporation's subsidiary companies under agreement directing committee to exchange such stock for oil royalties, allowing committeemen a share thereof and requiring conveyance of royalties in exchange for stock in oil company to be organized, as respects limitations, cause of action against officer by corporation's stockholders for conversion or for recovery of stock arose at the time of the exchange of the oil and gas company stock for the royalties, and not when oil company stock was issued. Code Civ.Proc. § 338, subds. 3, 4.

4. Trover and conversion 🔑2

An action for conversion lies for shares of stock in a corporation but not for every species of intangible personal property

5. Limitation of actions 🔑100(7)

Where, on stockholders' theory of rights of corporation, corporation officer's taking of oil royalties as compensation for services on a stockholders' protective committee constituted a breach of officer's duty to corporation as officer and amounted to a fraud, stockholders' action for relief based on fraud was required to be brought within three years of discovery of the fraud. Code Civ. Proc. § 338, subd. 4.

6. Limitation of actions 🔑195(5)

In stockholders' action to recover for corporation oil royalties withheld by officer for compensation for services on stockholders' protective committee on theory of fraud, burden was on plaintiff stockholders to allege and prove existence of stockholders of corporation who did not know of officer's acts at time they were done so as to postpone the running of the three-year limitation period on actions for fraud, and where no such showing was made, nonsuit was properly granted. Code Civ.Proc. § 338, subd. 4.

7. Limitation of actions 🔑100(1), 195(5)

Party suing for fraud who was charged with facts putting him on inquiry was charged with having discovered the fraud when he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so, and must show that such discovery was within the period of limitation before his action was brought. Code Civ.Proc. § 338, subd. 4.

8. Trusts 🔑30½(1)

Statement by defendant, who was an officer and director of corporation, to another officer thereof, who at the time was not a stockholder and did not appear to be acting for the corporation, of intention to give to corporation, compensation to be received by defendant as member of stockholders' protective committee, which statement was made before defendant assigned corporation's stock in oil and gas company to committee, was a mere statement of intention and did not make defendant a trustee of an "express trust".

9. Trusts 🔑30½(1), 102(1)

Where letter under which dissatisfied stockholders in oil and gas company assigned stock to stockholders' protective committee, which was to exchange such stock for oil royalties and royalties for stock in oil company to be organized, expressly provided that a share of the royalties was to belong to members of the committee for their services, and committeeman, who, as officer of a corporation, assigned corporation's stock in oil and gas company to committee, no "express trust" was created with reference to committeeman's royalty share, and, if there were a trust, committee member held his royalty share for corporation under "involuntary" or "constructive trust". Civ.Code, §§ 2223, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust", "Express Trust" and "Involuntary Trust".

10. Limitation of actions 🔑103(2)

In case of an involuntary or constructive trust, where there is no concealment and the facts are known or should have been known to the claimant, the statute of limitations begins to run when the so-called trustee acquires the property in question in violation of his duty, and no repudiation of the trust by the trustee is necessary for that purpose. Code Civ.Proc. § 338, subds. 3, 4.

11. Limitation of actions 🔑55(5)

Where officer of corporation committed breach of trust by appropriating to his own use oil royalties he had acquired as member of stockholders' protective committee, to which committee he had assigned corporation's stock in an oil and gas company, running against stockholders of corporation seeking to recover for corporation royalties so appropriated of three-year limitation of actions for conversion or fraud was not suspended by officer's subsequent exchange of royalties for stock in oil company organized to take over such royalties and refusal to deliver such stock to the corporation. Code Civ.Proc. § 338, subds. 3, 4.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Sam Bell and others against Bayly Bros., Inc., of California, and others, to enforce certain alleged rights of defendant corporation, on allegations that its board of directors refused to act in the matter. From a judgment for defendants after a motion for nonsuit was sustained, plaintiffs appeal.

Affirmed.

Salisbury, Robinson & Himrod, of Los Angeles, for appellants.

Chapman & Chapman, of Los Angeles, for respondents.

SHAW, Justice.

The plaintiffs, as stockholders, each owning one share of preferred stock of Bayly Bros., Inc., of California, a corporation, (hereinafter referred to as "Bayly Bros."), brought this action to enforce certain alleged rights of that corporation, on allegations that its board of directors, all of whom are among the defendants, refused to act in the matter. Plaintiffs appeal from a judgment adverse to them rendered on a motion for a nonsuit.

The facts presented by the record are many and complicated, but only a part of them are important to a consideration of the point which we think determinative of the appeal. The complaint, which is labeled "Complaint for Conversion," contains two counts. The first count alleges that the corporation above named was the owner of 1666⅔ shares of stock of National Oil Co. (hereinafter referred to as "oil stock") worth $50,000, which stood on the books of that company in the names of two trustees; that defendants Roy Bayly and Harold Bayly, acting for Bayly Bros., caused this oil stock to be transferred to other persons who are also defendants; that they did this without authority from the board of directors of such corporation and it received no consideration therefor; and that the named defendants and their transferees claim to be the owners of the stock. The second count incorporates all of the first except the allegations regarding the ownership and transfer of the oil stock, and in place thereof alleges that Bayly Bros. "now is" the owner of the oil stock and the individual defendants "unlawfully converted and disposed of the same to their own use." The relief demanded is the return of the oil stock or its value to the corporation. No dates are given for any of the acts of defendants complained of. The complaint was filed May 22, 1936. The answer, among other defenses, pleads that the action is barred by subdivisions 3 and 4 of section 338 of the Code of Civil Procedure. At the trial a motion for nonsuit was made and granted, one of the grounds of which was that the action is thus barred. On this ground the judgment must be affirmed.

[1] Taking the view of the evidence most favorable to plaintiffs, as we must in passing on a motion for a nonsuit, we see the following facts: Bayly Bros. was engaged in the business of broker, dealing in stocks and bonds and other securities. It kept records of the names, addresses and stock holdings of its customers, and following the custom of those engaged in the same business, in order to maintain the goodwill of its customers, it kept them advised of what was happening to their securities. Bayly Bros. had sold to a number of its customers shares of stock of Signal Oil & Gas Co. (hereinafter referred to as "Signal") and owned shares of the same stock on its own account. In 1932 dissatisfaction with the management of Signal arose among some of its stockholders, including Bayly Bros. and its customers, and another Signal stockholder named Ross McCollum and his friends. This culminated in the formation of a stockholders' protective committee, consisting of the defendant Harold Bayly, the plaintiff Bell and Ross McCollum. After negotiations between this committee and the management of Signal and after various proceedings, legal and otherwise, taken by the committee against that management, an offer was made by the latter to take over the stock of the dissatisfied Signal stockholders, amounting to 25,000 shares, in exchange for certain oil royalties. Thereupon a letter was drafted and presented for signing to the dissatisfied Signal stockholders which reads in material part as follows:

"Los Angeles, California, December 15, 1932. Messrs. Ross McCollum and Harold Bayly, Los Angeles, California. Dear Sirs: You have informed us that representatives of Signal Oil and Gas Company have made an offer to take over twenty-five thousand shares of its outstanding capital stock owned or controlled by you and the undersigned, and in consideration thereof to assign and transfer to you * * * [describing certain oil royalties]. You have accorded to the undersigned an opportunity to transfer the number of shares set opposite their names below along with your own shares, on the basis herein set forth, and we are desirous of taking advantage of that opportunity.

"We have therefore delivered to you certificates evidencing the number of shares set opposite our names, respectively, of stock of the Signal Oil and Gas Company, properly endorsed and witnessed for transfer, and we now authorize you to deliver the same to Signal Oil and Gas Company, or its nominee, when you have received assignments or conveyances of the royalty interests above mentioned vesting the title thereto in yourselves, and to be held by you as trustees for the benefit of the stockholders participating in the transaction on the basis herein set forth, as follows:

"The beneficial interests of the trust properties above referred to shall be deemed to be represented by and divided into thirty thousand (30,000) units, and of which five thousand (5,000) units shall belong to you as compensation for services rendered in connection with this transaction and in bringing it about. The remaining twenty-five thousand (25,000) interest shall belong to the stockholders whose stock is to be transferred as aforesaid in proportion to their interests, that is to say, one unit for each share of stock. You shall issue to each of us a declaration of trust showing our respective interests in the property.

"It is contemplated that the above mentioned royalty interests will ultimately be transferred to a corporation with outstanding capital stock not exceeding thirty thousand (30,000) shares, and when so transferred stock is to be issued in lieu of the beneficial interests above mentioned and in the same proportions. You are therefore hereby further authorized to take the necessary steps to vest the trust property in a corporation as above set forth, and in the event you deem it advisable to fix a par value of the stock of the corporation at a greater sum than one dollar per share, and thereby reduce the number of shares outstanding, you are authorized to do so, but always with the understanding that the stock shall be divided and issued upon the same pro rata basis as above set forth, and likewise, if it is deemed advisable that the stock of the corporation to take over the property shall be without par value, our stock interests shall be on the same basis.

"In the meantime, and so long as you hold the property in trust, you are authorized to manage and maintain the same, collect all proceeds, and distribute the same from time to time to the beneficiaries in proportion to their interests and you are authorized and empowered to do all things necessary and proper in the management and maintenance of the trust properties."

Signal stockholders holding 25,000 shares signed this letter. McCollum was one of them. Harold Bayly held no Signal stock personally. The Signal stock belonging to Bayly Bros. was held for it by two allied corporations, and Harold Bayly signed the letter for these two corporations, no other agent joining him.

At the time of the proceedings above mentioned Harold Bayly was a director and president of Bayly Bros., but was not actively engaged in its affairs, having other business which engaged his principal attention, and he received no salary from it. Both of the plaintiffs were employees of the corporation, but were not then stockholders in it. Both of them knew about the foregoing matters and obtained the signatures of some Signal stockholders to the letter of December 15, 1932, above quoted. The office and office force of Bayly Bros. were used in carrying on the business of the committee above mentioned.

McCollum and Bayly acted under the authority given them in this letter. The exact date at which they exchanged the Signal stock for the royalties does not appear, but it was some time before February 2, 1933. They then proceeded to organize a corporation, National Oil Company, and transferred the royalties to it some time in March, 1933. For some reason not appearing here, it was authorized to issue only 20,000 shares of stock instead of the 30,000 shares contemplated by the letter of December 15, 1932. These 20,000 shares were originally all issued to McCollum and Bayly in one certificate, in accordance with a permit of the Corporation Commission authorizing them to be so issued in exchange for the royalties. They were then apportioned among the various interested parties in the same proportions specified in the letter just mentioned, and the certificates for the shares due the former Signal stockholders were sent to them with a letter dated March 18, 1933, and sent out on or about that date.

For the 5,000 royalty interests which were to belong to McCollum and Bayly under the letter of December 15, 1932, only 3333⅓ shares of stock in the newly formed corporation were issued. By agreement between McCollum and Bayly these shares were equally divided between them. Plaintiffs claim that the 1666⅔ shares thus apportioned to Bayly in reality belong to the corporation for which they sue, and in this action they seek to recover them or their value for it. This claim is based on the contentions that Bayly, in negotiating the Signal settlement, was in reality acting for and on behalf of Bayly Bros. and that anything he obtained for doing so in reality belongs to the corporation, and further that as agent for the two corporations holding the Bayly Bros. Signal stock he could not lawfully execute the letter of December 15, 1932, because it undertook to transfer to him a part of their property, and that letter is therefore void as between him and Bayly Bros.

[2] The nature of the action brought by plaintiff is of some importance in determining whether the statute of limitations has run. The complaint is labeled as one "for conversion," and its allegations stamp it as such. Plaintiffs do not contend that the action is not one for conversion. The prayer of the complaint suggests an action for the specific recovery of personal property, but since the period of limitation is the same for that as for an action for conversion (Code of Civ.Proc., § 338, subd. 3), we need not concern ourselves with any uncertainty in this respect. It does not purport to be an action in equity to declare and enforce a trust. It is an action in

equity by reason of the fact that plaintiffs are suing as stockholders to enforce the rights of the corporation, under equitable rules (6A Cal.Jur. 805), but this does not affect the nature of the corporate right which is involved. Chetwood v. California Nat. Bank, 1896, 113 Cal. 414, 425, 45 P. 704.

It is plaintiffs' contention that the defendants committed no act of conversion before May 23, 1933. On that date 800 shares of National Oil Company stock were issued to the wife of defendant Harold Bayly and 800 shares to the mother of defendant Roy D. Bayly. These shares came directly from the original issue of 20,000 shares to McCollum and Harold Bayly. Later two certificates for 33 more shares each were issued to the same persons, from the same source. The complaint was filed on May 22, 1936; just one day within the period of limitation, if this contention is well founded.

[3] But upon the facts of this case the conversion, if any, occurred at an earlier date. If Harold Bayly was guilty of a breach of duty to Bayly Bros. in taking from the Signal stockholders compensation for his efforts in their behalf, and if the compensation so received by him belongs to Bayly Bros., that compensation, when received, was not the oil stock which plaintiffs are now pursuing, but a share in the oil royalties which were given by the Signal management in exchange for the Signal stock. That compensation, when received, came to him under the letter of December 15, 1932, above quoted. That letter did not provide, as appellants' argument assumes, that the entire oil royalties received by McCollum and Bayly were to be held by them in trust for the Signal stockholders or for anyone. On the contrary, it divided the royalties into 30,000 units and segregated these units into two parts, to be held and dealt with separately, thus: "five thousand (5,000) units *shall belong to you* [McCollum and Bayly] as compensation for services rendered;" and "the remaining twenty-five thousand (25,000) interest shall belong to the stockholders * * * one unit for each share of stock. *You* shall issue *to each of us* [the stockholders] a declaration of trust showing *our* respective interests in the property." (Emphasis ours.) This clearly provides that when the royalty interests were received one-sixth thereof should at once become the property of McCollum and Bayly. The provision for formation of a corporation to hold "the beneficial interests above mentioned" does not at all affect this part of the agreement. It authorizes, and perhaps requires, McCollum and Bayly to transfer their own royalty interests to the corporation, if formed, and take stock therefor, but it does not impose any limitation on their ownership. The provision that "so long as you hold the property in trust, you are authorized to manage and maintain the same" is limited to the property held in trust and the trust provided for covers only the interests of the Signal stockholders. If Bayly was required to turn over to Bayly Bros. any compensation acquired by him in this transaction, his taking and holding it under this letter of December 15, 1932, was plainly an act of dominion over it, and, if it was a subject of conversion, constituted a conversion, which occurred more than three years before suit was brought. Plaintiffs' action is therefore barred, if their action is properly one in conversion.

[4, 5] It may be questionable whether these oil royalties could be the subject of an action in conversion. Their exact nature does not appear, but they are obviously of some intangible nature and apparently personal property. Such an action lies for shares of stock in a corporation (Payne v. Elliot, 1880, 54 Cal. 339, 35 Am. Rep. 80), but not for every species of intangible personal property. Olschewski v. Hudson, 1927, 87 Cal.App. 282, 262 P. 43; Adkins v. Model Laundry Co., 1928, 92 Cal.App. 575, 583, 268 P. 939; Vuich v. Smith, 1934, 140 Cal.App. 453, 455, 35 P. 2d 365. But if not a conversion, the acts of defendants, in taking the royalties for themselves, on plaintiffs' theory of the rights of the corporation, constituted a breach of defendants' duty to it as officers and directors and amounted to a fraud, and the period of limitation for bringing an action for relief on that ground is fixed by subdivision 4 of section 338 of the Code of Civil Procedure at three years from the discovery of the fraud. Bainbridge v. Stoner, 1940, 16 Cal.2d 423, 430, 106 P.2d 423. Here no question of delayed discovery arises, for both plaintiffs, and, as far as appears, everyone else connected with Bayly Bros. knew of all defendants' acts at the time they were done.

[6, 7] If there were stockholders who had not such knowledge, the burden was on plaintiffs to allege and prove such fact.

Moreover, a party having knowledge of facts which would reasonably put him on inquiry, where the inquiry, if pursued, would have led to a discovery of the fraud of which he complains, will be charged with having discovered that fraud as of the time he would have discovered it if he had with reasonable diligence pursued the inquiry when he should have done so (Consolidated R. & P. Co. v. Scarborough, 1932, 216 Cal. 698, 704, 16 P.2d 268; Nighbert v. First Nat. Bk. of Bakersfield, 1938, 26 Cal. App.2d 624, 635, 79 P.2d 1105), and a motion for nonsuit is properly granted where the plaintiff fails to show that under this rule his discovery was within the period of limitation before his action was brought. See Haley v. Santa Fe Land Imp. Co., 1935, 5 Cal.App.2d 415, 425, 42 P.2d 1078. Here there was no secrecy or concealment about the execution or contents of the agreement between the Signal stockholders and Bayly and McCollum, set forth in the letter of December 15, 1932, but, upon the contrary, a widespread knowledge thereof. Plaintiffs have not alleged or proved anything to show that the corporation for which they sue or any of its stockholders, was not chargeable with knowledge of the agreement more than three years before this action was brought.

[8] Plaintiffs call attention to testimony that one of them discussed with Harold Bayly, before the letter of December 15, 1932, was signed, the provision therein that McCollum and Bayly were to have for themselves a share of the oil royalties, and objected to it, and that Bayly replied that Bayly Bros. was entitled to half of this "bonus," and contend that by reason thereof Bayly received this stock as trustee for Bayly Bros. and there was no repudiation of the trust until the stock transfers of May 23, 1933, already mentioned. The plaintiff who had this conversation with Bayly was not then a stockholder of Bayly Bros., although a director and vice president, and while he was its employee it does not appear that he was acting or authorized to act for it in the matter, or that Bayly was talking to him as representing Bayly Bros. In other words, this conversation cannot be regarded as one addressed to the corporation, and can have no more effect than any statement of his intentions which Bayly might have addressed to any other person. It was insufficient to make Bayly a trustee of an express trust.

Plaintiffs also invoke the rule that an agent may not deal with himself, and contend that because Harold Bayly signed the letter of December 15, 1932, for the corporations holding Bayly Bros. stock, the agreement contained in that letter is void as to Bayly Bros. This contention, if upheld, could result only in decreeing to Bayly Bros. such portion of the "bonus" as was derived from its Signal stock, whereas plaintiffs' claim is for all of it. But passing that point, it is not apparent why the matter referred to would affect or delay the running of the statute of limitations. Harold Bayly could have been sued for his breach of duty as soon as he obtained the royalties.

[9, 10] If on any view of the case Harold Bayly held in trust for Bayly Bros. the royalty share which, according to the letter of December 15, 1932, was to "belong" to him, such trust was not an express trust, for the letter clearly excludes any intention to create any such trust, or a resulting trust, for the same reason, but was an involuntary or constructive trust. Civil Code, §§ 2223, 2224; Lezinsky v. Mason Malt W. D. Co., 1921, 185 Cal. 240, 251, 252, 196 P. 884; Bainbridge v. Stoner, supra, 1940, 16 Cal.2d 423, 429, 106 P.2d 423. In case of such a trust where there is no concealment and the facts are known or should have been known to the claimant, the statute of limitations begins to run when the so-called trustee acquires the property in question in violation of his duty, no repudiation of the trust by the trustee being necessary for that purpose. Bainbridge v. Stoner, supra; Leviston v. Tonningsen, 1931, 212 Cal. 656, 664, 299 P. 724; Benoist v. Benoist, 1918, 178 Cal. 234, 237, 172 P. 1109.

[11] If Harold Bayly thus committed a breach of trust, by appropriating to his own use the royalties he acquired, and thereby started the running of the statute, its running is not suspended by the fact that he later exchanged that property for stock and refused or failed to deliver the stock to the corporation. Plaintiffs cannot evade the bar of the statute by skipping lightly over the first breach of duty and claiming to found their action on some subsequent conduct in line with it. If this could be done the process could be repeated every time one who converted property exchanged it for something else, and thus

the operation of the statute of limitations could be entirely defeated.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

53 Cal.App.2d 267

PECK v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 12187.

District Court of Appeal, First District, Division 2, California.

July 6, 1942.

As Corrected July 28, 1942.

1. **Appeal and error** 🔑1

Whether an appeal is a plain, speedy and adequate remedy is to be determined on the circumstances of each case.

2. **Prohibition** 🔑3(3)

A petition for a writ of prohibition for relief from an ex parte order of the municipal court appointing a receiver in an action to dissolve a partnership would be denied where petitioner failed to show that his right of appeal to superior court was not a plain, speedy and adequate remedy.

Original proceedings in prohibition by Arthur K. Peck, petitioner, against the Municipal Court of the City and County of San Francisco and another, respondents, to restrain respondents from taking further proceedings under an order appointing a receiver in an action to dissolve a partnership. An alternative writ of prohibition was issued.

Petition denied, and alternative writ discharged.

Simeon E. Sheffey, of San Francisco, for petitioner.

James M. Thomas and Edmund J. Holl, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

[1, 2] An alternative writ of prohibition was issued to restrain further proceedings under an ex parte order appointing a receiver in an action to dissolve a partnership pending in the municipal court. The alternative writ was issued and heard upon the authority of A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926; Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107, and similar cases holding that prohibition was an appropriate remedy where the order was in excess of the court's jurisdiction, though a remedy by appeal was provided by statute. The question whether an appeal is "a plain, speedy, and adequate remedy" is one to be determined on the facts and circumstances of each case. The petitioner has failed to show that his right of appeal to the superior court is not such a remedy.

For these reasons, the petition is denied and the alternative writ is discharged.

STURTEVANT, J., concurred.

20 Cal.2d 536

COMMUNIST PARTY OF UNITED STATES OF AMERICA et al. v. PEEK, State Secretary, et al.

L. A. 18354.

Supreme Court of California.
July 11, 1942.

1. Elections 🔑121(1)

A political party may maintain an action in its own name in California courts.

2. Action 🔑6

Under statute, the court may refuse in its discretion to grant the relief sought in an action for a declaratory judgment. Code Civ.Proc. § 1061.

3. Action 🔑6

Where it appeared from face of complaint in action for a declaratory judgment respecting constitutionality of statutes concerning elections that a speedy and adequate remedy was provided plaintiffs by the Elections Code, refusal to grant declaratory relief was not an abuse of discretion. St.1939, p. 159, § 2900; Code Civ.Proc. § 1061.

4. Mandamus 🔑12

Where plaintiffs sought in their petition for a writ of mandate to compel performance of future acts which, it was alleged, defendants would refuse to perform when performance became due, it was proper to sustain general demurrers to petition, since mandamus will not lie to compel the performance of future acts.

5. Elections 🔑7

The right of suffrage is guaranteed and secured by the constitution of California to all citizens who are within the requirements therein provided, and the individual citizen's constitutional right of suffrage includes the right to vote at all elections now or hereafter authorized by law, including the right to vote at primary elections. Const. art. 2, § 1.

6. Elections 🔑15

The right to vote is recognized as one of the highest privileges of the citizen, and any infringement by legislative power upon that right as granted by the constitution is idle legislation. Const. art. 2, § 1.

7. Elections 🔑21

In any election where the party system furnishes the means by which the citizen's right of suffrage is made effective, denial of his party's right to participate in the election accomplishes the "disfranchisement of voters" or compels them, if they vote, to vote for representatives of political parties other than that to which they belong, and the deprivation of the right of selection is a deprivation of the right of franchise.

See Words and Phrases, Permanent Edition, for all other definitions of "Disfranchisement of Voters"

8. Elections 🔑120

That certain offices may be made nonpartisan does not warrant conclusion that the party system is not a part of the citizen's constitutional right of suffrage. Const. art. 2, §§ 1, 2¾.

9. Elections 🔑21

Under constitutional provisions giving legislature power to determine conditions upon which electors and political parties may participate in primary elections, the legislature has power to exclude both individual citizens and political parties from participation in such elections upon certain conditions, but the power thereby conferred upon legislature is limited to prescribing reasonable tests and conditions for participation in elections. Const. art. 2, § 2½.

10. Elections 🔑21

The purpose of the constitutional amendment giving legislature power to determine conditions upon which electors and political parties may participate in primary elections is to give the legislature a free hand in dealing with the evils which were formerly prevalent in such elections, even to the extent of excluding parties and individuals from participation therein. Const. art. 2, § 2½.

11. Constitutional law 🔑48

In considering the validity of a provision in a statute respecting elections, the Supreme Court could not interfere with the provision if there was any theory upon which such provision could reasonably have been concluded by the legislature to be essential.

12. Elections 🔑21

The statute providing that no political party which uses as part of its party designation the word "Communist" shall be qualified to participate in any primary election is invalid as attempting to prescribe an unreasonable condition for participation by parties and individuals in primary elections, since there is no reasonable ground upon which such a restriction of the constitutional right of suffrage can be justified. St. 1940, 4th Ex.Sess., p. 362, § 2540.3; Const. art. 2, §§ 1, 2½; art. 20, § 11.

13. Evidence 🔑1

The doctrine of "judicial notice" was adopted as a judicial shortcut to avoid necessity for the formal introduction of evidence in certain cases where there is no real need for such evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Notice".

14. Evidence 🔑4

Before a court will take "judicial notice" of any fact, that fact must be a matter of common and general knowledge, well established and authoritatively settled, and the test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof.

15. Evidence 🔑4

If there is any possibility of dispute of a fact such fact cannot be judicially noticed.

16. Evidence 🔑4

The power of judicial notice is, as to matters claimed to be matters of general knowledge, one to be used with caution, and if there is any doubt, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required.

17. Evidence 🔑5(2)

The Supreme Court would not take "judicial notice" of the alleged fact that the Communist Party advocates overthrow of the government of the United States by force and violence, especially where such fact was denied by plaintiffs.

18. Elections 🔑21

The statute providing that no political party which uses as any part of its party designation the word "Communist" shall be qualified to participate in primary elections cannot be sustained on theory that the statute contains an implied finding by the legislature that the Communist Party advocates forceful overthrow of the government. St. 1940, 4th Ex.Sess., p. 362, § 2540.3.

19. Constitutional law 🔑52

It is not the function of the legislature to determine whether a statute declaring a general policy has been violated in a particular case, that being a "judicial function".

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Function".

20. Statutes 🔑77(1)

A statute which purports to determine that a particular person or group has violated a general law is a "special law" in nature and violates the constitutional provision prohibiting legislature from passing special laws in enumerated cases. Const. art. 4, § 25.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Law".

21. Constitutional law 🔑70(3)
Statutes 🔑101(1)

The legislature may investigate elections and determine that the public interest requires that any party advocating the forceful overthrow of government shall be denied a place on the ballot at primary elections, and a finding of the legislature that the problem requires restrictive legislation is conclusive on courts, but the legislature cannot determine that a particular person or group has advocated the doctrine which violates the policy laid down by statute providing that no party which uses as part of its party designation the word "Communist" shall be qualified to participate in primary elections. St.1940, 4th Ex.Sess., p. 362, § 2540.3; Const. art. 2, §§ 1, 2½; art. 20, § 11.

22. Statutes 🔑101(1)

While it is within the legislative power to determine that, in the public interest, any political party advocating the forceful overthrow of the Government of the United States should be denied a place on the ballot at primary elections, it is not within the legislature's power to determine that the Communist Party advocates the forceful overthrow of the government. Const. art. 2, § 2½.

23. Statutes 🔑77(1)

A law is a "special law" and unconstitutional if it confers particular privileges or imposes peculiar disabilities in the exercise of a common right upon a single person or group arbitrarily selected. Const. art. 4, § 25.

24. Statutes 🔑101(1)

While the legislature may properly deny a place on the ballot at primary elections to any political party advocating the forceful overthrow of government, the legislature may not, constitutionally, determine that a specified party advocates the doctrine of forceful overthrow of government without violating the constitutional provision prohibiting legislature from passing local or special laws providing for conducting elections. Const. art. 2, § 2½; art. 4, § 25, subd. 11.

25. Elections ⚷21

In so far as the statute respecting primary elections prohibits the qualification of any political party which is directly or indirectly affiliated with the Communist Party, the Third Communist International or with any other foreign agency, political party, organization or government, the statute is invalid as prescribing unreasonable conditions for participation in primary elections and as "special legislation" in violation of constitutional provision prohibiting legislature from passing special laws providing for conducting elections, but the remainder of such statute is valid. St.1940, 4th Ex.Sess., p. 362, § 2540.4; Const. art. 2, § 2½; art. 4, § 25, subd. 11.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Legislation".

26. Elections ⚷21

The legislature's power to prescribe tests and conditions for participation in primary elections includes the right to adopt tests designed to exclude those political parties advocating overthrow of the government by unlawful means or those parties carrying on a program of sabotage, force and violence, sedition or treason. Const. art. 2, § 2½.

27. Elections ⚷21

The legislature has power to establish tests for participation in a primary election based upon the number of votes cast for candidates of a particular political party in the last preceding election, but in adopting such a test of participation, it is the legislature's duty to preserve the integrity of the party system. Const. art. 2, § 2½.

28. Elections ⚷21

Any test prescribed by legislature for participation in primary elections based upon numerical data depends for its validity upon theory that legislature is seeking to exclude from participation in the election, thus infringing rights of suffrage, only insubstantial groups, the deprivation of whose rights can be justified by the larger good derived from a more efficient operation of the primary system. Const. art. 2, § 2½.

29. Elections ⚷21

The statute attempting to deny participation in primary elections to a political party unless it appears to the Secretary of State, as a result of information transmitted to him, 25 days prior to the last preceding primary election, that not less than 2,500 voters have declared their intention of affiliating with such party is invalid on ground that the statute is not a reasonable exercise of the legislature's power to establish tests and conditions for participation in primary elections. St.1941, p. 3036, § 2540.5; Const. art. 2, § 2½.

30. Elections ⚷88

Before the constitutional right to vote may be taken away from a citizen, he must be given an opportunity to be heard in his own behalf. Const. art. 2, § 1.

31. Elections ⚷21

The statute vesting in the Secretary of State, with advice and consent of the Attorney General, power to determine what political parties are qualified to participate in primary elections without provision for notice and hearing is invalid. St.1940, 4th Ex.Sess., p. 362, § 2540.9.

32. Elections ⚷154(1)

The right of any political party to participate in a primary election, if it is thought that provisions of statute attempting to deny participation in primary elections to any political party affiliated with the Communist Party might bar such participation, may be tested by a court proceeding brought under provisions of the Elections Code. St.1939, p. 159, § 2900; St.1940, 4th Ex.Sess., p. 362, § 2540.4.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by the Communist Party of the United States of America and others against Paul Peek, as State Secretary, etc., and others. From a judgment for defendants, plaintiffs appeal.

Reversed with directions.

Andersen & Resner, George R. Andersen, and Herbert Resner, all of San Francisco, and Leo Gallagher, of Los Angeles, for appellants.

George Olshausen, Harold M. Sawyer, and Bertram Edises, all of San Francisco, and Clore Warne, A. L. Wirin, Charles J. Katz, Laurence M. Weinberg, Robert Morris, Jr., and Loren Miller, all of Los Angeles, as amici curiae, on behalf of appellants.

Earl Warren, Atty. Gen., Eugene M. Elson and Lewis Drucker, Deputy Attys. Gen., J. H. O'Connor, Co. Counsel, and W. B. McKesson and George W. Wakefield, Deputy Co. Counsel, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

[1] In this action plaintiffs challenge the validity of Stats. Fourth Extra Session 1940, page 362, and Stats.1941, page 3036, which added sections 2540.3, 2540.4, 2540.5 and 2540.9 to the Elections Code. Plaintiffs are the Communist Party of the United States and three individual members thereof. The right of a political party to maintain an action in this state in its own name is no longer open to question. Independence League v. Taylor, 154 Cal. 179, 97 P. 303; see, also, Socialist Party v. Uhl, 155 Cal. 776, 103 P. 181. Plaintiffs' amended complaint sets forth three causes of action: the first, an action for declaratory relief seeking to have it adjudged that these statutes are unconstitutional; the second, a petition for a writ of mandate to compel the named defendants to perform the statutory duties necessary to qualify the plaintiff Communist Party to participate in the primary election of August, 1942; and the third, an action under Elections Code, section 2900, St.1939, p. 159, alleging that an error or omission is about to occur in the conduct of a primary election and seeking an order directing the defendants to correct the error. The superior court of Los Angeles county sustained without leave to amend general demurrers which were interposed to each of the causes of action by the defendant Paul Peek, as secretary of state, the defendant Earl Warren, as attorney general, and the defendant William M. Kerr, as registrar of voters of the county of Los Angeles. Plaintiffs bring this appeal from a judgment thereafter entered for defendants. The defendant William M. Kerr has since died and his successor, Michael J. Donoghue, has been substituted as registrar of voters of Los Angeles county.

[2-4] We find no error in the trial court's ruling as to the first two causes of action. Under Code of Civil Procedure, section 1061, the court may refuse in its discretion to grant the relief sought in an action for a declaratory judgment. It appears from the face of the pleading that a speedy and adequate remedy for this purpose is provided by Elections Code, section 2900. Under such circumstances it cannot be said that the trial court abused its discretion in refusing to grant declaratory relief. See Borchard, Declaratory Judgments (1941), p. 357, et seq. Neither can the court's order sustaining general demurrers to the petition for a writ of mandate be challenged successfully. Plaintiffs sought in their petition to compel the performance of future acts which, it was alleged, the defendants would refuse to perform when performance became due. Mandamus will not lie to compel the performance of future acts, and for that reason the general demurrers to the petition for the writ were properly sustained. McGinnis v. City of San Jose, 153 Cal. 711, 96 P. 367; McMullen v. Glenn-Colusa Irr. District, 17 Cal.App.2d 696, 62 P.2d 1083.

In their third cause of action, however, plaintiffs sought to set forth facts entitling them to relief under Elections Code, section 2900. That section provides: "Whenever it is made to appear by affidavit to the Supreme Court, district courts of appeal, or superior court of the proper county that an error or omission has occurred or is about to occur in the placing of any name on, or in the printing of, an official primary election ballot, or that any wrongful act has been or is about to be done by any person charged with any duty concerning the primary election, or that any neglect of duty has occurred or is about to occur, such court shall order the officer or person charged with such error, wrong or neglect forthwith to correct the error, desist from the wrongful act or perform the duty, or show cause why he should not do so. Any person who fails to obey the order of such court shall be cited to show cause why he is not in contempt of court." By affidavits of the individual plaintiffs Whitney, Yates and Perry it is alleged that an error or omission is about to occur in the placing of a name on an official primary ballot and that a wrongful act and neglect of duty is about to occur on the part of persons charged with a duty concerning a primary election. Defendants interposed general demurrers to this cause of action which were sustained by the trial court. Plaintiffs allege that the Communist Party and the individual plaintiffs will be denied the right to participate in the primary election of August, 1942, and that defendants have declared their intention to refuse to take any steps to qualify the Communist Party and its nominees for a place on the ballot at the primary election. This refusal, it is said, is made in reliance upon the provisions of Elections Code, sections 2540.3, 2540.4, 2540.5 and 2540.9. On appeal plaintiffs argue that these sections of the Elections Code are unconstitutional, and for that reason urge that the conduct of defendants will result in an error, omission or neglect of duty in connection with the primary election under the statutory provisions which are controlling. The question of the constitutionality of the challenged sections of the Elections Code is thus directly presented for consideration by this court.

The statutory provisions which are involved upon this appeal read as follows:

Elections Code, section 2540.3, added by Stats. Fourth Ex.Sess.1940, p. 362, § 1. "Notwithstanding any other provisions of this code, no party shall be recognized or qualified to participate in any primary election which uses or adopts as any part of its party designation the word 'communist' or any derivative of the word 'communist.' "

Elections Code, section 2540.4, added by Stats. Fourth Ex.Sess.1940, p. 362, § 2. "Notwithstanding any other provisions of this code, no party shall be recognized or qualified to participate in any primary election which is directly or indirectly affiliated, by any means whatsoever, with the Communist Party of the United States, the Third Communist International, or any other foreign agency, political party, organization or government or which either directly or indirectly carries on, advocates, teaches, justifies, aids, or abets the overthrow by any unlawful means of, or which directly or indirectly carries on, advocates, teaches, justifies, aids, or abets a program of sabotage, force and violence, sedition or treason against, the Government of the United States or of this State."

Elections Code, section 2540.5, added by Stats.1941, p. 3036. "Notwithstanding the provisions of Section 2540, no party shall be qualified to participate in any primary election unless it appears to the Secretary of State, as a result of examining and totaling the statements of registration of voters and their political affiliations transmitted to him by the county clerks 25 days prior to the last preceding primary election, that not less than 2,500 voters declared their intention of affiliating with that party."

Elections Code, section 2540.9, added by Stats. Fourth Ex.Sess.1940, p. 362, § 3. "The Secretary of State shall, with the advice and consent of the Attorney General, determine which parties are qualified to participate in any primary election. Such determination shall be subject to review by the courts in accordance with law."

The statutes challenged in this action constitute an attempted sweeping legislative revision of the provisions which for many years have governed the right of a political party to participate in primary elections in this state. Cf. Elections Code (1939), § 2540, Deering's Gen. Laws 1937, Act 2256, § 1, subd. 9, Stats.1913 p. 1379, § 1, subd. 9. Before entering upon the task of examining the constitutionality of this legislation, it would be well to set forth briefly certain of the fundamental principles which must guide our deliberations.

[5] *First,* the right of suffrage, everywhere recognized as one of the fundamental attributes of our form of government is guaranteed and secured by the Constitution of this state to all citizens who are within the requirements therein provided. Const. of Calif., art. II, § 1; Spier v. Baker, 120 Cal. 370, 374, 52 P. 659, 41 L.R.A. 196; Britton v. Board of Election Com'rs, 129 Cal. 337, 340, 61 P. 1115, 51 L.R.A. 115; People v. Elkus, 59 Cal.App. 396, 398, 211 P. 34; Cohn v. Isensee, 45 Cal.App. 531, 538, 539, 188 P. 279. This constitutional right of the individual citizen includes the right to vote "at all elections which are now or may hereafter be authorized by law" (Const. of Calif., art. II, § 1), including the right to vote at primary elections. Spier v. Baker, supra, 120 Cal., page 375, 52 P. 659, 41 L.R.A. 196; Britton v. Board of Election Com'rs, supra, 129 Cal., page 341, 61 P. 1115, 51 L.R.A. 115.

[6] *Second,* although the Legislature's power to pass laws regulating the conduct of elections was conceded under Constitution, article XX, section 11 (cf. Bergevin v. Curtz, 127 Cal. 86, 88, 59 P. 312), the Legislature was wholly without power, prior to the adoption of article II, section 2½, in 1900, to exclude any citizen from participation in a primary election who was within the terms of the constitutional provision. Spier v. Baker, supra, 120 Cal., page 375, 52 P. 659, 41 L.R.A. 196. As the court said in the Spier case (page 375 of 120 Cal., page 661 of 52 P.), "* * * the legislature has no power to deprive any citizen of the state, who fills all the requirements demanded by the section of the constitution quoted, from voting at an elec-

tion provided for by this act [a primary election law]. In this country, the right to vote is recognized as one of the highest privileges of the citizen. It is so recognized, not only by the citizen, but by the law; and any infringement by legislative power upon that right as granted by the constitution is idle legislation. If the legislature by this act has deprived citizens of the right to participate in the elections therein provided, who are qualified to participate under the constitution,—aye, even if the legislature has deprived one citizen so qualified of such right,—the act is void, as an attempted exercise of power it does not possess. As we have seen, section 11, art. 20, of the constitution, authorizes the legislature to pass laws in support of the privilege of free suffrage. This certainly does not mean the authorization of laws looking towards the curtailing and deprivation of free suffrage." In that case the court invalidated a legislative attempt to restrict the right to vote in a primary election to those voters registered at the prior general election, and held that the Legislature was without power to establish tests governing a citizen's right to vote in a primary election.

[7, 8] *Third,* the inability of the Legislature to infringe the citizen's constitutional right of suffrage prior to 1900 meant that, in any situation where the party system was an integral part of the elective machinery, the Legislature could not deny to a particular political party the right to participate in a given decision. Britton v. Board of Election Com'rs, supra; Eaton v. Brown, 96 Cal. 371, 373, 31 P. 250, 17 L.R.A. 697, 31 Am.St.Rep. 225. In any election where the party system furnishes the means by which the citizen's right of suffrage is made effective, denial of his party's right to participate in the election accomplishes, in the words of the court in the Britton case, "the disfranchisement of voters, or [compels] them, if they vote at all, to vote for representatives of political parties other than that to which they belong. The deprivation of the right of selection is a deprivation of the right of franchise." Britton v. Board of Election Com'rs, supra, 129 Cal., page 344, 61 P. page 1117, 51 L.R.A. 115; cf. People v. Election Com'rs, 221 Ill. 9, 18, 77 N.E. 321, 5 Ann.Cas. 562; State v. Phelps, 144 Wis. 1, 5, 33, 128 N.W. 1041, 35 L.R.A.,N.S., 353; see Starr "Legal Status of American Political Parties," (940) 34 Am.Pol. Science Rev. 439, 444. In some jurisdictions the basis for the citizen's right to exercise his franchise through political parties is also founded upon such fundamental doctrines as the constitutional right of assembly and the right of petition. See Starr, op. cit. supra, p. 444. Defendants argue that the fact that certain offices may be made non-partisan (Const. of Calif., art. II, § 2¾) indicates that the party system cannot be said to be a part of the citizen's constitutional right of suffrage. The obvious answer to this contention is that in a non-partisan election the party system is not an integral part of the elective machinery and the individual's right of suffrage is in no way impaired by the fact that he cannot exercise his right through a party organization.

[9-10] *Fourth,* since the adoption of article II, section 2½ of the Constitution of California in 1900, the Legislature has had power to exclude both individual citizens and political parties from participation in primary elections upon certain conditions. That section of the Constitution provides: "The Legislature shall have the power to enact laws * * * providing for the direct nomination of candidates for public office * * * at elections to be known and designated as primary elections; *also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election.* * * *" (Italics added.) The purpose of this constitutional amendment was to give the Legislature a free hand in dealing with the evils which had formerly been prevalent in primary elections, even to the extent of excluding parties and individuals from participation therein. Schostag v. Cator, 151 Cal. 600, 605, 91 P. 502; Heney v. Jordan, 179 Cal. 24, 27, 175 P. 402. The power thus conferred upon the Legislature, however, to restrict the constitutional right of suffrage has not been construed to be unlimited in scope. In discussing this power the court said in Socialist Party v. Uhl, 155 Cal. 776, at page 792, 103 P. 181, at page 188, "The power is vested in the Legislature, under section 2½ of article 2, to determine the tests and conditions upon which participation in a primary election may be had, either by electors as voters thereat, or by electors as candidates thereunder. The right is thus conferred to prescribe any reasonable test, and it is the duty of the Legislature to prescribe one. * * * The obvious purpose of a primary law is to preserve the integrity of parties. The

necessity for maintaining the integrity of such parties is recognized in the constitutional provision with reference to primary elections. * * * it is the duty of the Legislature, when legislating upon the subject of primaries, to so legislate as to maintain the integrity of parties, and the integrity of any political party * * *." Throughout the court's opinion in the Uhl case it is emphasized that the power of the Legislature to restrict the right of suffrage is limited to prescribing tests and conditions for participation in primary elections which are reasonable and not arbitrary. See Socialist Party v. Uhl, supra, 155 Cal., pages 785–787, 789–790, 792–794, 103 P. 181. In Schostag v. Cator, 151 Cal. 600, 91 P. 502, in which it was pointed out that the purpose of the constitutional amendment was to give the Legislature practically a free hand in dealing with primary elections, the court nevertheless emphasized that its power in restricting the right of suffrage was limited to setting up reasonable tests and conditions. See Schostag v. Cator, supra, 151 Cal., pages 603, 604, 91 P. 502; Katz v. Fitzgerald, 152 Cal. 433, 435, 436, 93 P. 112; Heney v. Jordan, 179 Cal. 24, 28, 175 P. 402. It follows, therefore, that the legislation challenged in this action is valid as a restriction upon the fundamental right of suffrage only if it comes within the limited power conferred upon the Legislature by California Constitution, article II, section 2½, to prescribe reasonable tests and conditions for participation by parties and individuals in primary elections.

1. *Act prohibiting use of word "communist."* Elections Code, § 2540.3.

[11, 12] In this section, Stats. Fourth Ex.Sess., 1940, p. 362, § 1, the Legislature provided that no party should be qualified to participate in any primary election "which uses or adopts as any part of its party designation the word 'communist' or any derivative of the word 'communist.'" In considering the validity of this legislation the court may not interfere "if there is any theory upon which the provision might reasonably have been concluded by the Legislature to be essential." Heney v. Jordan, supra, 179 Cal., page 27, 175 P. page 404. We can, however, find no reasonable ground upon which such a restriction of the constitutional right of suffrage can be justified. For the first time, in enacting conditions for participation in primary elections, the Legislature has departed from the tests of numerical strength and party registration which hitherto have been adopted as reasonable measures for improving the operation of the primary election as an instrument for expressing the desires of the individual voters. If we assume that the Legislature has power under the Constitution to deprive voters of their right of suffrage because of their political beliefs and assume, as argued by defendants, that the present statute proscribing any party designated by the word "communist" was designed to eliminate from the primary election those parties which advocated subversive doctrines, we cannot find that this statute has any reasonable relation to that purpose. The name adopted by a political party is frequently without any value in ascertaining the political beliefs of its adherents, and if the beliefs were pernicious, they would remain so despite a change in the name of the party. Reference to our own political history is sufficient to illustrate the utter impossibility of placing reliance upon the name currently used by a political party in so vital a matter as depriving it of a place on the primary ballot. Assuming for the moment, therefore, that the Legislature has power to deny the use of the primary election machinery to particular groups of dangerous citizens, it does not follow that it may do so by a statute which merely operates to deny to such groups the use of a particular name. Such legislation is particularly unfortunate when made the basis for restricting so fundamental a right as that of free suffrage. The statute has no reasonable relation to the goal at which the Legislature presumably aimed, and it must be held invalid as unreasonable.

[13-16] It is suggested that the Legislature might properly forbid the use of a particular name by political parties if some evil or unlawful connotation applies to that name. In apparent recognition of this theory defendants urge that this court can take judicial notice of the fact that the Communist Party advocates the overthrow of the government by force and violence. The doctrine of judicial notice was adopted as a judicial short-cut to avoid necessity for the formal introduction of evidence in certain cases where there is no real need for such evidence. Before a court will take judicial notice of any fact, however, that fact must be a matter of common and general knowledge, well established and authoritatively settled, not

doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof. See discussion 10 Cal.Jur. 693. As was pointed out in Varcoe v. Lee, 180 Cal. 338, 344, 181 P. 223, 225, "if there were any possibility of dispute" the fact cannot be judicially noticed; and again (page 345 of 180 Cal., page 226 of 181 P.): "It is truly said that the power of judicial notice is, as to matters claimed to be matters of general knowledge, one to be used with caution. If there is any doubt whatever, either as to the fact itself or as to its being a matter of common knowledge, evidence should be required."

[17] Tested by these standards, the doctrine has no place in the present case. Not only do plaintiffs vigorously assert that the Communist Party does not advocate force and violence, but the decided cases have definitely demonstrated that the fact here alleged to exist is not the subject of judicial notice. In State v. Reeves, 5 Wash.2d 637, 106 P.2d 729, 130 A.L.R. 1465, the attorney general of Washington urged, as do defendants here, that the Communist Party should be kept off the ballot and that the courts could take judicial knowledge of the fact that the party advocated force and violence. The Supreme Court refused to take judicial notice of that fact for the reason that the litigants denied it. Furthermore, it was said, if the court in the election case were to make a judicial finding on the question it would be tantamount to holding all registered communists were guilty of violating the criminal syndicalism act in the absence of evidence on the question. The court pointed out that the cases relied upon by the attorney general in that case (as are most of the cases relied upon by defendants), dealt with the deportation of aliens, and were cases reviewing an administrative record which did not involve judicial notice at all. In Ex parte Fierstein, 41 F.2d 53, a similar contention was made before the Ninth Circuit Court of Appeals. There the court reversed an order of deportation which had been predicated on proof the alien was a communist. Judge Wilbur, speaking for a unanimous court, held that the court could not take judicial notice of the fact that the Communist Party advocates force and violence, and that the order could not stand in the absence of evidence of that fact. Referring to some of the cases relied upon by defendants in the present case, the court stated (page 54 of 41 F.2d): "While the character of this organization has frequently been considered by the court, and in some very recent cases, Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; Antolish v. Paul, [7 Cir.], 283 F. 957; Skeffington v. Katzeff, [1 Cir.], 277 F. 129; Ex parte Jurgans, D. C., 17 F.2d 507, the decisions in these cases are based upon the evidence adduced before the court with reference to the character of this organization, and the statements made in the opinions of the court with reference to that organization are based upon the testimony before the court, and in no instance has the court attempted to take judicial notice of the character of this organization."

None of the cases cited compel a contrary conclusion. Most, if not all, of the federal cases relied upon did not involve the question of judicial notice at all. They were cases involving reviews of determinations by the Department of Labor, which by law is vested with fact-finding power and whose determinations were predicated on evidence. These cases were so distinguished in the Reeves and Fierstein cases, supra. In the case of Ex parte Coon, 44 Cal.App.2d 531, page 543, 112 P.2d 767, at page 774, the appellate court did state: "It is a matter of common knowledge that the Communist Party comes within that category"—that is, within the group that advocates and practices the overthrow of government by subversive activities. The statement was not only dictum, but it had no reference to the doctrine of judicial knowledge which was not involved in the case. The same can be said of Field v. Hall, 201 Ark. 77, 143 S.W.2d 567. As was pointed out in the Reeves case, supra, to hold that this court will take judicial notice of the alleged fact that the Communist Party advocates force and violence, without any evidence of that fact, would not only require judicial notice of a fact which plaintiffs and their counsel vehemently deny, but it would also necessitate a finding that every registered communist is a felon and could be convicted of a violation of our criminal syndicalist law upon mere proof of membership in the Communist Party. That is not the law.

[18-20] Although not urged in the briefs, it was suggested at oral argument that the prohibition against use of the word "communist" may be sustained be-

cause the statute can be said to contain an implied finding by the Legislature that the Communist Party advocates the forceful overthrow of the government. It is said that this implied legislative finding, even though on a controversial issue, is binding on the courts. To state the contention is to refute it. Aside from the fact that it is not the function of the Legislature to determine whether a statute declaring a general policy has been violated in a particular case, that being a judicial function, it is clear that a statute which purports to determine that a particular person or group has violated a general law is special in nature, and violates article IV, section 25, subdivision 11, of the Constitution, which provides: "The Legislature shall not pass local or special laws in any of the following enumerated cases * * * Eleventh —Providing for conducting elections * * *."

[21-24] We have no doubt that it is within the Legislature's power to investigate elections and to determine that the public interest requires that any party advocating the forceful overthrow of government should be denied a place on the ballot. Neither have we any doubt that the finding of the Legislature that the problem requires restrictive legislation is conclusive on the courts. The Legislature, however, is without power to determine that a particular person or group has advocated the doctrine which violates the policy laid down in the statute. If the statute be interpreted to include the implied finding here in question, as contended by defendants, it would mean that the Legislature had determined that a special group had violated the general policy of the statute. Such legislation would clearly be unconstitutional. That this is so, can readily be demonstrated. For example, it is clearly within the power of the Legislature to determine as a fact that, in the public interest, all diseased cattle should be destroyed, but it is not within the legislative power to determine that John Smith's cattle are diseased. So, while it was clearly within the legislative power to determine that, in the public interest, any party advocating the forceful overthrow of the government of the United States should be denied a place on the ballot, it is not within the power of the Legislature to determine that the Communist Party advocates the doctrine in question. It is now too well settled to require extensive discussion that a law is special and unconstitutional if it confers particular privileges or imposes peculiar disabilities in the exercise of a common right upon a single person or group arbitrarily selected. City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604; Smith v. McDermott, 93 Cal. 421, 29 P. 34; Darcy v. City of San Jose, 104 Cal. 642, 38 P. 500. It follows, that while the Legislature may properly deny a place on the ballot to any party advocating the forceful overthrow of the government, it may not, constitutionally, determine that a specified party advocates the doctrine in question without running afoul of the constitutional provision above quoted.

2. *Act forbidding foreign affiliation or policy of violence.* Elections Code, § 2540.4.

In this section of the Elections Code, added by Stats. Fourth Ex.Sess.1940, p. 362, sec. 2, the Legislature sought to deny participation in the primary elections to any political party affiliated with the Communist Party, the Third Communist International or any other foreign agency or political party. It also sought to deny participation to any party which advocates the overthrow of the government by unlawful means or carries on a program of sabotage or force and violence. The plaintiff Communist Party alleges that defendants, relying upon this statute, have declared their intention to refuse to take any steps to qualify the Communist Party or its nominees to appear on the primary ballot in August, 1942. While the allegations of the complaint do not indicate that the plaintiff party is subject to disqualification under each of the various clauses of this statute, we deem it necessary, in view of the fact that this cause must be remanded for further action by the trial court, to determine the constitutional issues raised by the statute as a whole for the guidance of the lower court.

[25] In so far as section 2540.4 prohibits the qualification of any party "which is directly or indirectly affiliated, by any means whatsoever, with the Communist Party of the United States [or with] the Third Communist International," it is subject to the defects already pointed out with reference to section 2540.3. It is special legislation and it attempts to bar political beliefs merely by reference to the particular name borne by groups at present thought to advocate objectionable doctrines. Such legislation has no rational basis. The

change of a party name would satisfy the statute without altering the political doctrines at which the Legislature has aimed its restrictions. In this particular, therefore, section 2540.4 must also be held to have no reasonable relation to the purposes which the Legislature had in mind. The test is not a reasonable one and it is outside the power conferred upon the Legislature by article II, section 2½ of the Constitution. It is also invalid because it is special legislation.

The statute forbids the qualification of any party "which is directly or indirectly affiliated, by any means whatsoever, with * * * any other foreign agency, political party, organization or government." While we have no doubt that the Legislature might properly deny the right to participate in a primary election to any political party which has subordinated itself to the control and direction of a foreign government, the sweeping language of this prohibition we think places it beyond the bounds of reason in so far as the Legislature's power to prescribe tests for participation in primary elections is concerned. Such a prohibition would destroy the rights of suffrage of those members of any party which affiliated itself with a foreign organization however beneficial the purposes of such an organization or however far removed from the field of political action within this country. No attempt is made to limit the operation of this clause to those foreign agencies whose activities constitute a clear threat to the operation of our elective system, and we do not think that the Legislature's power to restrict the constitutional right of suffrage was intended to authorize the adoption of tests so far removed from the express purpose of improving the operation of the primary election system. This portion of the statute also must be held to exceed the power conferred upon the Legislature and to be invalid for that reason.

[26] There is no doubt, however, that the remainder of section 2540.4 comes within the Legislature's power to prescribe tests and conditions for participation in primary elections. This power certainly includes the right to adopt tests designed to exclude those political parties advocating the overthrow of the government by unlawful means or those parties carrying on a program of sabotage, force and violence, sedition or treason. Such groups constitute an immediate threat to the functioning of our institutions, including the continued exercise of the right of suffrage. Since it is within the power of the state as to such groups to restrict even the rights of free speech and free press (see, for example, Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; De Jonge v. Oregon, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278), it clearly was within the reasonable bounds of the Legislature's power to determine that these bodies should also be barred from the primary election ballot. Under such circumstances we have no doubt that the Legislature's power to exclude parties and individuals from participation in a primary election extends to those groups whose political beliefs create a clear danger to the continued existence of the institutions under which our constitutional form of government functions. Section 2540.4 of the Elections Code, omitting the invalid portions which are clearly severable, must be upheld as a proper condition for participation in primary elections in this state in the following form: "Notwithstanding any other provisions of this code, no party shall be recognized or qualified to participate in any primary election * * * which either directly or indirectly carries on, advocates, teaches, justifies, aids, or abets the overthrow by any unlawful means of, or which directly or indirectly carries on, advocates, teaches, justifies, aids, or abets a program of sabotage, force and violence, sedition or treason against, the Government of the United States or of this State."

3. *Act requiring 2,500 registered members at the previous primary election.* Elections Code, § 2540.5.

[27] In this statute, added by Stats. 1941, p. 3036, the Legislature sought to deny participation to political parties in any primary election "unless it appears to the Secretary of State, as a result of examining and totaling the statements of registration of voters and their political affiliations transmitted to him by the county clerks *25 days prior to the last preceding primary election,* that not less than 2,500 voters declared their intention of affiliating with that party." (Italics added.) It is now well settled that the Legislature has power to establish tests for participation in a primary election based upon the number of votes cast for the candidates of a particular party in the last preceding election.

Katz v. Fitzgerald, supra. The present statute sets up a similar test of numerical strength, except that it provides an absolute requirement to be met by all parties rather than one of several alternative requirements any of which would qualify the party for participation. See Elections Code, § 2540(a), (b) and (c), St.1941, p. 1288.

In adopting such a test of participation it is the Legislature's duty to preserve the integrity of the party system (see Socialist Party v. Uhl, supra, 155 Cal. page 792, 103 P. 181), and tests based upon the numerical strength of the party are sustained upon the theory that the party system will function more effectively if the primary election machinery is denied to those political parties which are made up of exceedingly small bodies of citizens. See Katz v. Fitzgerald, supra, 152 Cal. page 436, 93 P. 112. So long as the tests for participation were stated alternatively, as in Elections Code, § 2540, it is clear that any substantial party could establish its right to participate in the primary election under some one of the various numerical tests therein provided. Thus, the party could qualify if it had cast for one of its candidates 3 per cent of the total vote at the last preceding gubernatorial election. Elections Code, § 2540(a). But failure to have cast this vote could not operate to deprive a substantial party of its present right to participate, however, since the party could also qualify by securing a petition signed by at least 10 per cent of the voters of the state at the last preceding gubernatorial election (§ 2540(c) or by establishing that at least 1 per cent of the entire voters of the state at the preceding gubernatorial election had declared their present intention to affiliate with that party. § 2540(b). The adoption of section 2540.5, however, as an absolute prerequisite to participation in a primary election introduces a new, and exceedingly stringent, element into the Legislature's requirements. Failure to meet the provisions of section 2540.5, in other words, cannot be obviated by compliance with any alternative test; and, in our opinion, this consideration is an important factor in determining the validity of this legislation.

[28] Any test based upon numerical data depends for its validity upon the theory that the Legislature is seeking to exclude from participation in the primary election (thus infringing rights of suffrage) only insubstantial groups the deprivation of whose rights can be justified by the larger good derived from a more efficient operation of the primary system. No one would contend that the Legislature has power under article II, section 2½, to adopt numerical tests which have the express purpose of ruling off the primary ballot those parties which clearly represent a large and substantial body of voters. If, therefore, the actual operation of section 2540.5 produces any such result, it cannot be held to be a test which is reasonably designed to accomplish the Legislature's purposes.

[29] The complaint in this case alleges that by virtue of the vote polled by the Communist Party for its candidates in the gubernatorial election of November, 1938, it was entitled to and did participate, in the primary election held in August, 1940. It is alleged that the plaintiff party has fully complied with the requirements imposed by Elections Code, § 2540, but that it did not have 2,500 registered voters who declared their intention to affiliate with the Communist Party 25 days prior to the primary election of August, 1940. It is apparent, therefore, that if the provisions of Elections Code, section 2540.5 are held valid, the Communist Party cannot qualify for participation in the primary election of August, 1942, despite its ability to meet the tests of numerical strength which have been applicable in this state for many years. It should be noted that, although Elections Code, §§ 2570 and 2571, St.1939, p. 122, require that data on the number of registered voters in each party be transmitted to the secretary of the state eighty days prior to each direct primary election and also twenty-five days prior thereto, the requirements for participation in section 2540.5 are measured by the information conveyed *twenty-five days before the last preceding primary election,* which ordinarily constitutes a period of two years. Since the provisions of section 2540.5 are made absolute, it is clear that no party, however substantial it might be, could participate in a primary election in this state unless it had 2,500 registered voters at a date two years prior to the time when it seeks to assert its right. In the case of a newly organized party the test imposes an absolute bar to participation in a primary election held after its organization because the right to participate is measured by events which transpired before it was

in existence. Such a test cannot possibly avoid impairing constitutional rights of suffrage by barring from the ballot political parties which represent substantial numbers of citizens. Moreover, as already pointed out, the test applied must be reasonable. To adopt a test predicated upon the number of registered voters affiliated with a particular party two years in the past when information exists as to the present registration and where there is no alternative test, is to apply an arbitrary and unreasonable standard which does not tend to accomplish any proper legislative purpose. Section 2540.5 of the Elections Code, therefore, must be held to be invalid because it is not a reasonable exercise of the power possessed by the Legislature to establish tests and conditions for participation in primary elections.

4. *Act conferring discretion to determine party doctrines.* Elections Code, § 2540.9.

[30-32] This section of the statute, added by Stats.Fourth Ex.Sess.1940, p. 362, § 3, provides: "The Secretary of State shall, with the advice and consent of the Attorney General, determine which parties are qualified to participate in any primary election. Such determination shall be subject to review by the courts in accordance with law." In so far as this section applies to the numerical tests which are imposed upon any party seeking to participate in a primary election, it gives the same kind of power to the secretary of state which he already possesses under Elections Code, section 2540(b) and (c), where his duties are ministerial in nature. The power delegated under this section is applicable to the portions of section 2540.4 which we have held valid, however, and there different considerations are controlling. When construed in conjunction with Elections Code, § 2540.4, it is apparent that the effect of section 2540.9 is to vest in the secretary of state and the attorney general discretion to determine what political parties come within the prohibition of the statute as bodies which advocate the overthrow of the government or which are engaged in a program of force and violence. It has been held that before the constitutional right to vote may be taken away from a citizen, he must be given an opportunity to be heard in his own behalf. Pierce v. Superior Court, 1 Cal.2d 759, 762, 37 P.2d 453, 460, 96 A.L.R. 1020; Ash v. Superior Court, 33 Cal.App. 800, 166 P. 841. We have held that where the party system is made an integral part of the elective machinery any attempt to bar a particular party from the ballot results in an infringement of the individual voter's right of suffrage. Supra. It follows that if the effect of the present statute is to restrict the constitutional right of suffrage and if such restrictions are made to depend upon an administrative determination as to the doctrines and beliefs of the political parties whose right to participate is challenged, an opportunity to be heard must be afforded those whose rights are subjected to attack. Elections Code, section 2540.9 vests in the secretary of state, with the advice and consent of the attorney general, the full power to determine what parties are qualified to participate in any primary election. No provision whatever is made for notice and hearing, nor is any time specified during which such a determination must be made. The provision that the determination "shall be subject to review by the courts" furnishes no protection to the political group which is disqualified if the disqualification is made immedately before the election, as is possible under the statute. Under such circumstances, if the determination as to a particular group were erroneous, the court's action could not repair the damage which would result from the temporary suspension of the party's right to participate in the election. It is our conclusion, therefore, that although the Legislature might properly bar from the primary ballot those parties which are described in the portions of section 2540.4 which we have held to be valid, the administrative provisions contained in section 2540.9 cannot be sustained as a proper means of ascertaining whether a particular party should be disqualified for its doctrines where fundamental rights of suffrage are involved. Cf. Lovell v. Griffin, 303 U.S. 444, 451, 58 S.Ct. 666, 82 L.Ed. 949. That section must therefore be held to be invalid. It does not follow, however, that the provisions of section 2540.4 are thus rendered ineffective. The right of any party to participate in a primary election, if it is thought that the provisions of that section might operate to bar such participation, can be tested by a court proceeding brought under the provisions of Elections Code, section 2900. This, in effect, is the result of the present action brought under that section.

For the reasons stated, the court erred in sustaining general demurrers to the complaint. The judgment is therefore reversed, and the trial court is directed to issue its order to show cause as provided in section 2900 of the Elections Code.

EDMONDS, CARTER, TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

20 Cal.2d 526

MILLER et al. v. DYER et al.

L. A. 17908.

Supreme Court of California.

July 10, 1942.

1. Specific performance 🔑13

If vendor has no title or interest in the land that he contracts to convey, he will not be required specifically to perform as equity will not compel him to obtain title and a decree of specific performance would be of no avail.

2. Specific performance 🔑14

If vendor is the equitable owner of land which he contracts to convey and has the right to call for the legal title, specific performance will be decreed at the suit of his vendee.

3. Escrows 🔑8(1)

Where vendors agreed to convey real property to vendee and deposited deed thereto in escrow with the intention of passing title, the vendee became the "equitable owner" of the land and vendors held the legal title in trust for vendee as purchaser.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Owner".

4. Specific performance 🔑10(1)

Where vendor contracted to sell to purchaser property which vendor was purchasing from third parties and deed to which had been deposited in escrow with intention of passing title, vendor had an "equitable title" therein which he could be compelled to convey in purchaser's action for specific performance.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Title".

5. Specific performance 🔑10(1), 129

Vendor could not defend purchaser's action for specific performance on the ground that vendor's title was not as complete as the one he agreed to convey, since if vendor had any interest in the property the purchaser, at his option, may enforce the contract with respect to whatever interest vendor possesses, and may also receive compensation for deficiency in performance.

6. Specific performance 🔑6

The provisions in statute that "neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation" is a codification of the rule of mutuality of remedy, which rule was not applicable where the unavailability of the remedy to the party against whom relief was sought resulted from his own default.

7. Specific performance 🔑106(1)

Where vendor contracted to convey property which she was purchasing from third parties, who had deposited deed in escrow with intention of passing title, purchaser's complaint in action for specific performance stated a cause of action against third parties even though they were not parties to the contract as they held legal title in trust for vendor, a conveyance of which title as well as vendor's equitable title could be compelled in same action, since equity avoids "circuity of action".

See Words and Phrases, Permanent Edition, for all other definitions of "Circuity of Action".

8. Specific performance 🔑106(1)

In action for specific performance of contract for exchange of realty, complaint stated cause of action against a title company and a loan association where title company held proceeds of loan for benefit of party entitled thereto under contract and the loan association made the loan and held a trust deed on land involved, since their interests must be determined to give proper relief and to avoid "circuity of action".

9. Action 🔑38(2)

An action for specific performance of a contract for exchange of real estate and for damages for delay in performance was not uniting improperly a cause of action for specific performance and for breach of the agreement to convey real property as the repudiation of the contract gave rise to a single cause of action regardless of the remedies available.

10. Specific performance ⚿12

A written contract for the exchange of real estate was not made unenforceable because a supplementary oral agreement to make up in cash the amount of a loan deducted by the lender may be unenforceable. Civ.Code, § 1624, subd. 4.

◆

In Bank.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Curtis E. Miller and others against Mabelle M. Dyer and others for specific performance of a contract for exchange of real property and for damages occasioned by delay in performance. General and special demurrers to the complaint were sustained with leave to amend. From judgments of dismissal entered upon their refusal to amend, plaintiffs appeal.

Reversed.

For prior opinion, see Cal.App., 120 P.2d 52.

John A. Jorgenson, of Los Angeles, for appellants.

Howard F. Shepherd, of Los Angeles, and Harvey, Rimel & Harvey, of Santa Ana, for respondents.

TRAYNOR, Justice.

In this action for specific performance of a contract for the exchange of real property and for damages occasioned by delay in performance, the trial court sustained general and special demurrers to the second amended complaint with leave to amend. Plaintiffs have appealed from judgments of dismissal entered upon their refusal to amend.

The complaint sets forth the following allegations: Defendant Mabelle Dyer agreed by written contract to pay the plaintiffs $250, to convey to them certain real property that she owned, to negotiate a loan of $2,000 on a parcel of realty owned by defendants Hector and Elizabeth Dyer, and to transfer both the amount of the loan and the realty to plaintiffs in return for a conveyance to her of certain real property owned by one of the plaintiffs. The value of the latter property approximates that of the properties and the cash that she was to transfer to them. Mabelle Dyer at the same time entered into a written contract with Hector and Elizabeth Dyer whereby the latter agreed to convey to her their real property, and she agreed to pay for it by executing and delivering to them a $3,000 trust deed on the property that she was to receive from plaintiffs. Appropriate deeds were deposited in escrow including one executed and delivered by Hector and Elizabeth Dyer "with the intention of passing title" to their property to Mabelle Dyer. The escrow clerk, however, returned that deed to Hector Dyer for a clerical correction without the knowledge or consent of plaintiffs. Mabelle Dyer obtained a loan of $2,000 from the defendant Laguna Federal Savings and Loan Association secured by a trust deed on the property. The lender required, however, that $500 of the loan be deducted and retained to cover the cost of repairs it deemed necessary. Mabelle Dyer agreed orally with the plaintiffs to make up the deduction in cash. The balance of the loan was transmitted to the defendant Title Insurance & Guarantee Company to be held by it for the parties entitled thereto upon the completion of the entire transaction. Defendants Mabelle, Hector, and Elizabeth Dyer have repudiated the transaction. Hector and Elizabeth Dyer refuse to redeliver their deed in escrow and Mabelle Dyer has instructed the title company not to pay to plaintiffs the loan funds it has on hand. The title company and the loan association claim to have an interest in the property adverse to plaintiffs.

[1-4] In support of their general demurrers respondents contend that the complaint fails to state a cause of action against Mabelle Dyer since it shows that she has no title to the land she contracted to convey and that she cannot perform her agreement to borrow $2,000 on the property and pay that sum to plaintiffs. If the vendor has no title or interests in the land that he contracts to convey he will not be required specifically to perform. The decree would be of no avail for equity will not compel him to obtain title. Title Guarantee, etc., Co. v. Henry, 208 Cal. 185, 280 P. 959; Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L.R.A.,N.S., 522. If, however, the vendor is the equitable owner and has the right to call for the legal title, specific performance will be decreed at the suit of his vendee. Farnum v. Clarke, 148 Cal. 610, 84 P. 166; Easton v. Montgomery, 90 Cal. 307, 27 P. 280, 25 Am.St.Rep. 123; Mc-

Donald v. Yungbluth, C.C., 46 F. 836; Miedema v. Wormhoudt, 288 Ill. 537, 123 N.E. 596; Cutler v. Lovinger, 212 Mich. 272, 180 N.W. 462. See, also, Pomeroy, Specific Performance of Contracts, 3d ed., p. 667. When Hector and Elizabeth Dyer agreed to convey their real property to Mabelle Dyer, and deposited the deed to such property in escrow, "with the intention of passing title," Mabelle Dyer became the equitable owner of the land and Hector and Elizabeth Dyer held the legal title in trust for her as purchaser. Keese v. Beardsley, 190 Cal. 465, 213 P. 500, 26 A.L.R. 1538; Jackson v. Torrence, 83 Cal. 521, 23 P. 695; Gilbert v. Sleeper, 71 Cal. 290, 12 P. 172. Mabelle Dyer could convey that equitable interest or title (Rogers, etc., Co. v. Southern California, etc., Co., 159 Cal. 735, 115 P. 934, 35 L.R.A.,N.S., 543; Easton v. Montgomery, supra), and she can be compelled to do so in this action for specific performance.

[5, 6] Mabelle Dyer's inability to convey to plaintiffs complete title to the land that she contracted to purchase from Hector and Elizabeth Dyer, and her inability to transfer to plaintiffs the entire proceeds of the loan would prevent her from specifically enforcing her contract with plaintiffs since a vendor may not force a defective title on an unwilling purchaser or compel performance while conditions precedent to his recovery remain for him to perform. Civ.Code §§ 3394, 3392. See, also, 23 Cal. Jur. 474. She cannot, however, defend this action on the ground that her title is not so complete as the one she agreed to convey. If the vendor has any interest in the property that he has contracted to convey, the vendee, at his option, may enforce the contract with respect to whatever interest the vendor possesses, and may also receive compensation for the deficiency in performance. Smiddy v. Grafton, 163 Cal. 16, 124 P. 433, Ann.Cas.1913E 921; Farnum v. Clarke, supra; McCowen v. Pew, 147 Cal. 299, 81 P. 958; Easton v. Montgomery, supra; Swain v. Burnette, 76 Cal. 299, 18 P. 394; Marshall v. Caldwell, 41 Cal. 611. See, also, Pomeroy, Specific Performance of Contracts, 3d Ed., p. 900. In Linehan v. Devincense, 170 Cal. 307, 149 P. 584, 586, the vendee failed to show an existing contract and his unexplained laches precluded any right to specific performance. The statement in the opinion that "as she [the vendor] could not have compelled specific performance of the contract, so specific performance may not be enforced against her * * * [citing Civ.Code § 3386]" was not necessary to the decision of the case, and is without support in the authorities. It is therefore disapproved by our decision herein. Section 3386 of the Civil Code, which states that "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation * * *" codifies the rule of mutuality of remedy that was well established in equity jurisprudence at the time of the adoption of the code." See 23 Cal.Jur. 448. That rule was never considered applicable where the unavailability of the remedy to the party against whom relief was sought resulted from his own default. Smiddy v. Grafton, supra; Farnum v. Clarke, supra; McCowen v. Pew, supra; Easton v. Montgomery, supra; Swain v. Burnette, supra; Marshall v. Caldwell, supra; Armstrong v. Sacramento V. R. Co., 52 Cal.App. 110, 198 P. 217. See, also, 28 Calif.L.Rev. 503; 16 Calif.L.Rev. 541; Pomeroy, Specific Performance, 3d Ed., p. 903 (1926); 2 Story, Equity Jurisprudence, 4th Ed., p. 457 (1918).

[7] It is contended that the complaint fails to state a cause of action against Hector and Elizabeth Dyer since they were not parties to the contract that plaintiffs seek specifically to enforce. They hold the legal title of the land sought to be conveyed, however, as trustees for Mabelle Dyer. Since the latter may be compelled to convey her equitable interest in the land to plaintiffs and since equity avoids circuity of action, Hector and Elizabeth Dyer may be compelled to convey the legal title to them. McDonald v. Yungbluth, supra; Miedema v. Wormhoudt, supra; see 33 Harv.L.Rev. 822.

[8] It is also contended that the complaint fails to state a cause of action against the title company and the loan association. The title company holds the proceeds of the loan for the benefit of the party entitled thereto upon the completion of the transaction. The loan association made the loan, transmitted the proceeds to the title company, and received a trust deed on the land involved. The asserted adverse interests of both defendants in the property arise out of transactions with the principal defendant, Mabelle Dyer, concerning her contract with the plaintiffs. Those interests must be determined to give plain-

tiffs proper relief and to avoid circuity of action.

[9, 10] The special demurrer of defendants title company and loan association on the grounds of misjoinder of parties defendant and of improper uniting of several causes of action fails to specify wherein the alleged misjoinder exists. Healy v. Visalia & T. R. Co., 101 Cal. 585, 36 P. 125. The special demurrer of defendants Dyer on the ground that causes of action for specific performance and for breach of an agreement to convey real property have been united improperly fails to take into account that the repudiation of the contract gave rise to a single cause of action regardless of the remedies available to plaintiffs. Abbott v. 76 Land & Water Co., 161 Cal. 42, 118 P. 425; San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549, 41 P. 495, 29 L.R.A. 839. The contention that the alleged cause of action is barred by the provisions of subdivision 4 of section 1624 of the Civil Code because a part of the alleged agreement for the exchange of real property was not in writing is untenable. The fact that Mabelle Dyer's supplementary oral agreement to make up in cash the amount of the loan deducted by the lender may be unenforceable does not prevent enforcement of the written contract. See cases cited in 12 Cal.Jur. 925.

The judgments are reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

WEST KEY NUMBER SYSTEM

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20 Cal.2d 556

WILKERSON v. SEIB et al.

L.A. 17975.

Supreme Court of California.

July 15, 1942.

1. Appeal and error 🔑917(1)

On appeal from a judgment of dismissal entered after an order sustaining general and special demurrers to amended complaint without leave to amend, allegations of complaint were required to be regarded as true.

2. Deeds 🔑61

A grantor's irrevocable delivery of a deed to a third person, with instructions that it be given to the grantee on the grantor's death, has the effect of vesting title to the property immediately in the grantee, qualified only by a life tenancy in the grantor, and the depositary thereby becomes the "trustee" of the deed for the grantee.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee."

3. Deeds 🔑61

Grantor's absolute and unconditional delivery of deed to third person, with instructions to hold the deed without recording and to deliver it on the grantor's death to the grantee, had the effect of vesting title to the realty immediately in the grantee, qualified only by a life estate in the grantor, and on the grantor's death, the grantee was entitled to receive the deed from the third person, and when the third person failed to make delivery as instructed, the third person continued to hold the deed in trust for the grantee, and the grantor's administratrix received the realty subject to the same trust, though the administratrix had no knowledge of the trust.

4. Money received 🔑17(1)
Trusts 🔑371(1)

In action to establish a trust and for money had and received, plaintiff's allegations that one defendant, as administratrix with will annexed, delivered to other defendants a portion of aggregate amount received by administratrix as trustee, without consideration paid by the other defendants and without change of position in any respect on the part of the other defendants, negatived receipt of any part of the trust funds by the other defendants as innocent third persons and for value, and overcame any presumption that such money was disbursed pursuant to court orders made concerning administration of testatrix' estate, either in extinguishment of a just and legally established claim or of rights under will.

5. Limitation of actions 🔑102(1)

Cause of action to establish a trust and for money had and received, was not barred by limitations, regardless of whether the facts alleged constituted a voluntary or involuntary trust insofar as defendants were concerned, where plaintiff made demand for payment of the trust funds on defendants four days after discovering the existence of the trust, and filed his action a few weeks after defendants' refusal to comply with the demand.

6. Limitation of actions 🔑103(2)

The statute of limitations does not begin to run in case of a voluntary trust until defendant repudiates the trust or at least until owner of property has knowledge of trustee's intention to repudiate the trust.

7. Limitation of actions 🔑103(2, 4)

In case of an involuntary trust, the statute of limitations begins to run, regardless of repudiation of the trust, from time when the wrongful or fraudulent acts are performed by the trustee, except that the statute is tolled as to the owner of the property until he actually acquires knowledge of the wrongful acts, or, by the exercise of reasonable care, until he is charged with such notice.

8. Executors and administrators 🔑315(6)

Action to establish a trust and for money had and received from rentals and sale of realty which testatrix had conveyed to plaintiff by deed which testatrix had delivered to a third person with instructions to deliver deed to plaintiff on testatrix' death, was not a "collateral attack" on probate court's final decree of distribution of testatrix' estate, where the theory of the action was based on alleged fiduciary relationship existing between plaintiff and defendant by reason of defendant's coming into possession of the money, and no redress was sought against defendant in her representative capacity as administratrix with will annexed.

9. Trusts 🔑363

Probate court had no power to try question of ownership of money received by administratrix with will annexed from rentals and sale of realty which testatrix had conveyed to a grantee by deed which testatrix had delivered to a third person with instructions to deliver the deed to the grantee on testatrix' death.

10. Courts 🔑200½

The Superior Court, sitting in probate, is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate.

11. Parties 🔑92(3)

In action to establish a trust and for money had and received, complaint alleging that testatrix executed a deed naming plaintiff as grantee and irrevocably delivered it to a third person with instructions to deliver it on testatrix' death to the plaintiff, and that after testatrix' death a defendant, who was administratrix with will annexed of testatrix' estate, collected income from the realty in question and also sold the realty, and from the proceeds gave to other defendants a certain sum without consideration, was not demurrable on ground of misjoinder of parties defendant.

12. Pleading 🔑193(6)

Complaint was not demurrable on ground that several causes of action were improperly united and were not separately stated, where each count was complete within itself, and arose out of the same transaction, since a cause of action arising out of the same transaction may be separately stated in different ways, even though inconsistent with each other.

13. Pleading 🔑193(1)

The fact that second count of complaint reciting that within two years last past, alleged indebtedness was incurred, was in part at variance with the time element entering into the plaintiff's statement of the first cause of action arising out of same transaction did not render the pleading demurrable.

14. Pleading 🔑225(1)

Though court was entitled to have a clarification of first cause of action which allegedly contained uncertain, ambiguous and unintelligible portions, yet where complaint was not fatally defective in its statement of a cause of action, it was improper to sustain a special demurrer without leave to amend, and plaintiff should have been given an opportunity to meet the objections advanced so that the litigation might be decided upon its merits.

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In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Herbert Wilkerson against Etta B. Seib and others to establish a trust and for money had and received. From a judgment of dismissal entered after an order sustaining general and special demurrers to plaintiff's third amended complaint without leave to amend, the plaintiff appeals.

Judgment reversed, and cause remanded for further proceedings.

Prior opinion, 119 P.2d 28.

William Ellis Lady, of Los Angeles, for appellant.

Millard M. Mier and William C. Schaper in pro. per., Mier & Schaper, and E. L. Overholt, all of Los Angeles, for respondents.

CURTIS, Justice.

The plaintiff, in an action to establish a trust and for money had and received, appeals from a judgment of dismissal entered after an order sustaining general and special demurrers to the plaintiff's third amended complaint without leave to amend.

[1] The complaint in question, the allegations of which must be regarded as true on this appeal from a judgment after demurrers, contains two counts. The basis of the plaintiff's claim is stated in the first cause of action substantially as follows: One Elizabeth J. Herbst, now deceased, owned a house and lot in Los Angeles. In January, 1931, she executed a deed of this property naming the plaintiff as grantee and irrevocably delivered it to one Mitchell, who as notary had taken her acknowledgment of it, with instructions to hold it without recording and to deliver it upon her death to the plaintiff. The plaintiff is alleged to have been "well acquainted" with Mrs. Herbst and to have "rendered and performed acts and deeds for her." Mrs. Herbst died in October, 1932, leaving a will nominating Mitchell as executor. The will was admitted to probate, Mitchell was appointed executor, and he acted as such until his death in August, 1936. Mitchell did not deliver the deed to the plaintiff but treated the property as part of the estate, collecting the sum of $1,632.29 as rentals and depositing this amount to the credit of the estate. In December, 1936, the defendant Seib, a niece of Mrs. Herbst, was appointed administratrix with the will annexed of the Herbst estate, and she continued to act as such until August, 1939. She took over the real property and the past revenue therefrom and collected current income amounting to $957.50 until her conveyance of the property to one Zillotto for a consideration of $2,400. She thus received from the property the total sum of $4,989.79, from which, it is alleged, she gave without consideration to the other defendants, Mier and Schaper, some unknown amount in excess of $2,000. The plaintiff's attorney in June, 1939, while going through Mitchell's papers relative to the Herbst estate, discovered the instrument executed in 1931. He immediately communicated with the plaintiff, who, on calling at the attorney's office on July 29, 1939, learned for the first time of the execution and delivery of this deed. On August 2, 1939, the plaintiff made demand upon the defendants for the money derived from the property subject of the 1931 conveyance. The plaintiff proceeds upon the theory that the property had been held by Mitchell in trust for the plaintiff, that the defendants in like manner now hold the receipts from the property—the aggregate sum of $4,989.79—and that they have refused to comply with his demand therefor. The second cause of action is merely a common count for money had and received, in the same amount.

This action was commenced in September, 1939. The complaint here in question was attacked by demurrers upon the following grounds: (1) failure to state facts sufficient to constitute a cause of action; (2) bar of the statute of limitations; (3) lack of jurisdiction of the court over the subject of the action; (4) misjoinder of parties defendant; (5) improper joinder of several causes of action; and (6) features of uncertainty, unintelligibility and ambiguity as to the statement of the first cause of action. The order of the court sustaining the demurrers was general in its terms. Accordingly, the defendants contend that if the demurrers were well taken as to any of the grounds urged therein, the judgment based on the court's order must be affirmed. Haddad v. McDowell, 213 Cal. 690, 691, 3 P.2d 550; Feldesman v. McGovern, 44 Cal.App.2d 566, 568, 112 P.2d 645. However, this principle is unavailing to the demurrants here in view of the following considerations determinative of the impropriety of the trial court's ruling.

[2, 3] The precise basis of the plaintiff's claim nullifies the force of the defendants' first objection challenging the sufficiency of the statement of facts in the complaint in question. By his first cause of action the plaintiff traced the real property and the earlier proceeds therefrom into the hands of the defendant Seib at a time when she was acting in her representative capacity as administratrix with the will annexed of the Herbst estate, but alleged that she received the property and income as trustee for the plaintiff and not as administratrix. This averment is in accord with the rule established by a long line of decisions in this state headed by the pioneer case of Bury v.

Young, 98 Cal. 446, 33 P. 338, 35 Am.St. Rep. 186, that the grantor's irrevocable delivery of a deed to a third person, with instructions that it be given to the grantee upon the grantor's death, has the effect of vesting the title to the property immediately in the grantee, qualified only by a life tenancy in the grantor, and the depositary thereby becomes the trustee of the deed for the grantee. See, also, Moore v. Trott, 156 Cal. 353, 104 P. 578, 134 Am.St.Rep. 131; Husheon v. Kelley, 162 Cal. 656, 124 P. 231; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703, and Hunt v. Wicht, 174 Cal. 205, 162 P. 639, L.R.A.1917C, 961. Commensurate with this principle, when Mrs. Herbst in 1931 made an absolute and unconditional delivery of the deed to Mitchell, title to the property involved passed at once to the plaintiff, the grantee, subject to a life estate in the grantor. Upon the death of Mrs. Herbst in 1932 the plaintiff, as owner in fee of the property, was entitled to receive the deed from Mitchell. When Mitchell failed to make delivery as instructed, he continued to hold the deed in trust for the plaintiff, and the defendant Seib received the property subject to the same trust. The fact that she had no knowledge of the trust could not destroy the plaintiff's rights under it.

In so replying upon the immediate passage of title under this deed to sustain his claim to the moneys accruing from the use of the property and its sale, the plaintiff does not dispute the doctrine of Green v. Skinner, 185 Cal. 435, 197 P. 60, holding that acceptance by the grantee is a condition precedent to the passage of title and his assent will be presumed and given retroactive effect only if the rights of third parties have not intervened. The plaintiff concedes that since the deed of 1931 was not recorded, the position of Zillotto, the innocent purchaser of the real property, cannot be attacked, and in this connection he merely seeks the proceeds from the sale, which, with the rentals previously collected, the defendant Seib continued to hold subject to the trust.

[4] According to the plaintiff's allegations, the defendant Seib delivered to the defendants Mier and Schaper a portion of the aggregate amount received by her as trustee, which transfer was without consideration and involved no change of position in any respect upon their part. This direct pleading of the defendants' status in relation to the plaintiff's claim negatives their receipt of any part of the total sum of $4,989.39 here in controversy as innocent third persons and for value, and overcomes any presumption that such money was disbursed pursuant to orders of court made concerning the administration of the Herbst estate, either in extinguishment of a just and legally established claim or of rights under the will. In consequence of these averments, it would appear that the defendants are holding the entire proceeds derived from the management and disposition of the property since the death of the grantor in 1932 for the use and benefit of the plaintiff, and the fact that there is no allegation that the defendant Seib knowingly received the property subject to the trust is immaterial under the circumstances.

[5-7] Nor can it be said that the cause of action so stated by the plaintiff is barred by the statute of limitations, regardless of whether the facts alleged constitute a voluntary or involuntary trust in so far as the defendants are concerned. In either case the determinative factors here are the plaintiff's lack of knowledge of the existence of the deed until July 29, 1939, his demand made four days later upon the defendants for payment of the moneys derived from the use and sale of the property in question, and his filing of this action on September 8, 1939, a few weeks following their refusal to comply with his demand. The principles conclusive of this point in favor of the plaintiff are concisely stated in Truesdail v. Lewis, 45 Cal.App.2d 718, at page 723, 115 P.2d 218, at page 221: "The rule is well established that the statute of limitations does not begin to run in the case of a voluntary trust until the defendant repudiates the trust or at least until the owner of the property has knowledge of the trustee's intention to repudiate the trust. Leviston v. Tonningsen, 212 Cal. 656, 664, 299 P. 724; 25 Cal. Jur. 271, sec. 133. In the case of an involuntary trust the statute of limitations begins to run, regardless of repudiation thereof, from the time when the wrongful or fraudulent acts are performed by the trustee, except that the statute is tolled as to the owner of the property until he actually acquires knowledge of the wrongful acts, or, by the exercise of reasonable care, until he is charged with such notice. Neilsen v. Neilsen, 216 Cal. 150, 13 P.2d 715; 25 Cal. Jur. 274, sec. 135." Consistent with this settled law, the circumstances referable to the plaintiff's discovery of the conveyance and his prompt assertion of his rights thereunder demonstrate beyond dispute that the

statute of limitations will not preclude his prosecution of the present action.

[8-10] Likewise without merit is the ground of demurrer based upon the premise that the court sitting in equity is without power to determine the present case, but that such matter is within the exclusive jurisdiction of the probate court. In this connection the defendants urge that all issues relative to the ownership of the moneys now claimed by the plaintiff were conclusively adjudicated in favor of the Herbst estate pursuant to the probate court's decree of distribution of these proceeds, and that such final order is valid on its face and therefore not subject to this collateral attack by the plaintiff. This argument disregards entirely the theory of the plaintiff's action based fundamentally on an alleged fiduciary relationship existing between the plaintiff and the defendant Seib by reason of her coming into possession of certain trust moneys. The plaintiff does not seek redress against the defendant Seib in her representative capacity, and the complaint in question contains no reference to the probate proceedings incidental to the closing of the Herbst estate. Therefore, the defendants' claim that the plaintiff's action constitutes a collateral attack on a final decree of distribution transcends the scope of the record presented on this appeal. Furthermore, it should be noted that under the circumstances here detailed the probate court in no event would have the power to try the question of the ownership of the moneys averred to be the subject of trust. The well-defined limits of that forum's jurisdiction in this regard are stated in Re Estate of Vucinich, 3 Cal.2d 235, at page 243, 44 P.2d 567, at page 570: "The superior court sitting in probate has jurisdiction to determine as against an executor the amount of money or property of the estate that has come into his hands, for the purpose of charging him therewith, and in determining that question to determine all issues necessarily incidental thereto. The power to determine as against the executor what money or other property belonging to the estate has come into his hands is implied in the power to settle his accounts and determine what remains in his hands to be distributed. [In re] Estate of Burdick, 112 Cal. 387, 44 P. 734; Stevens v. Superior Court, 155 Cal. 148, 99 P. 512. This power, however, is limited, in cases where title thereto is in controversy, to those where the executor or other personal representative claims the property in his individual capacity. In re Estate of Kelpsch, 203 Cal. 613, 265 P. 214; Bauer v. Bauer, 201 Cal. 267, 256 P. 820; In re Estate of Roach, 208 Cal. 394, 281 P. 607. It is undoubtedly the rule that the superior court sitting in probate is without jurisdiction to try the question of title to property as between a representative of the estate and strangers to the estate. Ex parte Casey, 71 Cal. 269, 12 P. 118; [In re] Estate of Haas, 97 Cal. 232, 31 P. 893, 32 P. 327." From this summarization of the rules affecting the power of the probate court to determine what money or property, title to which is disputed, belongs to the estate, it is manifest that the plaintiff's status as a stranger to the Herbst estate is decisive of that forum's lack of jurisdiction in the matter.

[11] The remaining grounds of demurrer presented for consideration on this appeal require but brief discussion. The specification of misjoinder of parties defendant is clearly refuted by the allegations of the complaint in question detailing the plaintiff's theory of the individual liability of the defendants by reason of their receipt of the proceeds of trust property without having given consideration therefor and without change of position on their part. Where under the facts as stated the defendants appear to be responsible for the satisfaction of the claim in litigation, the objection that they are not proper parties is of no avail on demurrer. 20 Cal.Jur. 571, § 54.

[12, 13] There is nothing in the point that several causes of action are improperly united and are not separately stated. Each count is complete within itself, and there is "no reason why a cause of action arising out of the same transaction may not be separately stated in different ways, even though they are inconsistent with each other. The defendant is permitted to plead inconsistent defenses [Code Civ.Proc. § 441]; and there can be no good reason why the same rule should not apply to different counts of a complaint as well as to the answer." Stockton Combined Harvester, etc., Works v. Glens Falls Ins. Co., 121 Cal. 167, 171, 53 P. 565, 566. As was said in Cowan v. Abbott, 92 Cal. 100, at page 102, 28 P. 213: "Theoretically, they are distinct causes of action, and there is no requirement that they shall correspond or be consistent with each other." In the case of Tanforan v. Tanforan, 173 Cal. 270, at page 273, 159 P. 709, 711, the court stated that inconsistent counts could be used "when for any reason the pleader

thinks it desirable so to do." Accordingly, the fact that the second or common count, reciting that "within two years last past" the alleged indebtedness was incurred, is in part at variance with the time element entering into the plaintiff's statement of the first cause of action does not render the pleading in question demurrable.

[14] Various portions of the first cause of action are cited by the defendants as uncertain, ambiguous and unintelligible, and it is urged that these faults concern material matters and therefore constitute a sufficient basis to support the court's adverse ruling to the plaintiff's claim. Although the court is entitled to have a clarification of the pleading in the particulars specified, yet where the complaint is not fatally defective in its statement of a cause of action, it is improper to sustain a special demurrer without leave to amend. In such case the plaintiff should be given the opportunity to meet the objections advanced in order that the litigation may be decided upon its merits. Olivera v. Grace, 19 Cal.2d 570, 579, 122 P.2d 564; Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1; Payne v. Baehr, 153 Cal. 441, 447, 95 P. 895; Starr v. Slaney, 11 Cal.App.2d 311, 314, 53 P.2d 395; 21 Cal.Jur. 120, 121.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 564

THOMPSON v. COOK et al.

L.A. 17983.

Supreme Court of California.

July 15, 1942.

1. Judgment 🔑113

The statute providing that where defendant has not appeared, service of notice of papers need not be made upon him means that notice of papers need not be served on a defaulting party if his rights are not thereby affected. Code Civ.Proc. § 1014.

2. Judgment 🔑102

A defaulting defendant is entitled to be served by an amended complaint when the amendment is as to a matter of substance and not a mere matter of form, since a defendant is entitled to opportunity to be heard upon the allegations of a complaint on which judgment is sought against him.

3. Judgment 🔑868(2), 898(4)

After a default judgment has been entered against a defendant and satisfied by levy of execution upon property belonging to him or in which he has an interest, the satisfaction of judgment may not be vacated and the judgment revived without giving him notice of proceedings to restore the judgment. Code Civ.Proc. §§ 708, 1014.

4. Judgment 🔑868(2)

A motion to revive a judgment satisfied of record is not a "paper" within statute providing that service of notice of papers need not be made upon a defendant who has not appeared and hence where motion to revive a default judgment satisfied of record was made without notice to debtor, trial court was without jurisdiction to act thereon and order granting the motion was void. Code Civ.Proc. §§ 708, 1014.

See Words and Phrases, Permanent Edition, for all other definitions of "Paper".

5. Judgment 🔑386(1, 3)

The trial court has no power to set aside on motion a judgment or order not void on its face unless the motion is made within a reasonable time not exceeding six months from date of entry of the judgment or order attacked except where the party in whose favor a judgment or order valid on its face runs admits facts or fails to dispute evidence showing its invalidity when the trial court must declare the judgment or order void. Code Civ.Proc. §§ 473, 708.

6. Judgment 🔑868(1)

Where plaintiff did not deny judgment debtors' averment that no notice of plaintiff's motion to revive default judgment had been given judgment debtors or that neither debtor had appeared and plaintiff did not claim that debtors had appeared, but that debtors were not entitled to notice, trial court erred in refusing debtors' motion to set aside the prima facie valid order of revival notwithstanding lapse of more than two years between date thereof and date of debtors' motion. Code Civ.Proc §§ 473, 708, 1014.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Leonard B. Colton against Marie E. Cook and others on two notes wherein K. W. Thompson was substituted as plaintiff. From an order denying defendants' motion to vacate an order reviving a default judgment for plaintiff, defendants appeal.

Reversed.

For prior opinion see, —— Cal.App. ——, 120 P.2d 54.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for appellants.

Geo. W. Zent, of Hollywood, for respondent.

CURTIS, Justice.

On February 13, 1936, Leonard B. Colton recovered a money judgment against the defendants in the sum of $4,012.29 by default. Upon this judgment an execution was issued and certain real property situated in the county of Glenn was sold under said execution to the said Leonard B. Colton for the full amount of said judgment, and said judgment was duly satisfied of record. Thereafter Leonard B. Colton moved the superior court to set aside the satisfaction of said judgment and to revive said judgment on the ground that the real property purchased by him at said execution sale was not subject to execution and sale, and that he recovered nothing in satisfaction of said judgment as a result of the sale of said real property under said execution. Said motion was granted on June 9, 1938. Thereafter and on March 17, 1941, defendants, after due notice to the plaintiff, moved the court to vacate and declare void said order of June 9, 1938. Said last named motion was made on the ground that said order of June 9, 1938, was made without notice to the said defendants, or either of them, and for that reason said order was void for "lack of notice and lack of jurisdiction of said defendants or either of them." This motion was denied by the trial court, and the present appeal is from this order of denial. At the date of the denial of said motion, the court made its order substituting as the plaintiff in said action K. W. Thompson in the place of the original plaintiff, Leonard B. Colton. Plaintiff as hereinafter mentioned refers either to the original or the substituted plaintiff.

The order granting plaintiff's motion to revive said judgment of date June 9, 1938, consists of a clerk's entry in the minutes of the court, which contains no recital of service of notice of the motion upon the defendants, and the record contains no proof of any service of any notice of said motion upon the defendants. The motion of defendants to vacate said order of June 9, 1938, reviving said judgment was supported by the affidavits of each of the defendants that no notice of the motion to revive said judgment was served on either of them. The plaintiff in resisting said motion made no denial of these allegations of defendants in their affidavits. The only fact set forth in the plaintiff's opposition affidavit which might in any way be considered material at the hearing of said motion was that the plaintiff on October 15, 1938, over four months after the motion to revive the judgment had been made, had sent by registered mail to the defendants a notice that the court by its order dated June 9, 1938, had reivived the original judgment in said action.

Respondent in his brief filed herein asserts that there are really two questions before the court on this appeal and they are stated as follows: (1) Under the facts of this case was the plaintiff required to give defendants notice of his motion to revive judgment after defendants had defaulted in the original action, never appearing therein in any way; and (2) if there was no service of process or of notice on defendants, were they entitled to have the said order of revival vacated *on motion* (respondent's emphasis) after nearly three years intervened between the time of making said order of revival and the date of defendants' motion to vacate the same? The appellants contend that there is only one question presented here for determination: Did the court at the time it made its order for revival of the judgment without notice to the defendants have jurisdiction to make said order? In our opinion a consideration of the two questions which respondent claims are before the court on this appeal will entirely answer this question of the appellants, and we will therefore confine our opinion to the discussion of the two questions propounded by the respondent.

[1] The motion to revive the judgment was made and granted by the court in pursuance of section 708 of the Code of Civil Procedure, which provides, among other

matters, that "the court having jurisdiction thereof [the action in which the original judgment was rendered] must, after notice and on motion of such party in interest [the party recovering the judgment], or his attorney, revive the original judgment in the name of the petitioner." The position of the respondent is that while this section applies generally to ordinary judgments, this section is not controlling in a case wherein the original judgment is by default. He relies upon section 1014 of the Code of Civil Procedure, which provides that "where a defendant has not appeared, service of notice of papers need not be made upon him." The only authority cited by respondent in support of his position is the case of Strong v. Shatto, 201 Cal. 555, 258 P. 71. In that action this court held that where a cross-complaint filed by one of the defendants sought only remedies related to the property of the plaintiff, and did not affect in any degree the rights and interests of the other defendants, the defendants who had defaulted in the action prior to the filing of the cross-complaint were not injuriously affected by it or the judgment in favor of the cross-complainant; and they were neither entitled to be served with such cross-complaint nor were they entitled to appeal from the judgment for the reason that they were not "aggrieved thereby." It cannot with any reason be contended that the appellants in this case were not aggrieved by the order reviving the judgment against them and vacating the satisfaction thereof. Before the order of revival there was nothing of record to show that they owed anything on the judgment; after its revival, if legally secured, the record in the case showed that they owed the entire amount of the judgment. The meaning of section 1014 of the Code of Civil Procedure as construed by the case of Strong v. Shatto, supra, appears to be that "notice of papers" need not be served on a defaulting party if his rights are not thereby affected.

[2] It has been repeatedly held that a defaulting defendant is entitled to be served by an amended complaint when the amendment is as to a matter of substance and not a mere matter of form. Lubarsky v. Richardson, 218 Cal. 27, 31, 21 P.2d 557; 14 Cal.Jur. 889. In Cole v. Roebling Construction Co., 156 Cal. 443, at page 446, 105 P. 255, 257, a clear statement of the rule is found: "As we have seen, an amended complaint was filed *subsequent* to the entry of the default, which was never served upon appellant. It is earnestly urged that the effect of this was to open the default and make the judgment entered irregular, one inadvertently rendered, and one given without jurisdiction. It is settled by a long line of decisions that where, after the default of a defendant has been entered, a complaint is amended in matter of substance as distinguished from mere matter of form, the amendment opens the default, and unless the amended pleading be served on the defaulting defendant, no judgment can properly be entered on the default. See Thompson v. Johnson, 60 Cal. 292; Reinhart v. Lugo, 86 Cal. [395], 399, 24 P. 1089, 21 Am.St.Rep. 52; Witter v. Bachman, 117 Cal. [318], 319, 49 P. 202; Woodward v. Brown, 119 Cal. [283], 304, 51 P. 2, 542, 63 Am.St.Rep. 108; Linott v. Rowland, 119 Cal. 452, 453, 51 P. 687; Riverside County v. Stockman, 124 Cal. [222], 224, 56 P. 1027; Tappendorff v. Moranda, 134 Cal. [419], 421, 66 P. 491. The reason for this rule is plain. A defendant is entitled to opportunity to be heard upon the allegations of the complaint on which judgment is sought against him."

[3] If a defaulting party is entitled to service upon him of all amended pleadings which affect his rights, and no judgment rendered without such service "can properly be entered on the default," we think upon the same principle that after a default judgment has been entered against a defendant and satisfied by a levy of execution upon property belonging to him or in which he has an interest, said satisfaction of the judgment may not be vacated and the judgment revived without giving him notice of the proceeding to restore said judgment.

[4] In the recent case of McDonald v. Severy, 6 Cal.2d 629, 59 P.2d 98, this court had before it the question as to the proper construction to be given the words "service of notice of papers," as used in section 1014 of the Code of Civil Procedure. It was there said at page 631 of 6 Cal.2d, at page 99 of 59 P.2d: "Moreover, section 473 of the Code of Civil Procedure (as amended by St.1933, p. 1851, § 34), providing for vacating judgments, expressly requires notice to the adverse party. It is true that section 1014 of the Code of Civil Procedure dispenses with the requirement of 'service of notice of papers' where a defendant has not appeared. But a motion to set aside a dismissal with prejudice cannot be considered

a 'paper' within the meaning of that section." In like manner it cannot be said that a notice of motion to revive a judgment satisfied of record is a "paper" within the meaning of said section 1014 of the Code of Civil Procedure. As the motion to revive the judgment was made without notice to the defendants, the court was without jurisdiction to act thereon and the order granting said motion was void. McDonald v. Severy, supra; Hitchcock v. Caruthers, 100 Cal. 100, 104, 34 P. 627; Kittridge v. Stevens, 16 Cal. 381, 382; Gill v. Peppin, 41 Cal.App. 487, 491, 182 P. 815; 14 Cal.Jur. 938.

We now approach the second question propounded by the respondent, that is, whether a motion to set aside said void order will lie after the lapse of over two years from the date it was granted. For the purpose of this discussion we will assume that the order reviving the judgment was valid on its face.

[5] It is well settled in this state that a court has no power to set aside on motion a judgment or order not void on its face unless the motion is made within a reasonable time, and it has been definitely determined that such time will not extend beyond the limited time fixed by section 473 of the Code of Civil Procedure as at present in force. Smith v. Jones, 174 Cal. 513, 516, 163 P. 890; People v. Temple, 103 Cal. 447, 453, 37 P. 414; Richert v. Benson Lumber Co., 139 Cal.App. 671, 675, 34 P.2d 840; Vaughn v. Pine Creek Tungsten Co., 89 Cal.App. 759, 761, 265 P. 491. However, to the rule just stated there is a well established exception which provides that although the judgment or order is valid on its face, if the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, then it is the duty of the court to declare the judgment or order void. While the question before the court in the case of Hill v. City Cab, etc., Co, 79 Cal. 188, 21 P. 728, was not in all respects like that which we are called upon to answer, yet the principle of law announced therein is equally applicable to the question before us. The court had under discussion the rule that a defendant cannot collaterally assail a judgment unless it be void on its face. While adhering to that rule, the court applied the exception just referred to and held at page 191 of 79 Cal., at page 728 of 21 P.: "But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law, upon such facts, we do not see why the case is not like that where a judgment is void upon its face. In the present case the findings establish the fact that there was no service of summons upon or authorized appearance by the defendant. And none of the evidence is brought up, nor does the question appear to have been raised by exception or demurrer, or in any other way. The facts, therefore, must be taken to be established by the record beyond all controversy. And upon such facts the law is, that the judgment is void. Baker v. O'Riordan, 65 Cal. [368] 371, 372, 4 P. 232; Merced Co. v. Hicks, 67 Cal. [108] 109, 7 P. 179. The judgment sued on, being shown to be absolutely void, cannot be held to be valid, or to be a cause of action."

This language from the case of Hill v. City Cab, etc., Co., supra, was quoted with approval by this court in the case of People v. Harrison, 107 Cal. 541, 546, 40 P. 956, which held that although a judgment not void on its face cannot be impeached by evidence showing a want of service of summons if such evidence is objected to, yet where the evidence is admitted to that effect without objection, or the parties stipulate or admit that there was in fact no service of summons, it is the duty of the court to declare the judgment void as a matter of law upon the admitted facts. The same principle of law was referred to in the case of Lake v. Bonynge, 161 Cal. 120, at page 133, 118 P. 535, at page 540, where the court stated: "We may assume, purely for the purposes of this decision, that, while a party relying on a judgment which is valid on its face may successfully resist any attack upon it which is collateral and not direct, still where the attack might be resisted as collateral, if he admits facts which show that a service of summons, constructive or personal, was not made on the defendant to the judgment, and allows evidence to be introduced without objection showing this fact, as it is then established that the judgment is void, it is the duty of the court to so declare. Hill v. City Cab, etc., Co., 79 Cal. 188, 21 P. 728; People v. Harrison, 107 Cal. 541, 40 P. 956."

In Akley v. Bassett, 189 Cal. 625, 639, 209 P. 576, the three cases cited above were approved in language practically the same as that used in Lake v. Bonynge, supra. See, also, La Paloma Land Co. v. Shannon, 89 Cal.App. 469, 476, 265 P. 295, and In re Estate of Ivory, 37 Cal.App. 2d 22, 29, 31, 98 P.2d 761. In this last cited case we find this apt language at page 29 of 37 Cal.App.2d, at page 765 of 98 P.2d: "In the present case, when the order of May 8, 1936, was entered it showed on its face that the probate court had jurisdiction. Subsequently, by stipulation, the parties agreed that the recitals in the order were false and had been secured by the extrinsic fraud of appellant. The legal effect of such stipulation was to add to the judgment roll of that order the true facts. As so corrected, the legal situation is the same as if the order of May 8, 1936, when entered disclosed that there was a known heir whose address was known and that such heir had not been notified. By reason of the stipulation, the order of May 8, 1936, must be read as if it named the wife and mother as known heirs, and as if it recited that the mother had intentionally not been notified. If the order had so recited it would clearly be void on its face, and the probate court at any time, at least up to the time of the closing of the estate, would have power to set it aside."

[6] Applying to the facts in this case the rule announced and confirmed in the decisions just cited, we are of the opinion that although the order reviving the judgment was not void upon its face, nevertheless upon the showing made at the hearing of the motion to set aside said order, the court erred in refusing to grant said motion, notwithstanding the lapse of time intervening between the date of the order reviving said judgment and the motion of defendants to set aside and vacate said order. The facts supporting this conclusion beside those set forth above will be briefly stated. The order reviving said judgment, as stated before, was contained in a minute entry in the clerk's record and is as follows: "Motion of plaintiff to revive Judgment against Defendants, Marie E. and Charles R. Cook, comes on for hearing, H. L. Duckett, Jr., appearing as attorney for plaintiff; said motion is granted." Defendants, as recited above, moved to set aside said order on the ground that neither of the defendants was served with notice of said motion to revive said judgment and that neither of them ever appeared in said action, and for these reasons the court was without jurisdiction to grant said motion. In support of this motion each of the defendants filed an affidavit in which each stated that affiant was never served with notice of said motion to revive said judgment and did not appear at the hearing of said motion either personally or by attorney "or otherwise."

While the plaintiff in defense of said motion to vacate said order to revive said judgment opposed said motion and filed an affidavit in opposition to the motion, in which he alleged that some months after the granting of said motion he served by mail a notice to the defendants that the court had granted his motion to revive the judgment, he did not deny the averments of defendants in their affidavits that no notice of the motion to revive the judgment was ever given to defendants, or either of them, or that neither of said defendants appeared in court when said order of revival was made. At the hearing of said motion to vacate the order reviving the judgment, it is stated by appellants in their briefs, and not denied by respondent, that plaintiff made no objection to the affidavits of the defendants that no notice was given therein of the motion to revive said judgment; neither was any denial made of said allegations nor was any claim made that either of said defendants appeared at the hearing of said motion to revive said judgment. On the other hand, the plaintiff as a defense to defendants' motion claimed that under section 1014 of the Code of Civil Procedure defendants, having made default in said action, were not entitled to any notice of said motion to revive said judgment or of any other proceeding in said action taken subsequent to the entry of default against them.

This statement of facts, which is uncontroverted, brings this case squarely within the rule announced in the authorities hereinbefore cited, that when on a motion of the character of defendants' motion to vacate the order reviving the judgment, an affidavit is filed showing that no service at all was made on a moving defendant and no evidence is produced controverting this showing, and no objection or exception is taken to the introduction of such testimony, the fact is then established that the judgment is just as void as if its invalidity appeared on the face of the judgment. This precise situation was under discussion in the case of Smith v. Jones, supra, where the court at page 517 of its decision in 174 Cal., at page 891 of 163 P., made the following statement: "It is contended, however, by respondent that if by analogy the limitation of time specified in said section 473 be applied, yet the order made here may be sustained on another principle of law which he invokes. This is that when on a motion of this character an affidavit is filed showing that no service at all was made on a moving defendant, and no evidence is produced countervailing this showing, and no objection or exception is taken to the introduction of such testimony, the fact is then established without controversy and a simple question of law is thus presented, and such condition of undisputed facts establishes a judgment just as void as if its invalidity appears on the face of the judgment, and like such a judgment may be set aside at any time when the uncontroverted fact of the failure to serve process shows that the court was without jurisdiction to pronounce the judgment, citing Hill v. City Cab, etc., Co., 79 Cal. 188, 21 P. 728; People v. Harrison, 107 Cal. 541, 40 P. 956." In that action, however, the court refused to follow the rule just stated for the reason that the facts before it did not bring that case within the requirements of said rule, as appears from the following excerpt from said decision immediately following the portion thereof quoted above: "But our examination of those cases shows a different condition from that presented here. Here the claim of respondent that no personal service was made on him does not stand uncontroverted. It appears from the judgment roll by the affidavit of King that defendant was personally served with process in the action, and the judgment so recites. It thus affirmatively appears from the judgment that the defendant was served. This fact he denies by his affidavit filed on the motion. But, certainly, there is thus presented a controverted fact of service and not an uncontradicted proof of nonservice, as claimed by respondent. Nor, is there anything to show that the hearing was without objection or exception on the part of plaintiff."

This last mentioned case makes a clear distinction between a factual situation wherein the rule announced in the authorities herein cited applies and a situation wherein the rule does not apply. As stated above, our conclusion is that the facts of this case clearly bring it within the terms of said rule.

Some suggestion is made in the briefs of counsel as to whether the plaintiff in his motion to revive the judgment in this action has brought himself within the terms of section 708 of the Code of Civil Procedure, entitling him to the relief therein provided. This question is not before us in the present instance and cannot properly be determined until the defendants have had an opportunity to put in such defense as they may have to the motion of plaintiff to have said judgment revived.

It follows that the order denying the motion of the defendants to vacate the order of June 9, 1938, was erroneous and should be reversed, and it is so ordered.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 531

MORENO v. CAIRNS et al.

L.A. 18222.

Supreme Court of California.

July 11, 1942.

1. Municipal corporations 🔑218(11)

The section of Los Angeles city charter requiring any city employee claiming that he has been unlawfully suspended, laid off or discharged to file a written demand for reinstatement with Board of Civil Service Commissioners includes coerced resignations within group of involuntary severances. Los Angeles City Charter, § 112½.

A "resignation" is characteristically a voluntary surrender of a position by one resigning made freely and not under duress.

See Words and Phrases, Permanent Edition, for all other definitions of "Resignation".

2. Municipal corporations ⚿198(5)

The resignation of assistant fire chief of city fire department, if voluntary, would preclude his subsequent reinstatement.

3. Municipal corporations ⚿198(5)

The resignation of assistant fire chief of city fire department, if coerced, was tantamount to an "unlawful discharge", within section of Los Angeles City Charter requiring any city employee claiming that he has been unlawfully suspended, laid off or discharged to file a written demand for reinstatement with Board of Civil Service Commissioners within 90 days following date of alleged unlawful discharge, and, hence, demand of assistant fire chief for reinstatement following severance from employment under such circumstances was required to meet conditions of such section. Los Angeles City Charter, § 112½.

See Words and Phrases, Permanent Edition, for all other definitions of "Unlawful Discharge".

4. Municipal corporations ⚿198(5)

A discharge of city employee in violation of section of Los Angeles City Charter providing that no officer or employee of city fire department shall be suspended, removed, deprived of office or position, or otherwise separated from service of such department, other than by resignation, except for good and sufficient cause, would be an "unlawful discharge" under section of charter requiring employee claiming that he has been unlawfully suspended, laid off or discharged to file a written demand for reinstatement with Board of Civil Service Commissioners within 90 days following date of alleged unlawful discharge, and the 90-day period would run from date of such unlawful discharge. Los Angeles City Charter, §§ 112½, 135.

In Bank.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Manuel A. Moreno for a writ of mandate to compel James Cairns and others, constituting the Board of Fire Commissioners of the City of Los Angeles, to reinstate petitioner as assistant fire chief of such city, restore his seniority rights and pay him back pay. From an adverse judgment, following an order sustaining a demurrer to petitioner's second amended petition without leave to amend, the petitioner appeals.

Affirmed.

Prior opinion, 118 P.2d 357.

Joseph K. Coady and Arthur J. Mullen, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Geo. W. Adams and Marvin Chesebro, Deputy City Attys., all of Los Angeles, for respondents.

TRAYNOR, Justice.

Petitioner appeals from a judgment against him entered upon an order sustaining a demurrer, without leave to amend, to his second amended petition for writ of mandate to compel respondents, members of the Board of Fire Commissioners of the city of Los Angeles, to reinstate him to the position of assistant fire chief and to his seniority rights, and to pay the balance on back salary that he claimed due him. The second amended petition alleges that petitioners served in the fire department for forty-two years with an unblemished record, that he was adjudged in excellent health in the last health examination ordered by the board, and that he was summoned before the board and was forced under protest to resign. The circumstances attending this resignation are alleged to be as follows:

"VI. That your petitioner has not been unlawfully suspended, laid off, or discharged from his position as assistant chief of said Fire Department, but on the contrary, your petitioner under duress, misrepresentation, fraud and undue influence, in that he would be deprived of all pension rights, was forced against his will and desire, to resign from his position with said department; that on July 1, 1939, your petitioner, without any notice other than two hours, was summoned before the Board of Fire Commissioners; that at such time your petitioner was told that if he did not then and there, within two hours, resign from his position with the Fire Department, he would be summarily discharged, and that if he was so discharged he would suffer a complete loss of all pension rights; that because of the pressure of duress, misrepresentation, fraud, and undue influence of complete loss of all pension rights, your petitioner did resign under protest; that no just or reasonable cause existed that your petitioner should have been resigned, other than fear of loss of pension rights with which he was threatened; that no charges of any kind were ever preferred against him.

"VII. That at the time your petitioner was forced to retire, he was informed that four positions as assistant fire chief were to be eliminated, but the rules of seniority then in force and applicable to petitioner were not applied in the case of your petitioner.

"VIII. * * * That your petitioner was deprived of his position arbitrarily and summarily, in that the procedure required by section 135 of the City Charter was not followed, but by intimidations, duress and threat of loss of all pension rights, your petitioner, against his will and without advice of counsel, or allowance of time to secure such advice and counsel, was forced under protest to resign."

About a year after his resignation the petitioner filed a petition with the Board of Fire Commissioners for reinstatement to active service and for rehearing of "enforced retirement." The board demurred on the sole ground that the petition did not state a cause of action because the petitioner failed to file with the board, pursuant to section 112½ of the charter of the city of Los Angeles, a written demand for reinstatement within ninety days following the date on which it was claimed that he was first illegally, "laid off, suspended or discharged."

Section 112½ of the charter provides: "Whenever it is claimed by any person that he has been unlawfully suspended, laid off, or discharged, and that such lay off, suspension or discharge is ineffective for any reason, any claim for compensation must be made and demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly laid off, suspended, or discharged. Such demand for reinstatement must be filed with the board of civil service commissioners and such claim for compensation for such allegedly wrongful, illegal or erroneous discharge must be filed with the city clerk. Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement. Proof of filing the claim for compensation within the time and in the manner herein specified shall be a condition precedent to any recovery of wages or salary claimed to be due on account of said lay off, suspension or discharge."

[1] The petitioner contends that since his separation from the department was effected by resignation under duress, and not by unlawful suspension, lay off, or discharge, he was not required to present a written demand before filing his petition for a writ of mandate. This contention overlooks the fact that a resignation is characteristically the voluntary surrender of a position by the one resigning made freely and not under duress. People v. Marsh, 30 Cal.App. 424, 159 P. 191; State ex rel. Young v. Ladeen, 104 Minn. 252, 116 N.W. 486, 16 L.R.A.,N.S., 1058. The absence of any reference in section 112½ to resignations is attributable to the fact that they would ordinarily be voluntary and not succeeded by demands for reinstatement, not to an intention to exclude from the limitations of that section demands that follow resignations made under duress. Such resignations are akin to lay offs, suspensions, or discharges by virtue of the element of coercion and bear only a formal resemblance to voluntary resignations. Whenever a person is severed from his employment by coercion the severance is effected not by his own will but by the will of a superior. A person who is forced to resign is thus in the position of one who is discharged, not of one who exercises his own will to surrender his employment voluntarily. The tacit sense of section 112½ is not that the omission of resignations from the group of involuntary severances is an omission of coerced as well as voluntary resignations, but that coerced resignations fall within the group of involuntary severances.

It is clear from the second amended petition that respondents demanded petitioner's separation from the fire department, that he was given but two hours to choose between formal resignation and summary discharge, and that he could not choose between remaining with the department or leaving it. Respondents' and not petitioner's will effected his separation from the department. There is no allegation that the statements regarding pension rights, elimination of positions, or summary discharge were not true and there is therefore no essential allegation to support a charge of fraud. See cases cited in 12 Cal.Jur. 800 et seq. and 6 Cal.Jur.Supp. 61. Fraud is alleged only as a part of the allegations of duress and threatened loss of pension rights. The paragraphs of the second amended petition quoted above make it clear that the petition is based upon allegations of coercion and duress.

[2, 3] Petitioner's emphasis upon the coercion that forced his resignation is prompted by the fact that there can be no reinstatement after a voluntary resignation. Kramer v. Board of Police Commissioners, 39 Cal.App. 396, 179 P. 216. By his own allegations his severance from his position was a resignation in name only, and he seeks reinstatement on the ground that it was in effect not a resignation. His failure to comply with the conditions of section 112½ governing demands for reinstatement compels him to advance his involuntary severance of employment as a resignation exempt from those conditions. He cannot escape from the dilemma, however, that the coercion attending his nominal resignation, while affording him a ground for reinstatement, also identifies that resignation as an actual involuntary severance from employment tantamount to an unlawful discharge within the meaning of section 112½ of the city charter. A demand for reinstatement following severance from employment under such circumstances must therefore meet the conditions of that section.

[4] Petitioner argues that if the coerced resignation be deemed an unlawful discharge the ninety-day period under section 112½ does not commence to run until the board of fire commissioners has complied with section 135 of the city charter providing that a officer or employee cannot be deprived of the right to his position without "good and sufficient cause" and a hearing before a Board of Rights on charges preferred against him. A discharge in violation of section 135, however, would be an unlawful discharge under section 112½, which by its express terms applies to discharges claimed to be "ineffective for any reason," and the ninety-day period would run from the date of such unlawful discharge.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, and CARTER, JJ., concurred.

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20 Cal.2d 599

DILLARD v. CITY OF LOS ANGELES et al.

L. A. 18221.

Supreme Court of California.

July 28, 1942.

Rehearing Denied Aug. 24, 1942.

See 128 P.2d 537.

1. Municipal corporations ⚷220(9)

Pension laws should be liberally construed and applied to the end that the beneficent policy thereby established may be accorded proper recognition.

2. Municipal corporations ⚷187

The fact that chronic heart condition was a contributing cause of death of policeman who suffered heart attack after struggle with prisoner and who died two or three hours later after his automobile collided with a parked automobile as he was driving to his home, did not bar his dependents' right to pension under city charter providing for pension in case of death as result of injury received during performance of duty.

3. Municipal corporations ⚷187

The fact that a police officer had at the time of his injury a previous heart affliction does not of itself defeat his dependents' right to a pension if the injury precipitated his death by aggravating heart condition.

4. Municipal corporations ⚷187

Evidence that policeman had heart attack after violent struggle with a prisoner and that he sustained fatal injuries when his automobile collided with a parked automobile as he was driving to his home established his dependents' right to pension under city charter providing for pension in case of death of policeman as result of an injury received during performance of duty, notwithstanding that medical testimony was to effect that automobile accident resulted from either heart attack or intoxication, where policeman was sober when he started for home, since consumption of intoxicants thereafter resulted from injury as being an attempt by policeman to bolster his strength.

5. Municipal corporations ⚷187

Where policeman after violent struggle with prisoner had a heart attack and died after his automobile collided with a parked automobile as he was driving to his home, it would be presumed that policeman was not negligent at time of automobile accident, and his dependents would not be precluded from recovering pension on ground that accident occurred as result of his negligence. Code of Civ.Proc. § 1963(4).

6. Municipal corporations 🔑187

Where policeman after violent struggle with prisoner had a heart attack and was directed by his superior to return home before expiration of his regular period of duty, and policeman thereafter sustained fatal injuries when his automobile collided with a parked automobile while he was driving home, injuries sustained in automobile accident were injuries "arising out of and in course of employment" so as to entitle policeman's dependents to a pension under city charter providing for pension in case of death of policeman as result of injury during performance of his duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Employment" and "In Course of Employment".

7. Municipal corporations 🔑187

Where policeman after violent struggle with prisoner had a heart attack and was directed by his superior to return home before expiration of his regular period of duty, but sustained fatal injuries in automobile accident while driving home, the so-called "going and coming rule" did not preclude policeman's dependents from recovering pension predicated on theory that injuries sustained in automobile accident were injuries sustained during performance of policeman's duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Going and Coming Rule".

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding in mandamus by Eletha R. Dillard against the City of Los Angeles and others to compel the defendants to place the petitioner, who was the widow of a deceased police officer, and her child on the pension rolls. Judgment for the defendants, and the plaintiff appeals.

Judgment reversed.

Prior opinion, 118 P.2d 345.

Rehearing denied; EDMONDS, J., dissenting.

Cryer & Jones, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Robert J. Stahl and Edward J. Olstyn, Deputies City Atty., all of Los Angeles, for respondents.

CARTER, Justice.

This is an appeal from a judgment denying a petition for a writ of mandate to compel the respondent city and the board of pension commissioners to place petitioner and her child on the pension rolls to which she claims she is entitled under the pension laws of the city by reason of her husband's death. The facts are undisputed.

Petitioner's husband, now deceased, was a regularly employed police officer of the city of Los Angeles. On the night of January 22, 1940, decedent, as a radio car patrolman, was on regular duty from 6 p. m. to 2 a. m.

At about 10:15 p. m. a suspect who was taken into custody while decedent and a fellow officer were patrolling, attempted to escape and in so doing struck decedent on the face and chest; the struggle extended over a considerable period of time. The prisoner was subdued and taken to a hospital where he and decedent were given medical care. They then proceeded to the central police station where the prisoner was left. While there decedent was pale and perspiring and appeared weak. His condition being observed by the desk sergeant, he was told to go home. He stated that he believed he could drive his own car home without assistance. He was taken by his fellow patrolman to a parking lot where his car was parked. He was left there about 12:10 a. m. At about 12:40 a. m. his car collided with an automobile parked at the curb about 40 feet south of an intersection. A person hearing the crash ran to the scene of the collision and found decedent slumped over his steering wheel unconscious but still alive. He died shortly thereafter.

The autopsy surgeon of Los Angeles found that decedent was bruised about the body and limbs and his ribs were fractured and his heart ruptured. The heart was fatty and the left descending coronary artery was sclerotic, its opening being reduced 95 per cent. A chemical analysis of the blood showed the presence of 25 per cent ethanol; that amount of ethanol indicated intoxication. He found the death to have been caused by "a crushing in of the chest and rupture of the heart, contributory to that being internal hemorrhage." In his opinion the decedent "had a chronic heart condition which had been developing over a period of years and was such as to render him subject to a heart attack at any time; that the amount of alcohol found was sufficient to indicate intoxication, and that there was no way to determine whether or not the accident could have been caused by the liquor or by the heart condition." Dr. Webb in his affidavit used on motion for a new trial stated that decedent's heart condition was such that he was subject to a heart attack at any time and under the facts as above stated the decedent was suffering from such an attack when he was at the central police station which "was the direct and natural result of the fight he had had with the prisoner in the radio car, in view of the heart condition revealed by the autopsy; that the deceased was so seriously ill at the time and in such precarious condition that he should never have been allowed to attempt to go home alone or to drive an automobile; that he was liable to lose consciousness at any moment and the collision which resulted in his death was what might well have been expected from a driver in his condition at the time." Dr. Anthony's affidavit was of similar report.

Decedent was sober and gave no indication whatsoever of having consumed any intoxicating beverage up to the time he was left at the parking lot. The presence of alcohol in his blood after the collision indicated that it must have been consumed in the thirty minutes from the time he was left at the parking lot until the collision. With reference thereto Dr. Anthony stated in his affidavit: "that in the opinion of affiant the taking of liquor under the circumstances was the not unnatural act of a man in the exhausted and weakened condition of said deceased at the time, in an effort to stimulate himself for the drive to his home; it was the act of a stricken and dying man to bolster his waning strength for further effort."

The city charter provision in question reads: "Whenever any member of the Fire or Police Department shall die as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty * * * then an annual pension shall be paid in monthly installments to his widow, or child or children. * * *" (Los Angeles City Charter, § 183.)

[1] Pension laws should be liberally construed and applied to the end that the beneficent policy thereby established may be accorded proper recognition. Casserly v. City of Oakland, 215 Cal. 600, 603, 12 P.2d 425; Klench v. Board of Pension Fund Com'rs, 79 Cal.App. 171, 249 P. 46; O'Dea v. Cook, 176 Cal. 659, 169 P. 366; Aitken v. Roche, 48 Cal.App. 753, 192 P. 464. That rule should be kept in mind in the determination of this appeal.

[2,3] Before considering the main point in question it should also be observed that under the circumstances here involved the fact that decedent's chronic heart condition from which he was suffering was a contributing cause which ultimately led to his death, does not bar the right to a pension where events occurring while in the performance of his duty caused the heart attack which led to his death. That is true regardless of whether or not the chronic condition originated while in the performance of his duty. The fact that a police officer had at the time of the injury a previous heart affliction does not of itself defeat his dependents' right to a pension if the injury precipitated his death by aggravating the heart condition. Buckley v. Roche, 214 Cal. 241, 4 P.2d 929; Peters v. Sacramento City E. R. System, 27 Cal.App.2d 10, 80 P.2d 179; Naughton v. Retirement Board of San Francisco, 43 Cal.App.2d 254, 110 P.2d 714. As seen from the foregoing recital of facts the evidence shows without contradiction that the altercation decedent had with the prisoner in his custody and the blows there received caused decedent to have a heart attack from which he was suffering when at the central police station and thereafter.

[4] Turning to the main contention in the case, that the evidence without dispute establishes that the case comes within the terms of the charter, that is, that decedent died as a result of an injury received during the performance of his duty, it is clear that the undisputed evidence leads to only one conclusion, that is, that the deceased died as the result of an injury received during the performance of his duty. The injury was received while decedent was struggling with a prisoner and endeavoring to retain him in custody. That he was in the performance of his duty when he received that injury cannot be questioned. That his death resulted from that injury is equally clear. While it is true that the immediate cause of his death was the injury he received in the automobile collision, that collision was the result of the

injury which brought on the heart attack. His condition was such, when he left the central police station, that he was on the verge of death from the heart attack brought on by the injury. He was in no condition to operate an automobile and should not have been permitted to do so. The medical evidence establishes that the automobile accident resulted from either the heart attack or the decedent having consumed an alcoholic beverage. Respondents argue that there are two possible inferences deducible from the evidence, that is, that the automobile accident resulted from the heart attack or that it was caused by the intoxication of the decedent, and in the latter event no pension is allowable. They point to the medical testimony that it could not be ascertained whether the automobile accident was caused by decedent's intoxication or the heart attack. They assert that no pension may be allowed when death follows an injury caused by the misconduct of the officer, and that becoming intoxicated is such misconduct. Assuming, but not deciding, that intoxication is misconduct which will defeat the right to a pension, the conclusion is not affected thereby. The evidence shows without contradiction that the consumption of the alcohol by the decedent must necessarily have occurred during a period of not over thirty minutes transpiring from the time he was left at the parking lot by his associate to the time of the automobile accident. There is no dispute that up to the time he was left at the parking lot he was sober and had not consumed any intoxicating beverage. His consumption of that beverage during that time was the natural act, as expressed by Dr. Anthony, "of a stricken and dying man to bolster his waning strength for further effort." Therefore, it follows that the injury which caused the heart attack also caused the consumption of the beverage which resulted in the condition of intoxication. Thus, it is immaterial whether the automobile accident which was the immediate cause of the death was the result of intoxication or the heart attack. The former was the result of the latter which was caused by an injury received during the performance of duty. It is all traceable to the initial impetus, the injury, which brought on the heart attack. The situation is not dissimilar to the case of an employee who suffers an injury in the course of his employment and takes what he believes to be medicine to relieve his condition temporarily, but the medicine turns out to be a deleterious substance and causes serious injury or death. Such injury or death may be said to have occurred in or arose out of his employment.

[5] The possibility that the automobile accident occurred as the result of decedent's negligence rather than the heart attack or intoxication is removed from the case by the presumption that decedent was not negligent. Code of Civ.Proc. § 1963 (4). There was no other actor in the automobile collision inasmuch as decedent collided with a car parked at the curb.

Analogous to the case here presented are those cases in which the rule is stated to be that an employee is entitled to compensation under the workmen's compensation laws for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee. Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, 60 P.2d 276; Sarber v. Aetna Life Ins. Co., 9 Cir., 23 F.2d 434; cases collected 39 A.L.R. 1276; 127 A.L.R. 1108. If the intervening act of a physician selected by the employee causing a new injury does not break the chain of causation, it certainly is not broken where a person, stricken and dying from an injury received in his employment, is killed when endeavoring to reach a place of safety in his automobile. In the Fitzpatrick case the Sarber case is quoted with approval at page 234 of 7 Cal.2d, at page 278 of 60 P.2d: "* * * 'Under the great weight of authority the employer is liable for all legitimate consequences following an accident, including unskilfulness or error of judgment of the physician furnished as required, and the employee is entitled to recover under the schedule of compensation for the extent of his disability, based on the *ultimate result of the accident, regardless of the fact that the disability has been aggravated and increased by the intervening negligence* or carelessness of the employer's selected physician.' The reasonableness of this principle is patent." (Emphasis added.) In the case at bar the pension act is at least as comprehensive as the Workmen's Compensation Act, and the ultimate result, that is, death, caused by the injury sustained, is the natural consequence of that injury.

[6] In addition to the foregoing, petitioner's recovery may be predicated upon the occurrence of the automobile collision which was the immediate cause of the death of decedent, and that result should be reached even if it be assumed that under the charter provision the injury must have arisen out of and occurred in the course of employment. The undisputed facts show a series of compelling circumstances. Decedent became ill from a heart attack as the direct result of the struggle which occurred in the course of and while he was performing one of the duties incident to that employment, the taking into custody and retention of a person violating the law. As the direct result of the illness, decedent was forced to return home before the expiration of his regular period of duty; the automobile collision also occurred before the expiration of that time. He was directed by his superior to return to his home by reason of that illness. It was known that his means of transportation to his home was his car. While going to his home he would necessarily encounter the hazards incident to operating a motor vehicle on the public streets. When an employee becomes ill or incapacitated as the result of an injury which occurs in or arises out of the course of his employment, it may justly be said that he is still in the course of his employment when en route, at his employer's direction, from his place of employment to a place of safety or where he may receive care and treatment for the injury or illness during his regular hours of labor. An injury received while so en route certainly is an incident of the employment, as the injury initially received in the employment caused him to be on the way to receive attention. The mere fact that he used his automobile in seeking refuge is of no consequence; that was done with the implied assent of the employer inasmuch as the latter directed him to go home, knowing he would use that means of transportation. It may fairly be said that while so en route he is on the business of both the master and his own.

Principles applicable to workmens' compensation cases where it is necessary to show that the injury arose out of or occurred in the course of the employment, support the foregoing. An employee engaged in outside work does not step out of the course of his employment while seeking shelter from a storm. Western Pac. R. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754. The case falls within the rule that those acts of the employee necessary to his comfort, convenience, safety or welfare while at work are incidental to his employment, and an injury sustained in the performance of such acts arises out of and occurs in the course of employment. Whiting-Mead Com. Co. v. Industrial Acc. Comm., 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518; County of Los Angeles v. Industrial Acc. Comm., 89 Cal.App. 736, 265 P. 362. For illustration, in the case of Los Angeles County v. Industrial Acc. Comm., supra, an injury received by an employee while going from his place of employment to a service station to get water for a fellow employee who had fainted, was held to have arisen out of and occurred in the course of employment. That principle may well apply where the employee receives an injury in the course of his employment that compels him to seek treatment and care or a place of refuge away from his place of employment. In either case the act of seeking treatment, care or refuge is incidental to the employment and arises out of it.

[7] The so-called going and coming rule is not an obstacle to that conclusion. It has many exceptions, and under the circumstances here involved, it has no application. The employee is not going home after his day's work is completed. Rather he is compelled by reason of an injury which was incurred during the performance of his duty to seek treatment, care or refuge away from his place of employment.

For the foregoing reasons there was a clear abuse of discretion on the part of the pension board in refusing petitioner's application for a pension, and the superior court should as a matter of law, upon the undisputed evidence, have granted the writ of mandate prayed for by her.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

20 Cal.2d 607

SLOAN v. DONOGHUE, Registrar of Voters.

S. F. 16803.

Supreme Court of California.

July 29, 1942.

1. United States 🔑10

Where boundaries of congressional district were changed after election of congressman but before his death, election to fill the vacancy should be held in the old district as originally bounded. Pol.Code, § 110, as enacted by St.1941, p. 2209; § 117, as amended by St.1931, p. 297; U.S.C.A.Const. art. 1, § 2, cl. 4; art. 1, § 4, cl. 1; 2 U.S.C.A. § 8.

2. United States 🔑10

The 1941 statute changing boundaries of congressional district was intended to apply to the next general election and succeeding elections, not to special elections held to fill vacancies arising in terms that were occupied when the statute was passed. Pol. Code § 110, as enacted by St.1941, p. 2209; § 117, as amended by St.1931, p. 297; U.S. C.A.Const. art. 1, § 4, cl. 1.

In Bank.

Mandamus proceeding by Pearl F. Sloan against Michael J. Donoghue, as registrar of voters of the County of Los Angeles, to prepare and hold a special election. On respondent's general demurrer to the petition.

Peremptory writ issued.

Robert W. Kenny and Morris E. Cohn, both of Los Angeles, for petitioner.

Earl Warren, Atty. Gen., Chas. W. Johnson, Deputy Atty. Gen., and Hugh E. McManus, of Los Angeles, as amici curiæ, on behalf of petitioner.

J. H. O'Connor, Co. Counsel, of Los Angeles, for respondent.

PER CURIAM.

By this proceeding in mandamus, the petitioner, a qualified elector of the 67th Assembly District, which is within the 17th Congressional District, seeks to compel the respondent, as Registrar of Voters of the County of Los Angeles, to take all steps essential to the preparation and holding of a special election on August 25, 1942, in accordance with the proclamation of the governor calling such special election. Respondent has demurred generally to the petition.

At an election held in November, 1940, Lee E. Geyer was elected a representative or congressman from the 17th Congressional District to the 77th Congress of the United States for a term ending with the expiration of that Congress at the end of the year 1942. The boundaries of such district at the time of his election were fixed and established by section 117 of the Political Code, as amended in 1931, St.1931, p. 297, and the district then comprised the 66th, 67th and 68th Assembly Districts. On October 13, 1941, Geyer died and a vacancy thereby resulted, which now exists. Intermediate his election and death, however, the Legislature at its regular session held in 1941 adopted a new Apportionment Act which changed the boundaries of the 17th Congressional District. This was done by repealing section 117 of the Political Code and substituting therefor section 110 of that code (Stats.1941, ch. 696, p. 2209). The latter section delineated the 17th Congressional District as comprising the 66th, 67th, 68th Assembly Districts and the 46th Assembly District, the latter district being added to what formerly had constituted the boundaries of said congressional district. On April 8, 1942, the governor by proclamation ordered that a special election be held August 25, 1942, in the 17th Congressional District, to fill the vacancy there existing. The proclamation pursuant to opinion of the Attorney General first had and obtained, ordered that such special election be held in the 17th Congressional District "as the said district was constituted in 1940 and prior to the taking effect of the Reapportionment Act in 1941, to fill the vacancy * * * caused by the death of Lee E. Geyer."

The issue presented by this proceeding is whether the election was properly proclaimed to be held in the 17th Congressional District as it existed when Geyer was elected. Or, conversely, should the election have been proclaimed to be held in the enlarged district as it existed when the governor issued his proclamation.

A brief reference should first be had to the constitutional and statutory provisions relating to the election of Representatives to Congress.

Clause 1 of section 4 of article I of the federal Constitution provides that the Legislature of each state shall prescribe the times, places and manner of holding such elections, subject to the power of Congress to at any time make or alter such regulations.

Clause 4 of section 2 of article I of the same Constitution provides that "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." (It was pursuant to this authority that the governor issued the proclamation ordering the special election here involved.)

Pursuant to its constitutional authority, Congress has provided that "The time for holding elections in any State * * * for a Representative * * * to fill a vacancy * * * may be prescribed by the laws of the several States * * *." (2 U.S.C.A. § 8). The Legislature of this state has adopted no statute relating to the filling of such vacancies.

[1] We are satisfied that under the circumstances of this case the proclamation of the governor properly called for the election to be held in the old district. McCrary on Elections, 4th Ed., p. 141, states "The true rule, therefore, must be that a district once created, and having elected a Representative in Congress, should be allowed to continue *intact* for the purpose of filling any vacancy which may occur, until the end of the Congress in which it is represented."

In 20 Corpus Juris 89, section 67, it is said that "If after a congressional election the state is redistricted and a vacancy then occurs, such vacancy should be filled by the suffrage of the electors of the old district and not by that of the electors of the new district * * *." See, also, 29 C.J.S., Elections, § 54.

In Hunt v. Menard, reported in 2 Bartlett Contested Congressional Election Cases, p. 477, the House of Representatives, acting under clause 1, section 5 of article I of the federal Constitution which makes it the sole judge of the validity of elections of its members, refused seats to two persons who based their claims thereto upon a special election held in a new district. It was there said: "It would not be a preservation of the purity of the elective franchise, nor would it be a just guardianship of the republican principle that all shall have a right to be represented to admit the power of a State legislature to provide that a portion of the people should have two representatives in Congress, while another portion should have none, or not to be represented by the man of their choice * * *. It is, besides, in disregard of the law of Congress of June, 1842, which declares that no one district shall be entitled to two representatives."

It is true that the practice has not been uniform, such elections in some states having been ordered in the new district, in others in the old district. It is significant, however, that Perkins v. Morrison, 1 Bartlett Contested Congressional Election Cases 142, wherein it was held by the House of Representatives that a representative was entitled to be seated who had been elected to fill a vacancy at a special election held in the new district, was expressly disavowed by the House in Hunt v. Menard, supra, quoted from above. Other cases, such as Pool v. Skinner, reported in Mobley Contested Congressional Election Cases, p. 65, and People v. Voorhis, 222 N.Y. 494, 119 N.E. 106, 111, went off upon the proposition that courts are without jurisdiction to interfere with a governor's proclamation or to enjoin an election based thereon, upon which proposition we need not here express any opinion because of our conclusion on the ground first herein mentioned. Upon the merits, however, the four dissenting justices in the Voorhis case, supra, expressed views in accordance with our conclusion herein stating, "Thus the state could, by this reasoning, place the Seventh district over upon the territory of the Fourth, and direct that a vacancy occurring in the Seventh be filled from the new congressional district. The same territory and electors would thereupon have two representatives in Congress, the one elected in 1916 for the Fourth district still in office, and the one elected to fill the vacancy in the new Seventh, changed to the boundaries of the Fourth. This in part has been done here. * * * To shift that district during his term over upon the territory of some other district by simply changing the number and then permitting the vacancy to be filled from that other district is in effect, if not in theory, giving two Congressmen from the same district. A district represents a defined territory and not a mere number. It is a practical matter, and not one that yields to attenuated argument. I doubt whether the Legislature has power, in view of this act of Congress, to change the congressional district from which a Representative is elected during his term of office. However this may be, I am convinced that the Legislature in passing the acts of 1917 never intended to have them apply to vacancies, but that, as above stated, the intention was to have these new districts for the next regular congressional election."

While this appears to be the first instance in which this court has been called upon to determine whether under the circumstances here presented a special election to fill a vacancy is properly called in the old district, and not in the new district, it is not the first time the problem has arisen in this state. The attorney general states that similar problems have arisen with the adoption of each Apportionment Act by the Legislature and that his office uniformly has advised that the special election should be held in the old district, the new district being effective for the first time at the general election next following the adoption of the Apportionment Act. He cites us to five such opinions, exclusive of the one rendered to the governor in this instance, emanating from his office since 1929.

[2] Nothing in the Apportionment Act of 1941 indicates that it was intended to apply to special elections held to fill vacancies arising in terms occupied at the time of its passage. It was intended to apply to the next general election and succeeding elections. That it could not have been intended to apply to a special election to fill a vacancy in the present Congress would appear from the fact that it provides for twenty-three congressional districts and the State, now represented by twenty congressmen, is entitled to twenty-three congressmen only in the Seventy-eighth and succeeding Congresses for which the first election is the general election to be held in November of this year.

Moreover, to apply the Apportionment Act of 1941 to special elections held to fill vacancies arising in terms occupied at the time of its passage would lead to arbitrary and capricious results. To cite one: If the special election here involved were to be held in the new enlarged district, the voters of the 46th Assembly District, which district has been added to the old 17th Congressional District, would be accorded double representation in the present Congress for they are already represented by the congressman from their old district in whose selection they had a voice. As already shown, such double representation is improper. By the same token the voters of the 46th Assembly District are not disenfranchised by restricting the special election to fill the vacancy to the old district for, as stated, they are already represented in this Congress.

We are satisfied, therefore, that the only practical and sound conclusion is that regardless of the repeal of the act (§ 117, Pol.Code) creating and delineating the old district, the special election to fill the vacancy now existing should be held in the old district, thus retaining the same proportionate Congressional representation under the old Apportionment Act and giving to the new Apportionment Act application to the selection of representatives for the Seventy-eighth and succeeding Congresses, as intended.

Let a peremptory writ of mandate issue forthwith upon the filing of this decision.

20 Cal.2d 579

LYONS et al. v. BRUNSWICK-BALKE-COLLENDER CO. et al.

L. A. 18265.

Supreme Court of California.

July 16, 1942.

1. Venue 🔑21

The section of the Code of Civil Procedure permitting the defendant to have certain actions tried in the county where he resides is "remedial" in nature and should be liberally construed to the end that a defendant may not be unjustly deprived of that right. Code Civ.Proc. § 396b.

See Words and Phrases, Permanent Edition, for all other definitions of "Remedial Statute".

2. Venue 🔑61

A motion for a change of venue on the ground of defendant's residence in another county should be filed at the time defendant demurs or answers. Code Civ.Proc. § 396b.

3. Venue 🔑77

The reasoning upon which cases holding that a motion for a change of venue on the ground of defendant's residence in another county should be filed at the time defendant demurs or answers is that the failure to move for a change of venue on the ground of residence at the time of the demurrer or answer constitutes a "waiver" of the right to have the venue changed. Code Civ.Proc. § 396b.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

4. Venue ⚷77

Where change of venue is sought at the time the demurrer or answer is filed there is no "waiver" by defendant of his right to have venue changed to another county by subsequent conduct in the action unless he thereby evinces an intent to invoke the jurisdiction of the court in which the action is commenced for the determination of questions of fact or law or in effect consents to the trial of the case in such court. Code Civ.Proc. § 396b.

5. Estoppel ⚷119

"Waiver" is ordinarily a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

6. Venue ⚷61

The failure to institute proceedings for change of venue on the ground of residence at the time of filing a demurrer or answer standing alone requires that relief be denied when an attempt is made by later proceeding, but where there is a sufficient showing that there was no intent to waive the right or to invoke the jurisdiction of the court in which the action was commenced and the defendant has acted diligently and in good faith, relief should not be denied. Code Civ.Proc. § 396b.

7. Venue ⚷21

The right of defendant to have certain actions tried in the county of his residence is an ancient and valuable right which has always been safeguarded by statute and is supported by a long line of judicial decisions. Code Civ.Proc. § 396b.

8. Venue ⚷24

The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional and if plaintiff would claim such right, he must bring himself within the terms of the exception. Code Civ.Proc. § 396b.

9. Venue ⚷61

Where nonresident defendant filed an affidavit of merits consenting that action be transferred to co-defendant's county which adjoined defendant's county, whereupon plaintiffs dismissed action as to codefendant, a prompt motion by defendant for change of venue accompanied by amended demurrer was properly allowed. Code Civ.Proc. § 396b.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by M. L. Lyons and others against the Brunswick-Balke-Collender Company and another. From an order granting defendant Bowell's motion for a change of venue, the plaintiffs appeal.

Order affirmed.

For prior opinion, see 120 P.2d 34.

Gibson, Dunn & Crutcher, Frederic Sturdy, David P. Evans, and George H. Whitney, all of Los Angeles, for appellants.

O'Melveny & Myers, Pierce Works, and Jackson W. Chance, all of Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs appeal from an order of the Superior Court for Los Angeles County granting defendant Bowell's motion to change the place of trial of the above-entitled action from that county to the Superior Court for San Mateo County. It is conceded that the action is of a character which the defendants are entitled to have tried in the Superior Court for the county of their residence. Defendant Dooley resides in the City and County of San Francisco; defendant Bowell resides in San Mateo County; defendant, the Brunswick-Balke-Collender Company, is a foreign corporation authorized to transact business in this state. Bowell's motion was made upon the ground that the Superior Court for Los Angeles County was not the proper place of trial inasmuch as he is a resident of San Mateo County.

Plaintiffs commenced their action in the Superior Court of Los Angeles County on March 28, 1941. On April 29, 1941, defendants filed a joint demurrer to the complaint in the action, and at the same time defendant Dooley filed affidavits and notice of motion to change venue to the Superior Court of the City and County of

San Francisco on the ground of his residence there, and that defendant Bowell did not reside in Los Angeles County. Accompanying Dooley's motion was an affidavit of merits by defendant Bowell in which he stated that "he * * * consents that the place of trial * * * be changed to the Superior Court * * * for the City and County of San Francisco." The corporation defendant also consented to the change.

The motion for change of venue was set for hearing on May 9, 1941, but on May 7, 1941, plaintiffs dismissed the action as to defendant Dooley without prejudice.

On May 14, 1941, and before any hearing was had on the demurrer, defendant Bowell filed a notice of motion for change of venue to San Mateo County, on the ground that his residence was there, accompanied by affidavits stating that San Francisco City and County and San Mateo County are adjacent to each other, the situs of the courts of the respective counties being thirty miles apart; that he had theretofore consented to the change of venue to the Superior Court of the City and County of San Francisco moved for by Dooley because of "the proximity of the City and County of San Francisco, to the County of San Mateo, the place of residence of affiant, and that the trial of the action in the Superior Court of the State of California, in and for the City and County of San Francisco would not impose any undue hardship on affiant for the reasons stated"; that he did not, and never intended to consent to the trial of the action in Los Angeles County; that the corporation defendant consented to his requested change of venue. At the same time Bowell filed a separate amended demurrer. Plaintiffs moved to strike Bowell's motion on the ground that he had waived his right to have the venue changed. The court granted Bowell's motion, and the other motions and demurrers were ordered off the calendar.

Dooley's motion and Bowell's motion were made pursuant to sections 395, 396b and 397 of the Code of Civil Procedure. Section 396b reads in part:

"* * * if an action or proceeding is commenced in a court having jurisdiction of the subject-matter thereof, other than the court designated as the proper court for the trial thereof, * * * the action *may, notwithstanding, be tried in the court where commenced, unless the defendant, at the time he answers or demurs, files* with the clerk, * * * an affidavit of merits and notice of motion for an order transferring the action or proceeding to the proper court, together with proof of service, upon the adverse party, of a copy of such papers. Upon the hearing of such motion the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the same transferred to the proper court." (Emphasis added.)

It is plaintiffs' contention that under that section a motion for change of venue must be filed at the time the answer or demurrer is filed, otherwise the right to change of venue is waived, and that here defendant Bowell did not file a notice of motion when the joint demurrer was filed and Dooley made his motion, but rather consented to have Dooley's motion for a transfer to the City and County of San Francisco granted; therefore Bowell waived his right to a change of venue in the first instance and his motion came too late.

[1] Section 396b of the Code of Civil Procedure permitting the defendant to have certain actions tried in the county where he resides is remedial in nature and should be liberally construed to the end that a defendant may not be unjustly deprived of that right. Lundy v. Lettunich, 50 Cal.App. 451, 195 P. 451; Code Civ. Proc. § 4. Therefore in considering this appeal we must be guided by that principle.

[2, 3] It has been stated frequently that a motion for a change of venue on the ground of defendant's residence in another county should be filed at the time defendant demurs or answers; that rule follows the wording of section 396b of the Code of Civil Procedure. Witter v. Phelps, 163 Cal. 655, 658, 126 P. 593; McNeill & Co. v. Doe, 163 Cal. 338, 340, 125 P. 345; Wadleigh v. Phelps, 147 Cal. 541, 82 P. 200; Jones v. Frost, 28 Cal. 245; Pearkes v. Freer, 9 Cal. 642; Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209; Reyes v. Sanford, 5 Cal. 117; Tooms v. Randall, 3 Cal. 438; Union Lumber Co. v. Metropolis Const. Co., 13 Cal.App. 584, 110 P. 329; Bell v. Camm, 10 Cal.App. 388, 102 P. 225; Powell v. Sutro, 80 Cal. 559, 22 P. 308; Remington S. M. Co. v. Cole, 62 Cal. 311, 318; Story v. Christin, 137 Cal.App. 484, 30 P.2d 1016; Cook v. Pendergast, 61 Cal. 72. But the reasoning upon which those cases are based is that

the failure to move for a change of venue on the ground of residence at the time of demurrer or answer constitutes a *waiver* of the right to have the venue changed. Wadleigh v. Phelps, supra; Cook v. Pendergast, supra; Jones v. Frost, supra; Pearkes v. Freer, supra; Bell v. Camm, supra; Pittman v. Carstenbrook, 11 Cal. App. 224, 104 P. 699; Howell v. Stetefeldt Furnace Co., 69 Cal. 153, 10 P. 390; Henry v. Willett, 60 Cal.App. 244, 212 P. 698; Bohn v. Bohn, 164 Cal. 532, 129 P. 981; Herd v. Tuohy, 133 Cal. 55, 65 P. 139; Watts v. White, 13 Cal. 321, 324; People v. Sterling Refining Co., 86 Cal. App. 558, 261 P. 1080; Bloom v. Oroville-Wyandotte Irr. Dist., 34 Cal.App.2d 102, 93 P.2d 164; see, also, Gallo v. Boyle Mfg. Co., Inc., 30 Cal.App.2d 653, 86 P.2d 1067. For illustration it is said in Howell v. Stetefeldt Furnace Co., supra, 69 Cal. at page 154, 10 P. at page 391:

"The object had in view by the legislature in enacting section 396 (now 396b), Code Civil Proc., was to prevent trials of actions in counties other than those in which defendants resided, unless they waived such right." And in Cook v. Pendergast, supra, 61 Cal. at page 78:

[4-6] "Section 396 (now 396b) of the Code of Civil Procedure provides, in effect, that a defendant *may be held to have waived his right* to a change of the place of trial on the ground that the action has not been commenced in the proper county, unless at the time he first appears either by answer or demurrer, he files an affidavit of merits, and demands in writing a transfer to the proper county." (Emphasis added.) Furthermore it has been held, in cases where the change of venue was sought at the time the demurrer or answer was filed, that there was no waiver by defendant of his right by subsequent conduct in the action unless he thereby evinced an intent to invoke the jurisdiction of the court in which the action was commenced for the determination of questions of fact or law, or that he in effect consented to the trial of the case in such court. Pittman v. Carstenbrook, supra; Bloom v. Oroville-Wyandotte Irr. Dist., supra; Lundy v. Lettunich, supra; Goss v. Brown, 64 Cal.App. 381, 221 P. 683; Gallo v. Boyle Mfg. Co., Inc., supra; Wood, Curtis & Co. v. Herman Min. Co., 139 Cal. 713, 73 P. 588. It is true, as pointed out by plaintiffs, that in those cases the papers for change of venue were filed at the time specified in section 396b of the Code of Civil Procedure, and the court was concerned with whether or not acts other than the failure to file the papers in time constituted an express or implied waiver, but as we have seen, the theory in either case is *waiver* on the part of defendant. Waiver is ordinarily a question of fact. 25 Cal. Jur. 932. While it may be true that the failure to institute proceedings for change of venue on the ground of residence at the time of filing a demurrer or answer, *standing alone,* requires as a matter of law that relief be denied when an attempt to obtain it is made by later proceedings, there is nothing in section 396b or the cases heretofore cited, which compels a holding that such waiver occurs as a matter of law where, as in this case, there is a sufficient showing that there was no intent to waive the right or to invoke the jurisdiction of the court in which the action is commenced, and the defendant has acted in good faith and with diligence. To blind one's self to the realities by a slavish adherence to technicalities is not consonant with justice or the liberal tendencies with respect to rules of procedure and practice. To give the construction to section 396b contended for by plaintiffs would be unreasonable and out of line with the rules pertaining to waiver. Furthermore, it would require a strict and literal, rather than a liberal interpretation of that section.

[7-9] The right of the defendant to have certain actions tried in the county of his residence "is an ancient and valuable right, which has always been safeguarded by statute and is supported by a long line of judicial decisions. 'The right of a plaintiff to have an action tried in another county than that in which the defendant has his residence is exceptional, and, if the plaintiff would claim such right, he must bring himself within the terms of the exception.' Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209." Brown v. Happy Valley Fruit Growers, 206 Cal. 515, 522, 274 P. 977, 979. The facts of this case clearly present a situation in which it should be said that defendant Bowell has not waived that right as was found by the trial court. His residence being near the city and county of San Francisco there was no reason for him to insist on a trial in San Mateo County. He did not at any time consent that the Superior Court of Los Angeles County should retain the right to try the action. When his co-de-

fendant Dooley demanded a transfer to the Superior Court of the City and County of San Francisco, he naturally agreed that that court could try the case; it was not equivalent to his consent that the case be tried in the Superior Court of Los Angeles County. Plaintiffs then, without prior notice to defendants of their intention to do so, dismissed the action as to defendant Dooley. The reason therefore may reasonably be said to have been to prevent the transfer of the case from Los Angeles. Defendant Bowell was then placed in a position where he had to make his motion for a transfer if he wished to preserve his right. He acted promptly, a week after the dismissal, and filed an amended demurrer at the same time. As far as appears, the demurrer had not been submitted to the court for decision nor ruled upon when he filed his motion for a transfer. Plaintiffs have suffered no prejudice.

The order is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

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53 Cal.App.2d 838

KROEKER et al. v. JACK et al.

Civ. 3056.

District Court of Appeal, Fourth District, California.

July 17, 1942.

Appeal and error 🔑773(2)

Where there is no stipulation or order extending time for filing briefs on appeal from order terminating and dismissing proceeding for preparation of record on appeal from a judgment and no brief has been filed or appearance made by appellants, who made no opposition to motion to dismiss appeal, appeal will be dismissed.

Appeal from Superior Court, Kern County; Pat R. Parker, Judge Assigned.

Proceeding by Jake Kroeker and others against George W. Jack and others for preparation of a record on appeal from a judgment. From an order terminating and dismissing the proceeding, petitioners appeal. On respondents' motion to dismiss the appeal.

Appeal dismissed.

Edwin P. Jacobsen, of Delano, and H. E. Schmidt and Borton, Petrini, Conron & Borton, all of Bakersfield, for appellants.

Claflin, Dorsey & Campbell, of Bakersfield, George A. Westover and Higgs & Fletcher, all of San Diego, and Elliott, Vedder, Sullivan & Dunham, of Los Angeles, for respondents.

PER CURIAM.

This is a motion to dismiss an appeal taken from an order of the trial court terminating and dismissing proceeding to have prepared a record on an appeal from a judgment.

The transcript on the appeal from the order was filed on February 27, 1942. There is no stipulation or order extending the time for filing briefs. No brief has been filed and no appearance has been made by appellants who made no opposition to the motion.

The appeal from the order is dismissed.

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53 Cal.App.2d 383

PROVIDENT LAND CORPORATION v. BARTLETT et al.

Civ. 12180, 12226.

District Court of Appeal, First District, Division 2, California.

July 14, 1942.

1. Appeal and error 🔑76(1)

A "final judgment" is a judgment which ends the suit.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

2. Appeal and error 🔑66

An appeal can only be taken from a final judgment.

3. Appeal and error ⚷80(6)

Where no issue was joined as to one cause of action in cross-complaint, judgments for cross-defendants, entered on cross-complainant's failure to amend cross-complaint after demurrers and motion to strike had been sustained in part as to other causes of action, were not "final" or appealable, but were premature and void. Code Civ. Proc. § 956.

◆

Appeals from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action for declaratory relief by the Provident Land Corporation against Louis Bartlett, wherein defendant filed a cross-complaint against plaintiff and others. From adverse judgments, defendant appeals.

Appeals dismissed.

Paul A. McCarthy and Louis Bartlett, both of San Francisco, for appellant.

George R. Freeman and Elmer Laine, both of Willows, and Leander L. James, of San Francisco, for plaintiff and respondent.

George R. Freeman and Elmer Laine, both of Willows, and Joseph Wahrhaftig and Gregory, Hunt & Melvin, all of San Francisco, for cross-defendants and respondents.

STURTEVANT, Justice.

Provident Irrigation District, a corporation, heretofore issued and there were outstanding a large number of its bonds. The corporation became embarrassed financially. The plaintiff, another corporation, Provident Land Corporation, hereinafter called the Provident, was formed for the purpose of acquiring said bonds and protecting the rights of the holders thereof. George H. McKaig, W. G. Aldenhagen, and E. O. Kaufmann were the directors of the Provident. George H. McKaig, Fred G. Stevenot, and E. O. Kaufmann were the members of and constituted the Bondholders' Protective Committee of the Provident Irrigation District. The defendant Louis Bartlett, Esq., was employed to render legal services. He entered upon the discharge of the employment and performed valuable services which were terminated by the settlement of all matters in controversy.

The Provident commenced an action against the defendant Louis Bartlett to obtain declaratory relief. The defendant appeared and answered and at the same time filed a cross-complaint. He named as defendants the Provident, the directors thereof, and the members of the Bondholders' Protective Committee of Provident Irrigation District. The cross-complaint contained two counts. Later he filed an amendment as of course, adding certain defendants. He also amended the second count. On April 17, 1941, he filed a second amendment adding a third cause of action which is a common count for services rendered. Counsel treated all three counts as but different statements of one and the same claim. On April 7, 1941, George H. McKaig demurred to the cross-complaint and to counts one and two; on April 15, E. O. Kaufmann demurred to the cross-complaint and to counts one and two; on April 7, 1941, W. G. Aldenhagen demurred to the cross-complaint and to counts one and two. The record does not show that a demurrer or answer was filed by the Provident. However, it does show that the Provident made a motion to strike and, as will hereinafter be noted, the motion was granted.

The record shows that on November 19, 1941, the trial court made the following nunc pro tunc order as of May 8, 1941: "Demurrer of cross-defendant Provident Land Corporation to the cross-complaint is overruled; demurrers of cross-defendants George H. McKaig and E. O. Kaufmann, as members of Bondholders' Protective Committee of Provident Irrigation District are overruled as to the first cause of action and sustained as to the second cause of action; demurrers of George H. McKaig, W. G. Aldenhagen and E. O. Kaufmann individually to first and second causes of action sustained; leave is granted to cross-complainant to file amended cross-complaint if so advised."

After the entry of the order just quoted the record stood as follows: The demurrer of the Provident was overruled; the demurrers of McKaig and Kaufmann, as members of the Bondholders' Committee, were overruled as to the first cause of action and sustained as to the second; the demurrers of McKaig, Aldenhagen and Kaufmann, individually, to the first and second causes of action were sustained. No issue was joined as to the third cause of action. Notice of the entry of said orders was duly given, no amendment was made, and purported judgments were separately entered in favor of Aldenhagen, Kaufmann and McKaig. From each of said judgments the cross-complainant has appealed.

On March 12, 1942, on the motion of the Provident, the trial court ordered paragraphs one to twelve, inclusive, of the second cause of action stricken out. No amendment being made, on May 29, 1942, a purported judgment was entered in favor of the Provident against the cross-complainant, on the second count. June 5, 1942, the cross-complainant appealed therefrom.

[1-3] A consideration of the foregoing facts shows that all of said appeals must be dismissed for want of jurisdiction in this court to hear the same. As to the third cause of action issue has not been joined on law or fact as between the cross-complainant and any one of the cross-defendants. As to the first cause of action, since the above rulings were made, we may assume that all of the cross-defendants have now answered and that the action is now at issue on said count. After the issues of law have been disposed of and after issue has been joined on questions of fact, the action will be in a condition to be tried and thereafter for a final judgment to be entered. That is, for a judgment to be entered which ends the suit. Guaranty Trust, etc., Bank v. City of Los Angeles, 186 Cal. 110, 116, 199 P. 35. An appeal from that judgment is the only one that the parties may legally be subjected to. Gunder v. Gunder, 208 Cal. 559, 561, 282 P. 794. All of the above-mentioned rulings may be reviewed on that appeal. Code Civ.Proc. § 956; 2 Cal. Jur. 816. These propositions are applicable to rulings on demurrer and motions to strike when several counts are contained in the pleadings under attack. Greenfield v. Mather, 14 Cal.2d 228, 231, 93 P.2d 100. When, as here, a final judgment has not been rendered, purported judgments such as were entered in the instant case are premature and void. De Vally v. Kendall De Vally O. Co., Ltd., 220 Cal. 742, 745, 32 P.2d 638.

A controversy involving similar questions was before the court in Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174. At page 618 of 5 Cal.2d, at page 1174 of 55 P.2d, Mr. Chief Justice Waste, speaking for the court, had this to say: "It is evident that the cause was attempted to be disposed of piecemeal—that a single object, although stated in several counts, was sought to be attained by the action, and that this single and unseverable object was arbitrarily attempted to be split up as the basis for two distinct judgments. It is at once apparent that no final judgment was entered in the action until March 14, 1935. The judgment of January 4, 1935, was not a final judgment and is not appealable under the terms of section 963 of the Code of Civil Procedure, or otherwise. Our conclusion is fully supported by the leading case of Gunder v. Gunder, 208 Cal. 559, 282 P. 794, and the many cases which follow it, notably De Vally v. Kendall De Vally, etc., Co., 220 Cal. 742, 32 P.2d 638; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938 [78 A.L.R. 1104], and Potvin v. Pacific Greyhound Lines, 130 Cal.App. 510, 20 P.2d 129."

Neither party to this record has mentioned the applicability of the above-mentioned rule to the facts of this case. That was also true in De Vally v. Kendall De Vally O. Co., Ltd., supra. But referring to such a record, Mr. Justice Preston, speaking for the court, on page 745 of 220 Cal., on page 639 of 32 P.2d had this to say:

"Although the matter is not mentioned by counsel for either side, it appears that the court should not have given a judgment herein until the final disposition of the entire cause. The law contemplates but one final judgment in a cause. As stated in the case of Nolan v. Smith, 137 Cal. 360, 361, 70 P. 166, quoting from Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. [557], 577, 33 P. 633: 'There can be but one final judgment in an action, and that is one which, in effect, ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy. (Citing authorities.)' See, also, Doudell v. Shoo, 159 Cal. 448, 114 P. 579; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938 [78 A.L.R. 1104], and Potvin v. Pacific Greyhound Lines, Inc., 130 Cal.App. 510, 512, 20 P.2d 129."

The appeals from the judgments are dismissed.

NOURSE, P. J., and SPENCE, J., concurred.

53 Cal.App.2d 6

LAWRENCE v. CITY OF LOS ANGELES et al.

Civ. 13440.

District Court of Appeal, Second District, Division 2, California.

June 25, 1942.

Hearing Denied Aug. 20, 1942.

1. **Evidence** 🔑509, 545, 571(2)

Opinions of qualified medical doctors as to whether an individual was intoxicated, predicated upon percentage of alcohol in individual's blood, though not conclusive, are admissible when there is a proper preliminary showing that blood tests upon which such opinions have been predicated have been properly conducted.

2. **Evidence** 🔑510, 555

Doctors who made blood tests after decedent's death were properly permitted to testify that in their opinion decedent was "intoxicated" at time of his death where an analysis of his blood disclosed that it contained 0.28 per cent. ethanol.

See Words and Phrases, Permanent Edition, for all other definitions of "Intoxicated".

3. **Municipal corporations** 🔑187

A police officer's widow seeking to recover a pension from city had burden of proving that deceased met his death as result of his employment.

4. **Municipal corporations** 🔑187

Evidence that police officer had been driving automobile on wrong side of street for approximately a block before colliding head-on with a truck, and that in doctors' opinion based on blood tests decedent was intoxicated at time of his death, sustained finding that decedent did not receive injuries in "course of employment" so as to entitle his widow to a pension.

See Words and Phrases, Permanent Edition, for all other definitions of "Course of Employment".

5. **Evidence** 🔑571(2)

Testimony of doctors that in their opinion police officer was intoxicated at time of his death when he was driving an automobile on wrong side of street and collided head-on with a truck, because an analysis of his blood disclosed that it contained 0.28 per cent. ethanol, sustained court's finding that deceased was "intoxicated" at time of his death, precluding recovery of pension by his widow.

6. **Appeal and error** 🔑717

The opinion of trial judge will not be considered by appellate court for purpose of determining that findings of fact are not supported by the evidence.

7. **Municipal corporations** 🔑187, 200

Under city charter providing for pension to widow of any member of the fire or police department who "shall die as the result of any injury received during performance of his duty", the quoted phrase means that there must have been a causal relation mediate or immediate between the duty performed by deceased and the injury resulting in death.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall Die as the Result of any Injury Received During Performance of his Duty."

8. **Municipal corporations** 🔑187

Where police officer was intoxicated at time of his death when he drove automobile on wrong side of street and collided head-on with approaching truck, his widow was not entitled to pension on ground that he died as result of injury received during performance of his duty, since the intoxication was the "proximate cause" of his injury resulting in death.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Mandamus proceeding by Emilie A. Lawrence against the City of Los Angeles, and others, to require respondents to make an order allowing petitioner a pension because of the death of her husband who was a police officer of the city. From an adverse judgment, petitioner appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Paul Taylor and Bartlett & Kearney, all of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Robert J. Stahl and Edward J. Olstyn, Deputy City Attys., all of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of respondents after the trial court entered a judgment denying petitioner's application for a writ of mandate requiring respondents to make an order allowing her a pension because of the death of her husband, a police officer of defendant city, petitioner appeals.

The essential facts are:

November 1, 1939, at approximately 5:30 p. m. petitioner's husband, a police officer of the city of Los Angeles, left the central police station in a Ford automobile owned by defendant city apparently en route home. At approximately 6:10 p. m. of the same day while driving in an easterly direction on the wrong side of Alhambra avenue he collided head-on with a truck being driven in a westerly direction upon the same highway. As a result of the accident petitioner's husband received injuries from which he died. At the time of the accident decedent was under the influence of intoxicating liquor.

Petitioner urges three propositions for reversal of the judgment, which will be stated and answered hereunder seriatim.

First: The trial court committed prejudicial error in receiving in evidence opinions of doctors that petitioner's husband was at the time of his death under the influence of an intoxicating beverage, which opinions were based solely upon the results of tests of the blood of decedent taken from him after his death.

[1] This proposition is untenable. Opinions of qualified medical doctors as to whether an individual was intoxicated or not predicated upon the percentage of alcohol in the individual's blood, though not conclusive, are admissible when there is a proper preliminary showing that the blood tests upon which such opinions have been predicated have been properly conducted (State v. Duguid, 50 Ariz. 276, 72 P.2d 435, 437; Kuroske v. Aetna Life Ins. Co., 234 Wis. 394, 291 N.W. 384, 387, 127 A.L.R. 1505; Commonwealth v. Capalbo, 308 Mass. 376, 32 N.E.2d 225, 228.

[2] In the present case no objection was made that a preliminary foundation had not been laid for the admission of the testimony of Drs. Louis J. Gogol and J. Dryden Davenport. Therefore, the trial court properly permitted them to testify that in their opinion decedent was intoxicated at the time of his death, since an analysis of his blood disclosed that it contained 0.28% ethanol.[1]

[3, 4] *Second: There is not any substantial evidence to sustain the trial court's findings that:*

(a) The death of petitioner's husband was not the result of an injury received

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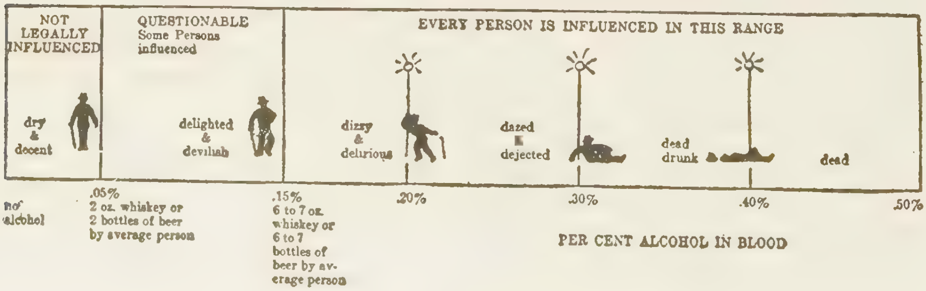
[1] It appears to be the consensus of the medical profession that when the blood alcohol concentrate of the driver of an automobile is 0.15% (by weight) such fact is conclusive evidence that the driver is under the influence of alcohol. (Committee on Tests for Intoxication of the National Safety Council, Chemical Tests for Intoxication (1938) p. 5; see also for an excellent discussion of the subject "The Medico-Legal Aspects of the Blood Test to Determine Intoxication," by Professors Mason Ladd and Robert B. Gibson, *The Iowa Law Review*, January, 1939, Vol. XXIV, No. 2, p. 191, et seq.; and "Alcohol in Relation to Traffic Accidents," by Richard L. Holcomb, Vol. III, No. 12, *The Journal of the American Medical Association*, September 17, 1938, p. 1076.) The Committee on Tests for Intoxication in its 1940 report thus graphically illustrates the relationship between alcohol in the blood and the degree of intoxication:

THERE IS A DEFINITE RELATION BETWEEN ALCOHOL IN THE BLOOD AND DEGREE OF INTOXICATION



by him in the course of the discharge of his duties as a police officer; and

(b) Petitioner's husband was intoxicated at the time of his death.

This proposition is likewise untenable.

(a) Based on the testimony of eyewitnesses it appears that decedent had been driving on the wrong side of the street for approximately a block before the automobile which he was driving collided head-on with a truck coming in the opposite direction. This testimony, coupled with that of Drs. Gogol and Davenport to the effect that in their opinion decedent was intoxicated at the time of his death, in the absence of any evidence that petitioner's husband was engaged in the pursuit of his duties at the time of the unfortunate accident, resulted in a failure by petitioner to sustain the burden of proving that deceased met his death as a result of his employment, and the trial court's finding that petitioner's husband did not receive injuries in the course of his employment which resulted in his death was correct.

[5, 6] (b) As we have heretofore determined that the trial court properly admitted the testimony of Drs. Gogol and Davenport that decedent was intoxicated at the time of his death, such testimony is substantial evidence to sustain the trial court's finding upon this issue and also that the death of petitioner's husband resulted from his operating an automobile while intoxicated. Petitioner's argument based upon statements of the trial judge during the trial contrary to the findings is unavailable to petitioner, since the rule is settled in California that the opinion of the trial judge will not be considered by this court for the purpose of determining that the findings of fact are not supported by the evidence (Cohen v. Metropolitan Life Ins. Co., 32 Cal.App.2d 337, 342, 89 P.2d 732).

[7] *Third: It is immaterial whether the decedent was under the influence of an intoxicating beverage or not, since he died as a result of an injury received during the performance of his duty.*

This proposition is untenable. Section 183 of the charter of the city of Los Angeles reads in part thus:

"Whenever any member of the Fire or Police Department shall die as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty, or after retirement, or while eligible to retirement from such department on account of years of service, then an annual pension shall be paid in equal monthly installments to his widow. * * *"

The words, "shall die as a result of any injury received during the performance of his duty," as used in the foregoing section means that there must have been a causal relation, mediate or immediate, between the duty performed by the deceased and the injury, which has resulted in his death. (See Rhodes v. United States, 8 Cir., 79 F. 740, 743, 25 C.C.A. 186; 48 C.J. (1929), 788, § 9.)

[8] In view of the finding of the trial court supra, which we have held finds substantial support in the evidence, there can be no question that there was no causal connection between the duty which decedent was employed to perform and the injury which resulted in his death. When decedent became intoxicated, that became a proximate cause of the injury which he subsequently received and which caused his death, and therefore neither he nor his widow was entitled to a pension. The law is accurately stated by Mr. Justice Ward in MacIntyre v. Retirement Board of San Francisco, 42 Cal.App.2d 734, 735, 109 P.2d 962, 963, thus:

"The right to a pension is not indefeasible, and an employee, though otherwise entitled thereto, may not be guilty of misconduct in his position and maintain his rights notwithstanding such dereliction of duty."

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

53 Cal.App.2d 339

WUEST v. WUEST.

Civ. 13563.

District Court of Appeal, Second District, Division 1, California.

July 9, 1942.

1. Parties 🔑91

Where an action properly lay against a defendant and his interests were not affected by the joinder of the county clerk as a party defendant, the joinder did not furnish such defendant with a valid objection to the complaint and a demurrer on the ground of misjoinder was available only to the county clerk. Code Civ.Proc. § 426.

2. Pleading 🔑193(6)

In suit to vacate interlocutory judgment of divorce as beyond the jurisdiction of the court which entered it, allegations as to the manner in which the claimed absence of jurisdiction was brought about were mere matters of inducement to the main cause of action and did not render the complaint demurrable for failure to separately state several causes of action. Code Civ.Proc. § 426.

3. Pleading 🔑68

The fact that certain allegations of the complaint were based upon information and belief do not militate against the sufficiency of the complaint.

4. Pleading 🔑16

Pleadings are intended to be self-serving and pleadings based on hearsay are expressly authorized

5. Pleading 🔑192(2)

Complaint in suit to vacate interlocutory judgment of divorce by reason of requirement of trial court that plaintiff sign stipulation relating to division of community property as prerequisite to the granting of a judgment for plaintiff and that findings be waived so that no appeal could be taken was not subject to demurrer for ambiguity, unintelligibility or uncertainty. Code Civ. Proc. § 426.

6. Attorney and client 🔑77

The general authority of an attorney does not permit him to bind his client by any act which amounts to a surrender in whole or in part of any substantial right.

7. Pleading 🔑214(1)

In passing upon a demurrer to a pleading the verity of the pleading must be assumed.

8. Courts 🔑40

A departure by a court from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect of depriving one of a constitutional right, is as much an "excess of jurisdiction" as where there exists an inceptive lack of power.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess of Jurisdiction".

9. Divorce 🔑167

Complaint to vacate interlocutory judgment of divorce alleging that trial judge informed plaintiff's counsel during the trial that unless plaintiff signed a stipulation to dispose of community property in a certain manner the court might not grant plaintiff a decree and that court insisted that findings be waived, so that no appeal might be prosecuted from the interlocutory judgment, disclosed the material prejudice of a substantial right belonging to plaintiff by the trial judge and stated a cause of action for which equity could give relief under its general powers. Civ.Code, § 3523.

10. Equity 🔑1

Equitable remedies correspond to the primary right of the injured party and to the wrong by which that right has been violated preserving the element of flexibility so that new remedies may be invented or old ones modified so as to be capable of dealing with novel conditions that justice may be effectually carried out.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Lois E. Wuest against William O. Wuest to vacate and modify in part a judgment entered in an action for divorce instituted by the plaintiff against the defendant. From a judgment of dismissal predicated upon an order sustaining a demurrer to plaintiff's complaint without leave to amend, plaintiff appeals.

Reversed and remanded with directions.

Newby & Newby, of Los Angeles, for appellant.

Cook & Obeji, of Van Nuys, for respondent.

WHITE, Justice.

Plaintiff herein filed an action for separate maintenance. Subsequently, by an amendment to her complaint, she sought a divorce upon the ground of extreme cruelty, asked for a reasonable amount of the community property, custody of the minor children and allowance for their support and maintenance, together with alimony for herself, court costs, and attorney's fees. Defendant answered and cross-complained for divorce on the ground of extreme cruelty, sought custody of the minor children, and an equitable division of the community property. After a trial, plaintiff was granted a divorce on the ground of extreme cruelty. Custody of the children was awarded jointly to the parties, with actual custody in the defendant husband, with right of visitation to the plaintiff wife. An award also was made in favor of the wife for alimony and attorney's fees.

In connection with the community property of the parties, the court determined that the same was of the value of $34,165.25, and ordered that one-half of this amount, or $17,082.62, be paid by defendant husband to the plaintiff over a period of not to exceed 23.73 years at the rate of $50 per month. The judgment further enjoined defendant husband from disposing of any of the community property until plaintiff had been paid in full for her share thereof and impressed upon such real property a lien in favor of plaintiff until she had received the value of her one-half interest therein. An interlocutory judgment of divorce in accordance with the foregoing was thereupon entered on May 31, 1940.

It appears from the record that the determination of the value of the community property, as well as the method by which plaintiff was to be paid her share, resulted from a stipulation entered into during the trial between the parties litigant and their respective counsel which was filed with and approved by the court, the terms of which stipulation, so far as the community interests of the parties were involved, being incorporated in the interlocutory judgment of divorce.

On May 27, 1941, and prior to the entry of a final judgment of divorce, plaintiff in the last-mentioned proceeding commenced an action in the Superior Court of Los Angeles County to vacate and modify in part the judgment entered in the divorce case. By her complaint filed in the last-named action plaintiff alleged that prior to and during the trial of the divorce action she was in an enfeebled condition mentally and physically, due to the cruel and inhuman treatment inflicted upon her by her husband, coupled with the strain under which she labored by reason of being subjected to investigations by court assistants and psychiatrists appointed by the court after the commencement of the divorce action and prior to the entry of the interlocutory judgment therein. Plaintiff then alleged in her complaint that she was informed by her attorney, who is not her present counsel, that the judge presiding in the divorce trial (who was not the judge presiding in the instant proceeding) had informed said attorney that the judge "might not grant the plaintiff a divorce if she refused to sign the stipulation attached to 'Exhibit A' and that she insisted upon the stipulation being signed by both parties to said action and their respective attorneys, so that neither party could appeal; and said judge also made the statement in open court before said stipulation was signed, that it must be signed by both parties and their attorneys so that no appeal could be taken from any judgment entered in said action; that because of these representations to plaintiff and her weakened mind, due to the said assaults of her husband and the passing through the change of life, she reluctantly signed said stipulation."

The complaint further charged: "That plaintiff was not informed before signing said stipulation that she would be deprived of making any application to the court which rendered said judgment, for a modification thereof with reference to the property rights of plaintiff, and if she had been so informed she would not have signed said stipulation; nor was plaintiff ever informed that she might have applied to the court for relief under section 473 of the Code of Civil Procedure of the State of California until long after the expiration of six months after the entry of said judgment, Exhibit A."

It was further alleged in plaintiff's complaint, upon information and belief, that the judge presiding at the divorce trial "conferred in her chambers with the attorneys for plaintiff and defendant during the trial of said action No. D-183,252, and in the absence of the parties; and in said conferences that said judge informed said attorneys that she would not divide the community property in kind, because she felt that because of the unstable mental condition of plaintiff she might not be able to hold said property or the proceeds derived from a sale thereof, if awarded to her, and hence that whatever amount that would be awarded to plaintiff should be based upon her life-expectancy and paid to plaintiff in monthly installments, so that no part of the principal could be expended by plaintiff during her lifetime, except said monthly installments of $50.00 each; that plaintiff was not informed of these conferences prior to the entry of said judgment, nor until the verification of this complaint; that if plaintiff had been informed of the effect of said judgment of depriving her of her property rights in the community property of the plaintiff and the defendant, she would not have signed said stipulation attached hereto as a part of said 'Exhibit A.'

"Plaintiff alleges that she never authorized her attorney to waive written findings of fact in said action No. D-183,252 and she had no information about the legal effect of said waiver until a very recent date."

Defendant interposed a demurrer to plaintiff's complaint upon the ground that the same did not state facts sufficient to constitute a cause of action; that there was a misjoinder of parties, in that the County Clerk of Los Angeles County was made a party defendant; that several causes of action were alleged but not separately stated in the complaint, and finally, that the pleading was ambiguous, unintelligible and uncertain. After hearing on the demurrer, the trial court made its order sustaining the same without leave to amend, and from the judgment of dismissal predicated thereon plaintiff prosecutes this appeal.

[1-5] Whether the demurrer should have been sustained is the only question to be decided. We are persuaded that the demurrer should have been overruled. Concerning defendant's claim of misjoinder of parties by naming the county clerk as a defendant, it may well be said that this ground of demurrer, while available to the county clerk, did not furnish defendant Wuest with a legal or valid objection to the complaint. It was not open to defendant Wuest to demur for misjoinder of parties where the action properly lay against him and his interests were not affected by the joinder of the county clerk. Madary v. City of Fresno, 20 Cal.App. 91, 98, 128 P. 340; Gardner v. Samuels, 116 Cal. 84, 90, 47 P. 935, 58 Am.St.Rep. 135. Furthermore, it is asserted in appellant's brief, and not denied by respondent, that the defendant county clerk, through the medium of a stipulation filed in the action, made no objection to his being named a party defendant. Respondent's claim that the complaint includes several causes of action without separately stating them is equally without merit. The pleading states but a single cause of action, viz., that the interlocutory judgment of divorce entered by the superior court was beyond its jurisdiction. Other allegations as to the manner in which the claimed absence of jurisdiction was brought about may be regarded as mere matters of inducement to the main cause of action. Nor does the fact that certain allegations of the complaint are based upon information and belief militate against the sufficiency of the pleading. Because pleadings are meant to be self-serving, it has been held that basing them on hearsay is expressly authorized. Davis v. City of San Diego, 33 Cal.App.2d 190, 193, 91 P.2d 640. Nor was the complaint ambiguous, unintelligible or uncertain. It fully met the requirements of section 426 of the Code of Civil Procedure.

[6] We come now to a consideration of respondent's claim that the complaint did not state facts sufficient to constitute a cause of action. In effect, the complaint charged that during the trial the judge informed plaintiff's counsel that unless she signed a stipulation to dispose of the community property in a certain manner the court "might not" grant her a decree, and also alleged that the court further insisted that findings be waived, to the end that no appeal might be prosecuted from the interlocutory judgment. This the trial judge certainly had no right to do. The right of appeal is as sacred and inviolable as the right to a trial, and when by judicial oppression such right is violated or vitiated, the guaranteed and substantial rights of a party have been materially affected thereby. The trial judge certainly had no right to advise plaintiff through her counsel, in effect, as appears from the allegations of the complaint, that although plaintiff had established and proved a case entitling her to an interlocutory judgment of divorce on the ground of cruelty, nevertheless such a judgment would not be granted unless the plaintiff stipulated to accept

her share of the community property on an amortized plan extending over a period in excess of 23 years, and further that plaintiff waive findings so that an appeal might not be taken from the judgment. The fact that plaintiff's attorney on her behalf agreed to the stipulation does not aid respondent in justifying the means by which such stipulation was brought into being. It is a cardinal rule that an attorney cannot by virtue of his general authority bind his client by any act which amounts to a surrender in whole or in part of any substantial right. 3 Cal.Jur. 667. If the trial judge was convinced by the evidence that plaintiff was entitled to a judgment, the same should have been granted her, and she should have been left free to appeal from that portion of the judgment which divided the community property of the parties, if she so desired. In making the waiver of appeal by plaintiff from any portion of the judgment the price of obtaining a judgment to which she was entitled, the trial judge materially prejudiced a substantial right belonging to plaintiff. The trial of a case should not only be fair in fact, but it should also appear to be fair, and where the contrary appears it shocks the judicial instinct and conscience to allow the judgment to stand. To countenance the destruction of a litigant's fundamental right by a process such as that which appears from the complaint with which we are here concerned would be to validate and recognize a rule that would be most disastrous in its results, so far as order and system in the administration of justice are concerned.

[7, 8] The means by which appellant was compelled to abdicate the rightful exercise of her historic right to appeal constituted an excess of power by the court, and the jurisdiction of the court was thereby overreached. As a consequence thereof, a judgment was rendered (if the allegations of the complaint be true, and we must as the trial court should, in passing upon a demurrer to a pleading, assume the verity thereof) with reference to the division of the community property that was of no force or effect, because the means adopted to compel plaintiff's acquiescence in that portion of the judgment affecting the disposition of the community property transgressed the fundamental right guaranteed every litigant in a court of justice to appeal from a judgment affecting his liberty or his property. As was said in McClatchy v. Superior Court, 119 Cal. 413, 418, 51 P. 696, 698, 39 L.R.A. 691, "Any departure from those recognized and established requirements of law, however close the apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction as where there exists an inceptive lack of power. 'The substance and not the shadow determines the validity of the exercise of the power.' Postal Telegraph, etc., Co. v. Adams, 155 U.S. [688], 689, 698, 15 S.Ct. 268, 360, [39 L.Ed. 311]."

[9, 10] That the broad and flexible powers of a court of equity may be invoked to right the wrong allegedly done appellant here is well established. § 3523, Civ. Code. Living as we do in a world of change, equitable remedies have necessarily and steadily been expanded to meet increasing complexities of such changing times, and no inflexible rule has been permitted to circumscribe the power of equity to do justice. As has been well said, equity has contrived its remedies "so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated," and "has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed." 1 Pom.Eq.Jur., 4th Ed., p. 125, § 111. As was said in Bechtel v. Wier, 152 Cal. 443, 93 P. 75, 77, 15 L.R.A., N.S., 549, "the powers of a court of equity, dealing with the subject-matters within its jurisdiction, are not cribbed or confined by the rigid rules of law. From the very nature of equity a wide play is left to the conscience of the chancellor in formulating his decrees, that justice may be effectually carried out. It is of the very essence of equity that its powers should be so broad as to be capable of dealing with novel conditions." See, also, 10 Cal.Jur., p. 463, § 6, p. 559, § 96. The allegations of the complaint herein present a situation for the application of the well known powers of a court of equity to find a remedy for every wrong.

For the foregoing reasons, the judgment is reversed and the cause remanded, with directions to the court below to overrule defendant Wuest's demurrer and to afford him a reasonable time within which to answer plaintiff's complaint should he be so advised.

YORK, P. J., and DORAN, J., concurred.

53 Cal.App.2d 347

WUEST v. WUEST.

Civ. 13549.

District Court of Appeal, Second District, Division 1, California.

July 9, 1942.

1. Appeal and error ⚷907(3)

On an appeal on the judgment roll alone the appellate court must assume that the trial judge in settling the record on appeal caused to be inserted therein all matters relevant to the ruling to which exception has been made or which will explain the same.

2. Appeal and error ⚷907(3)

On an appeal on the judgment roll alone, where the appellate court was not furnished with any record of what occurred at the hearing other than the order involved, the appellate court would assume that the motion was presented to the trial court and determined upon factual issues raised by the motion and supporting affidavit.

3. Appeal and error ⚷934(1)

Every intendment is in favor of the order or judgment made by the trial court.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Lois E. Wuest against William O. Wuest for divorce. From an order refusing to modify the interlocutory judgment of divorce, plaintiff appeals.

Affirmed.

Newby & Newby and Dee Holder, all of Los Angeles, for appellant.

Cook & Obeji, of Van Nuys, for respondent.

WHITE, Justice.

Plaintiff and defendant are wife and husband. The former instituted an action against the latter for separate maintenance and later, by amendment to her complaint, sought a divorce on the ground of extreme cruelty. Following trial, an interlocutory judgment of divorce was granted to plaintiff wife and the same was entered May 31, 1940. In her divorce complaint plaintiff sought a division of the community property belonging to the parties. The portion of the interlocutory judgment affecting distribution of the community property, the manner of payment to the wife for her share thereof, as well as the provisions of a stipulation with reference thereto signed by the parties and incorporated in the interlocutory judgment, and the claimed conditions and circumstances which led up to the signing of such stipulation, are set forth in detail in an opinion this day filed, entitled Lois E. Wuest, Plaintiff and Appellant, v. William O. Wuest, Defendant and Respondent, Cal.App., 127 P.2d 934, to which reference is hereby made for a narration thereof.

In April, 1941, prior to the entry of the final judgment of divorce, the wife filed in the superior court a notice of motion by which she sought "an order that the interlocutory decree heretofore entered in the within action, on or about the 31st day of May, 1940 * * * insofar as said interlocutory decree concerns itself with the community rights of the parties hereto, be modified and the rights of the parties in the community property be fixed and determined in pursuance of said interlocutory decree as modified in the following respects:

"(1) That the community property of the parties be sold" and the proceeds be divided between the parties;

(2) That in lieu of a sale, the property be partitioned in kind;

(3) Or in lieu of either of the above, the parties be determined to hold the property as tenants in common in such proportions as the court might deem equitable and just.

On May 9, 1941, the court made its order denying the aforesaid motion of plaintiff to modify the interlocutory judgment. From the order denying her motion plaintiff prosecutes this appeal.

Appellant contends that the court below denied her motion on the ground that it was without jurisdiction "to do anything whatsoever concerning the interlocutory decree," and her briefs in their entirety are devoted to an argument in support of the claim that by the terms of the interlocutory judgment the court reserved unto itself and possessed jurisdiction to grant the relief sought. Respondent on the other hand contends that the granting or denial of the relief sought by the appellant in the superior court was a matter of fact to be determined by it, and the court's decision on the merits will not therefore be disturbed on appeal in the absence of a clear showing that such decision was erroneous.

[1-3] This appeal comes before us on the judgment roll alone. Contained therein is the notice of motion to modify the interlocutory decree and the plaintiff's affidavit in support thereof. The only reference in the clerk's transcript as to what transpired in the trial court following hearing of plaintiff's motion is the following order made by the court on May 9, 1941: "Motion by plaintiff to modify interlocutory decree of divorce heretofore submitted April 18, 1941, is denied." Nowhere in the record on appeal do we find any intimation that the order of the court was based upon a belief that it was without jurisdiction to grant the relief sought. We are not furnished with any record of what transpired at the hearing other than the order of the court just set forth. We must assume that the trial judge in settling the record on appeal caused to be inserted therein all matters relevant to the ruling to which exception has been taken or which will explain the same. In the light of the record before us, we are required to assume that plaintiff's motion was presented to the court and determined upon factual issues raised by plaintiff's motion and supporting affidavit. We cannot indulge in the assumption that such motion was denied on the ground that the court believed it was without jurisdiction in the premises. Every intendment is in favor of the order or judgment made by the trial court, and appellant does not question the correctness of the order if made after consideration of a factual situation, but contends only that the court denied her relief solely because of lack of jurisdiction. The record does not sustain appellant in this contention. Therefore the order must be, and it is, affirmed.

YORK, P. J., and DORAN, J., concurred.

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53 Cal.App.2d 350

GRIFFIN v. LOS ANGELES CITY HIGH SCHOOL DIST. et al.

Civ.13701.

District Court of Appeal, Second District, Division 2, California.

July 9, 1942.

Hearing Denied Sept. 3, 1942.

1. Schools and school districts ⚿133

A noncertificated high school principal, having been demoted to a high school teacher, could not compel restoration to position as principal and recover principal's salary since under tenure law no person employed in an administrative or supervisory position requiring certification could be classified as a permanent employee other than as a classroom teacher. School Code, § 5.502, as amended by St.1935, p. 1881.

2. Schools and school districts ⚿141(5)

The demotion of a high school principal to the position of high school teacher was not illegal on the ground that principal had not been given the right to a hearing as provided by the rules of the board of education where the rule was applicable to permanent employees and did not apply to principals who had not been accorded tenure, and the action of the board in adopting the rule could not be construed as giving tenure to principals who were not accorded tenure by the general law. School Code, § 5.502, as amended by St.1935, p. 1881.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceeding by Clementina De Forrest Griffin against the Los Angeles City High School District and another to compel petitioner's reinstatement as principal in a high school. From a judgment for respondent, petitioner appeals.

Affirmed.

Milton M. Cohen, Arthur E. Briggs, Carl B. Sturzenacker, and Milton M. Cohen, Jr., all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondents.

W. J. WOOD, Justice.

In this proceeding petitioner asked the lower court to issue a writ of mandate commanding respondent high school district and the Board of Education of the City of Los Angeles to reinstate her as principal in one of the high schools of respondent district. The trial court sustained a demurrer to her petition without leave to amend and petitioner has appealed from the ensuing judgment.

It is alleged in the petition that petitioner for more than 20 years was successfully employed as a principal in the high schools of the respondent district, her last work in that capacity having been performed throughout the school year 1940–41 and that during this entire period her work was not criticized by any superior; that on or about May 2, 1941, the respondent board of education took action by which it preceeded to "demote" her to the position of a high school teacher; that her salary as principal for the school year 1940–41 was $5,100 per year and that other high school principals are being paid the same salaries for the school year 1941–42 as for the school year 1940–41. In addition to asking restoration to her position as principal, petitioner asked for payment of her salary as such principal for the months of the school year 1941–42. She attached to her petition a copy of a rule of the board of education which she claims afforded her the right of a hearing before her assignment to the position of high school teacher and contends that she was improperly denied a hearing before action was taken by the board.

[1] It is conceded that petitioner has not held a city certificate and that her petition does not come within the ruling of Kennedy v. Board of Education, 82 Cal. 483, 22 P. 1042. In 1921 the Legislature enacted a state-wide teachers' tenure law, which was so amended in 1927, St.1921, p. 1664, St.1927, p. 1913, as to provide that "no person employed in an administrative or supervisory position requiring certification qualifications shall be classified as a permanent employee other than as a classroom teacher." It has been held that tenure was not given to principals by the statewide tenure law. Bland v. Board of Trustees, 67 Cal.App. 784, 228 P. 395; Work v. Central Union H. School Dist., 6 Cal.App. 2d 626, 44 P.2d 1047. In 1929 the School Code was adopted but we find that, rather than giving tenure to principals, section 5.502 provides that no person employed in an administrative or supervisory position requiring certification shall be classified as a permanent employee other than as a classroom teacher. The section specifically provides that a person so employed shall "be classified as and shall become a permanent employee as a classroom teacher." St. 1935, p. 1881. The decision in Anderson v. Board of Education, 126 Cal.App. 514, 15 P.2d 774, 775, 16 P.2d 272, is not of aid to petitioner, for in that case tenure was accorded a principal in the city of San Francisco because of a charter provision applicable only to that city. In ruling in favor of the petitioner in the Anderson case the court said: "In this case we purposely refrain from determining the application of the School Code to the principals in districts outside of San Francisco and confine our judgment to the facts presented in the petition."

[2] Paragraph X of the petition is as follows: "That on or about May 2nd, 1940, by resolution of said Board of Education, said board duly and regularly adopted and enacted a rule and procedure to be applicable to all of the certified personnel of said school district, a copy of which rule is hereto attached, marked, 'Exhibit A,' and made a part of this petition." According to the copy of the rule attached to the petition provisions are made for the appointment of committees for the purpose of hearing charges against certificated employees. The action of the board of education in adopting a rule providing for hearings of charges against certificated employees cannot be construed as giving tenure to principals, who are not accorded tenure by the general law. Respondents argue that the rule itself does not give an employee against whom charges may be filed the absolute right to demand a hearing. Consideration of this point would require a lengthy discussion of the elaborate procedure set up in the rules, a discussion which we consider unnecessary in view of our conclusion that the rule has no application to principals. Preceding a statement of the steps to be taken for the hearings provided by the rule we find the heading: "Certificated Personnel. Re: Preliminary Hearing Procedure for Certificated Personnel." Then follows this discussion: "The California School Code provides a procedure for the dismissal of both probationary and permanent certificated employees. When and if this procedure is to be followed, it is essential that a thorough investigation of the facts in each case has been made to warrant the filing of charges against an employee.

* * *" In the steps outlined for the "preliminary hearing" it is provided that charges shall be filed by the assistant superintendent in charge of the school "to which the certificated employee is assigned." It is at once apparent that the rule is applicable to "probationary and permanent certificated employees." Principals are not permanent employees. There is nothing in the rule which gives a principal, who has not been accorded tenure, a right to demand a hearing before any committee referred to in the rule. Petitioner's rights as a classroom teacher are not involved in this proceeding.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

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53 Cal.App.2d 301

BURFORD et al. v. BAKER.

Civ. 13212.

District Court of Appeal, Second District, Division 2, California.

July 8, 1942.

1. Physicians and surgeons 🔑18(8)

Where plaintiff, who had been treated since August, 1936, for a pituitary gland deficiency and other ailments, received a hip injury causing a noticeable limp, and physician failed to X-ray, and in October, 1938, upon termination of services X-ray revealed a separation of the epiphysis of right femur, in malpractice action, finding that such separation occurred during the time plaintiff was under defendant's care was supported.

2. Physicians and surgeons 🔑18(8)

In action for malpractice in treating a hip injury, where X-rays taken after termination of defendant's services revealed an epiphyseal separation, plaintiff was not required to prove conclusively and beyond the possibility of doubt that such separation occurred during the time plaintiff was under defendant physician's care, but it was sufficient to establish a reasonable probability of the origin and existence of the injury during that time, and the court could draw reasonable inferences from the circumstances established and base its findings thereon.

3. Appeal and error 🔑930(1)

After verdict or decision of the court has been fairly rendered, all circumstances of case, together with any reasonable inference which may be drawn therefrom, will be marshaled in support of judgment.

4. Physicians and surgeons 🔑18(8)

In action against osteopathic physician for malpractice in treating hip injury as a bruise or arthritis and in failing to have X-rays taken which subsequently revealed a separation of the epiphysis of the right femur, a finding that physician was negligent was supported by substantial evidence.

5. Physicians and surgeons 🔑18(8)

In action for malpractice in treating a hip injury as a bruise or arthritis and directing exercise of the hip without having an X-ray taken which, upon being subsequently taken, revealed a separation of the epiphysis of the femur, evidence was sufficient to establish that physician's negligence in failing to have X-ray taken and in directing exercise of the hip, rather than immobilization, was the proximate cause of the damage suffered by plaintiff.

6. Physicians and surgeons 🔑15

In action for malpractice in treatment of hip injury, where X-ray subsequently taken revealed an epiphyseal separation of femur which physician had not discovered, the fact that a glandular deficiency with which plaintiff was suffering may have caused or contributed to separation would not free physician from liability, since physician was not charged with having caused separation, but with failure to discover and properly treat the injury.

7. Torts 🔑21

One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured.

8. Appeal and error 🔑1051(1)

In action for malpractice in treatment of hip injury, overruling of objections to questions asked of plaintiff's expert witness was not reversible error, although the questions were subject to criticism in that certain elements present in plaintiff's case were not included and that proper treatment and diagnosis were not defined, where there was other evidence sufficient to sustain finding, and it was not reasonable to conclude that the court was misled or that any other findings would have been made if the question had been free from criticism.

9. Evidence ⚷506

In action for malpractice in treatment of hip injury in failing to discover and treat an epiphyseal separation of the femur, subsequently revealed by X-rays, permitting an expert to state his opinion that the separation occurred on the day plaintiff received injury in an automobile accident was not invading province of the trier of facts, where testimony was manifestly for the purpose of proving that separation could have existed while plaintiff was under defendant's care.

10. Pleading ⚷237(7)

In action for malpractice in treatment of hip injury, permitting plaintiff at the close of the trial to amend complaint by changing date of termination of defendant's employment to conform to the proof was not an abuse of court's discretion.

11. Physicians and surgeons ⚷18(7)

In action for malpractice in treatment of hip injury in failing to take X-ray of the injury and discover that plaintiff was suffering from an epiphyseal separation of the femur and in failing to properly treat the same, defendant's offer to prove that during the period plaintiff's injury was being treated he caused 41 X-rays to be taken of various other patients was properly rejected as immaterial, since whether defendant believed in the use of X-ray or not or had taken X-rays of other patients was not in issue.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by George W. Burford and others against Dr. W. Donald Baker to recover damages for the alleged malpractice of defendant. From a judgment in favor of the plaintiff named, defendant appeals.

Affirmed.

Parker & Stanbury and Raymond G. Stanbury, all of Los Angeles, for appellant.

Frank Desimone and S. L. Kurland, both of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for the malpractice of defendant physician. Defendant has appealed from a judgment in plaintiff's favor in the sum of $7,500. The parents of the minor plaintiff joined with him in the action but no judgment was entered in their favor and they are not parties to the appeal.

Plaintiff, who was a minor of the age of fourteen years at the time of the treatment complained of, for some time had been suffering from a pituitary disturbance which rendered his growth and development abnormal. Defendant, an osteopathic physician and surgeon, became the family physician in August, 1936, and undertook to treat plaintiff for his glandular deficiency. The treatment consisted of frequent injections, which course of treatment was continued until October, 1938, when defendant's services were terminated. In addition to caring for the glandular disturbance defendant also gave medical attention to all other ailments of plaintiff, including the removal of his tonsils, treatment for an attack of appendicitis and care of an injured wrist. On December 20, 1937, plaintiff was involved in an automobile accident, as a result of which he received injuries to his right hip. On the day of the accident plaintiff was taken to defendant's office by his father and for the first time walked with a noticeable limp. Defendant's examination disclosed that plaintiff's hip was painful and reddish blue and swollen in an area about twelve inches in diameter. Plaintiff's father suggested that an X-ray be taken of the injured area but defendant stated that it was unnecessary because the injury was only a bruise or muscle strain and recommended the application of hot towels. The pain and discomfort did not subside under this treatment and plaintiff returned to defendant a week or two later, but defendant stated he could do nothing for him. Plaintiff's condition failed to improve and each time he went to defendant to be treated for his glandular condition he walked with an obvious limp and complained of the pain in his hip and leg. On several occasions defendant stated that arthritis had developed and advised plaintiff to exercise his leg as much as possible and to refrain from favoring the leg. Despite several requests by plaintiff's father, no X-rays of the injured hip were taken by defendant. Plaintiff continued to complain of intense pain and informed defendant that he could not put on or take off his right shoe or stocking and that he could not walk steadily. Several light treatments were administered by defendant during the period plaintiff remained in his care but no other treatment was given. Defendant insisted that the leg should be exercised and that plaintiff should be prevented from forming the habit of favoring the right leg.

Plaintiff went to a Dr. Bailey in July, 1938, for relief from a pain which had developed in his back and informed Dr. Bailey of the history of the case and of the fact that defendant was treating his hip joint for arthritis. Dr. Bailey gave plaintiff osteopathic, manipulative treatments designed to relieve the back ache, but apparently did nothing for the hip injury. In October, 1938, an X-ray was taken of plaintiff's right hip and it was then discovered for the first time that he was suffering from a separation of the epiphysis of the right femur. Dr. Bailey attempted to reduce the separation, or fracture, as it was sometimes referred to by the witnesses, and placed plaintiff's right hip and leg in a cast. After the removal of the cast plaintiff was required to wear a built-up shoe and to walk on crutches. Dr. Bailey's treatment was unavailing, however, because the injured hip joint had already ankylosed, making an abnormal union. Plaintiff will, according to his experts, be crippled for life and, from time to time, will have painful spasms and contractions of his muscles. Defendant's right leg is one inch shorter than his left leg and there is a permanent loss of motion in his right hip. As a secondary result of his condition, he has developed a lateral curvature of the spine, known as scoliosis.

[1-3] It is contended by defendant that the evidence is insufficient to sustain the court's finding to the effect that the epiphyseal separation took place during the time when plaintiff was under defendant's care. It was established by expert testimony that persons of plaintiff's type, i. e., the "fat boy" type, who are suffering from a pituitary gland deficiency, are liable to suffer an epiphyseal separation and that such a separation may be brought about with or without trauma of any character, but that trauma, such as that suffered by plaintiff, could have caused the separation. The expert witnesses further testified that the primary, most noticeable symptom of an epiphyseal separation is a limp. It was proved that immediately following the accident plaintiff developed a noticeable limp which was promptly brought to defendant's attention, and that he complained of pain in his hip, which condition continued during all of the time he was under defendant's care. After examining the X-rays of plaintiff's injured hip, numerous expert witnesses gave their opinions as to the approximate time when the separation first occurred, fixing the time of the origin of the injury as being from four to twelve months prior to October 10, 1938, the date on which the X-rays were taken. This evidence, when considered with other circumstances in the case, was sufficient to establish a reasonable probability of the origin and existence of the injury during the time that plaintiff was under defendant's care. Plaintiff was not required to prove conclusively and beyond the possibility of doubt that the epiphyseal separation occurred during that time. The court could draw reasonable inferences from the circumstances established and base its findings thereon. It is established that: "After the verdict of a jury [or decision of the court] has been fairly rendered, all the circumstances of the case, together with every reasonable inference which may be drawn therefrom, will be marshaled in support of the judgment. Because of the very subtleness of the origin and development of disease, less certainty is required in proof thereof." Sim v. Weeks, 7 Cal.App.2d 28, 40, 45 P.2d 350, 356; Barham v. Widing, 210 Cal. 206, 215, 291 P. 173.

[4] The finding that defendant was negligent is supported by substantial evidence. Several medical experts testified in effect that an osteopathic physician and surgeon who possessed the ordinary skill and knowledge of similar practitioners in the community in which defendant practiced, would under the circumstances disclosed by the evidence have had an X-ray taken of plaintiff's injured hip soon after plaintiff first developed the limp and complained of pain in his hip; that upon discovering the epiphyseal separation, such practitioner would have treated it by reducing the fracture, or separation, and would have created immobilization by applying a cast thus protecting the injured member from weight-bearing. Not only did defendant fail to have an X-ray taken, but he also failed to immobilize the injured hip. Instead, he directed plaintiff to exercise the hip as much as possible.

[5] Defendant argues that even if he was negligent, there is no evidence to es-

tablish that his negligence was the proximate cause of plaintiff's injury. Specifically, it is argued that there is no evidence to prove that proper diagnosis and treatment would have produced any result different from that which was shown to have existed at the time of trial. In support of his position defendant relies upon the testimony of some of the medical experts to the effect that plaintiff's glandular deficiency produced a calcium shortage in his bones and was a predisposing factor in the epiphyseal separation; that the end result in this case, as disclosed by the X-rays, was a composite consequence of various factors which were inherent in the preexisting disease, or glandular disturbance. We must, however, accept as true all evidence which is favorable to plaintiff and which supports the questioned finding, disregarding all evidence in conflict therewith. On behalf of plaintiff an expert witness testified that in case of a fracture or separation of the femoral epiphysis any weight-bearing or exercise of the injured member would tend to twist the head and neck of the femur and would be very detrimental; that upon discovery of such a separation rapid reduction and immobilization greatly enhance the probability of a good result; and where, as in this case, the patient has attempted to walk and perform the ordinary functions of life for ten months before the separation is discovered, the chances for success of attempted reduction and immobilization are "not so good." A physician testified that the destruction of the bone and distortion of the joint, as disclosed by the X-rays, was chiefly due to premature weight-bearing. Another expert testified that if the separated epiphysis had been recognized and adequate treatment instituted, particularly relief of weight-bearing, little or no ankylosis, narrowing of the joint space or shortening of the head or neck of the femur would have occurred; that deformity does not occur where proper treatment is instituted shortly after the fracture or separation and that the end result appearing from the X-rays in this case would probably not have appeared if early recognition of the condition had occurred and adequate treatment been instituted. One of defendant's experts was asked by defendant's counsel: "If a young man of Robert Buford's age were to have separation of the epiphysis in the upper femur as he did, and were to walk around on it without any care or support, can you tell us what effect, if any, it would have on him so far as the formation of callus is concerned at the site of the separation?" The witness replied: "It would eventually unite, but there would be more distortion in relation of the hip to the neck—more deformity." When asked his opinion as to the cause of the destruction of the bone in the head and neck of the femur, another expert testified: "My opinion is that this boy was permitted to walk upon his right leg, that thereby it would cause more or less of a wearing or destruction of the fragmented end of the neck of the femur, which would cause shortening of the bone." The testimony is sufficient to sustain the court's finding that defendant's negligence was the proximate cause of the damage suffered by plaintiff for which an award was given.

The facts of this case bear a striking similarity to the facts in Rankin v. Mills, 207 Cal. 438, 278 P. 1044. The Rankin case involved an action to recover for defendant's malpractice in failing to diagnose (no X-ray was taken) and treat plaintiff's fractured hip. It was proved that as a result of the failure to treat the injury the bone had made an abnormal, fibrous union, the leg was shortened and it was too late to secure a bony union. Evidence was introduced on behalf of defendant to the effect that due to the age of plaintiff, a bony union was very unlikely under any form of treatment and that in most cases such a fracture would result in the patient's becoming crippled for life regardless of the treatment used. In affirming the judgment in favor of plaintiff the court accepted testimony of plaintiff's expert witness to the effect that the end result would not have been the same if the fracture had been properly treated.

[6, 7] It is argued that the finding as to proximate cause cannot be sustained for an additional reason. Defendant contends that since plaintiff's glandular deficiency might have caused the epiphyseal separation without the intervention of any trauma and since the end result could have been the combined result of several factors, there is no proof as to what proportion of the total damage was caused by his negligence. This contention cannot be sustained, for defendant was not charged with having caused the epiphyseal separation, recovery being sought only for the damages resulting from his negligent failure to discover and treat the separation. The chief

importance of the precise cause of the separation lies in the fact that it might be shown to prove that the separation occurred while plaintiff was under defendant's care. The fact that the glandular deficiency or other factors may have contributed to the ultimate damage suffered by plaintiff cannot free defendant from liability. "One who contributes to damage cannot escape liability because the proportionate contribution may not be accurately measured." City of Oakland v. Pacific Gas & Electric Co., 47 Cal.App.2d 444, 118 P.2d 328, 331.

[8] The action of the trial court in overruling defendant's objections to questions asked of plaintiff's expert witness Dr. Herbert Judson is assigned as error. The witness was asked if he had seen cases of the separation of the epiphysis in boys between 12 and 16 years of age, overweight, and suffering from glandular disturbances and what the effect of proper treatment and proper diagnosis had been in those cases. The question was subject to criticism in that certain elements present in plaintiff's case were not included and for the reason that proper treatment and proper diagnosis were not defined. However, there was other substantial evidence properly admitted which was sufficient to sustain the findings of the court. It is not reasonable to conclude that the court was in anywise misled or that any other findings would have been made if the question had been free from criticism.

[9] It is next contended that in permitting another of plaintiff's experts to state his opinion as to the time when the epiphyseal separation occurred, which he stated to be on the day of the automobile accident, the witness was allowed to invade the province of the court by testifying to the ultimate fact in issue. Defendant has not cited any authority which holds that an expert witness may not state his opinion, based on proven facts, as to the time when an injury occurred. The questioned testimony was manifestly introduced for the purpose of proving that the separation could have existed while plaintiff was under defendant's care. The court did not err in admitting it.

[10] At the conclusion of the trial plaintiff was permitted to amend his complaint by changing the date of the termination of defendant's employment from July, 1938, to October, 1938. It is now contended that there was no evidence to justify the amendment. The record discloses ample evidence that defendant continued to treat plaintiff until October, 1938. The court did not abuse its discretion in permitting the amendment.

[11] The action of the trial court in rejecting defendant's offer to prove that during the period from December 20, 1937, to February 1, 1938, he caused forty-one X-rays to be taken of various other patients, is assigned as error. Whether defendant believed in the use of X-rays or had taken X-rays of other patients was not in issue. The proffered testimony was therefore not material and was properly excluded. The fact that defendant may have exercised ordinary care by taking X-rays of forty-one other patients has no bearing on the issue of negligence in the present case and cannot controvert the conclusive proof that he failed to take an X-ray of plaintiff's hip.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concurred.

53 Cal.App.2d 363

In re RUIZ' ESTATE.

RUIZ v. CUTTING et al.

Civ. 12099.

District Court of Appeal, First District, Division 1, California.

July 10, 1942.
Hearing Denied Sept. 3, 1942.

1. Executors and administrators 🔑188

Whether a wife, against whom her husband has recovered an interlocutory divorce decree based upon her cruelty, is entitled to a family allowance upon husband's death within the statutory year is not determined by the time or cause of an earlier separation, since it cannot be presumed that separation was without justification on the part of the aggrieved spouse and by virtue of the interlocutory judgment the spouses were living separate by agreement.

2. Executors and administrators 🔑188

Surviving wife became "widow" on husband's death, notwithstanding that interlocutory divorce decree had been granted prior to his death. Probate Code, § 680.

See Words and Phrases, Permanent Edition, for all other definitions of "Widow".

3. Executors and administrators 🔑188

A wife, against whom her husband had recovered an interlocutory divorce decree based upon her cruelty, is not entitled to a family allowance upon the husband's death within the statutory year, where the decree found her to be at fault, since the husband was then no longer liable for support.

4. Executors and administrators 🔑188

In determining status of spouses at time of husband's death as to whether there was then a family and whether husband was under obligation to support the wife, recourse may be had to the judgment roll in the divorce case, where interlocutory judgment of divorce had been entered.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Proceeding in the matter of the estate of Joe Ruiz, deceased, wherein Mary E. Ruiz filed a petition for family allowance which was granted, and Francis Cutting, executor, and others filed motion to vacate the order. From an order which vacated the earlier order granting the allowance, Mary E. Ruiz appeals.

Order affirmed.

Hearing denied; GIBSON, C. J., and SHENK and EDMONDS, JJ., dissenting.

O. C. Parkinson, of Stockton, for appellant.

Rutherford, Jacobs, Cavalero & Dietrich, Newton Rutherford, D. R. Jacobs, Philip Cavalero, Stephen Dietrich, and William H. Woodward, all of Stockton, for respondents.

GOODELL, Justice pro tem.

The appellant Mary E. Ruiz prosecutes this appeal from an order which vacated an earlier order granting her a family allowance of $150 per month. She and Joseph B. Ruiz were married on October 26, 1938, and on February 7, 1939, they separated. She instituted a suit for separate maintenance against him for extreme cruelty and he filed therein a cross-complaint for divorce alleging extreme cruelty. The case was tried, findings were made, and on June 21, 1940, an interlocutory judgment of divorce was awarded to the husband from which no appeal was taken. The findings negatived the wife's allegations of cruelty and found to be true the allegations of cruelty contained in the husband's cross-complaint.

On March 17, 1941, the husband died. On May 16, 1941, the appellant's ex parte petition for a family allowance was granted. On June 5, 1941, the executor joined with two residuary devisees and legatees in a motion to vacate the order, which motion was granted on August 15, 1941, and this appeal was taken.

The appellant states the question involved as follows: "Does a wife who has left her husband's house against her will upon his express order to get out and stay out lose her right to a family allowance from his estate by reason of an intervening interlocutory decree of divorce in his favor upon the ground of mental cruelty, no final decree having been entered, no agreement ever made by the wife to waive right to support, and the husband having died less than a year after entry of the interlocutory decree?"

[1] The first few words of the statement just quoted sound the keynote of the appellant's position on this appeal, namely, that the separation was against the wife's will and because of the husband's "express order to get out and stay out." Throughout her briefs the appellant stresses and reiterates the argument that the separation was caused by the decedent husband. She alleged in her complaint that the separation took place on June 19, 1939; this was denied by the husband, who pleaded that it took place on February 7, 1939, and the court found with him. Some of the acts of cruelty may have been before that date but some of them are definitely found to have taken place *after* that date, which circumstance makes no difference. 9 Cal.Jur. 661, § 33; see, also, Stitt v. Stitt, 8 Cal.2d 450, 452, 65 P.2d 1297, 1298, where it is said: "In the absence of allegations and proof, it cannot be presumed that the separation was without justification on the part of the aggrieved spouse." Moreover, it is settled law that the spouses were "by virtue of the interlocutory judgment, living separate by agreement." London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 466, 184 P. 864, 867, followed in Stauter v. Carithers, 185 Cal. 160, 196 P. 37, 9 Cal.Jur. 758, § 109. The earlier separation, then, whenever it was, and whatever the cause, is of no legal significance.

The question, stripped of this collateral issue of separation, is whether a wife, against whom her husband has recovered an interlocutory judgment based upon her cruelty, is entitled to a family allowance upon the husband's death within the statutory year.

[2] Section 680 of the Probate Code reads as follows: "The widow and minor children are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate * * *." The appellant is, of course, the decedent's widow (In re Estate of Dargie, 162 Cal. 51, 121 P. 320) and she has no property of her own, and no income; she is therefore within the letter of section 680. On that claim of an absolute statutory right to family allowance she stands, and from that premise she argues that the denial of the family allowance is sheer judicial legislation. However, it is the function of the courts to ascertain and declare legislative intent, and with respect to the intent of this particular provision (formerly § 1466, Code Civ.Proc.) the Supreme Court over fifty years ago had this to say in In re Noah's Estate, 73 Cal. 583, 589, 15 P. 287, 290, 2 Am.St.Rep. 829: "We also think that, in enacting section 1466 of the Code of Civil Procedure, the legislature had in contemplation the ordinary case where 'the parties to the marriage relation live together until death severs the tie.' *The letter of the statute may cover other cases.* We are not to be understood as saying that, in every instance where the husband and wife have separated, the widow should be denied an allowance. * * *" (Emphasis ours.)

The judgment herein made no provision for the support or maintenance of the wife, and indeed it could not have done so, for it had been awarded to the husband for the wife's fault. In re Nielsen, 19 Cal.App.2d 305, 65 P.2d 360. Thus it is obvious that appellant now insists on her right to this family allowance despite the fact that for nine months preceding the husband's death he had been freed from all obligation to support her. See In re Noah's Estate, 73 Cal. 583, 588, 15 P. 287, 2 Am.St.Rep. 829, supra.

[3] The appellant argues that separation does not destroy the right to a family allowance, or, to put it another way, the right "is not conditioned upon her having lived in a family relation with her husband at the time of his death." It was so held in Re Estate of Gould, 181 Cal. 11, 183 P. 146, 147, where the interlocutory judgment awarded part of the community property to the wife and part to the husband "free and clear of all claim of the defendant [wife]." The husband died just a week after the interlocutory judgment, and the wife was granted a family allowance. It was claimed, that because of the separation—which had continued for many years—there was no family at the time of the death, and that the award to the husband of such remaining community property free and clear of all claim of the wife, destroyed her right to a family allowance, but it was held otherwise. However, it must be borne in mind that in that case the judgment had been awarded to the wife for the fault of the husband. In Re Estate of Parkinson, 193 Cal. 354, 224 P. 453, also relied upon by appellant, a family allowance was upheld. The wife had been separated from her husband for many years. He had sued her for divorce in Michigan, but had lost. Later she obtained a decree against him for separate maintenance. He disposed of his estate by will to the exclusion of his wife. It will be observed, again, that the court had determined that the fault was the husband's. Indeed at the time of his death the decree in the separate maintenance case obligated the husband to support the wife. Another case relied upon by appellant is In re Estate of Henningsen, 199 Cal. 103, 247 P. 1082, where the Gould and Parkinson cases are followed. There the spouses had separated about three months before the wife's death. It was held that separation did not bar the surviving spouse —in that case, the husband—from asserting his right to a probate homestead. The question of fault was not adjudicated, for no suit had been brought for divorce. In Re Estate of Ehler, 115 Cal.App. 403, 1 P.2d 546, the wife was granted a family allowance. She had commenced a suit for divorce against her husband, who died while it was pending. There had been no adjudication as to fault. In re Estate of Hale, 117 Cal.App. 545, 4 P.2d 263, is substantially the same as the Ehler case. In both cases the husband was paying temporary support to the wife under a court order at the time of his death. No case has been cited by appellant holding that where there has been an adjudication fixing a spouse's guilt, such spouse is entitled, in spite of such adjudication, to a family allowance. On the contrary, In re Estate of Fulton, 15 Cal.App.2d 202, 59 P.2d 508, 510, holds that where a wife voluntarily abandoned her husband un-

der conditions rendering him no longer liable for her support, and an interlocutory decree had been granted to him on the ground of her desertion, she lost her statutory right as a widow to a probate homestead. The comprehensive review in that opinion of the authorities on this general subject renders an extended discussion of them herein wholly unnecessary. It is difficult to find any distinction between that case and this. There the husband obtained the judgment on the ground of wilful desertion; here he obtained it on the ground of extreme cruelty. In both cases the court adjudicated the fault to be on the wife's side, and in both the court held that the marriage should be dissolved under conditions rendering the husband no longer liable for the wife's support. In the Fulton case the court says that in its opinion "the principles of law that are determinative * * * are laid down in Re Estate of Miller, 158 Cal. 420, 111 P. 255, 256 * * *." With this we agree. In the Miller case an order setting apart to the widow an estate under $1,500 in value was reversed because the court had shut out evidence designed to show that the wife had abandoned the decedent. The Miller case is quoted extensively in the Fulton case, supra, at pages 205–207 of 15 Cal.App.2d, 59 P.2d 508, and from such quotation it is clear that the court deemed crucial the status of the parties at the time of the decedent's death. The purpose of such inquiry is to determine whether there existed in fact a family relationship as defined In re Noah's Estate, supra, that is, whether the surviving spouse claiming post-mortem support out of the estate had been, to quote In re Noah's Estate, "in the receipt or in law entitled to demand of deceased a maintenance before his death."

[4] There can be no serious question that, in determining the status of the spouses at the time of the husband's death—whether, in other words, there was then a "family" and whether the husband was then under any obligation to support the wife—recourse may be had to the judgment-roll in the divorce case and that it, indeed, should be the sole source of information. Manifestly no higher, better, or more dependable evidence is obtainable. In Re Estate of Fulton, supra, in referring to the interlocutory judgment of divorce, the court said: "The judgment has become final, and this court is bound thereby." See, also, In re Estate of Breitter, 69 Cal.App. 424, 231 P. 351 (cited, by the way, by appellant), and Borg v. Borg, 25 Cal.App.2d 25, 76 P.2d 218, and Overell v. Superior Court, 29 Cal.App.2d 418, 84 P.2d 789.

The notice of motion for an order vacating the earlier order granting the family allowance was based upon the ground that the first order had been made "as a result of mistake, inadvertence, misapprehension and fraud on the part of said petitioner." In fairness to the appellant it should be said that the petition for family allowance showed on its face that the interlocutory decree had been granted to the decedent-husband against the petitioner-wife, and the record shows that the file in the divorce suit was produced before the judge who made the order, who read the findings and judgment and discussed the matter with appellant's counsel. No fraud, therefore, is attributable to the appellant.

For the foregoing reasons, the order appealed from is affirmed.

PETERS, P. J., and WARD, J., concurred.

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53 Cal.App.2d 368

In re EGELINE'S ESTATE.

EGELINE v. HAGELSTEIN.

Civ. 12092.

District Court of Appeal, First District, Division 1, California.

July 10, 1942.

Executors and administrators ⇨188
Homestead ⇨141(1)

A wife, against whom husband has recovered an interlocutory judgment of divorce based upon her cruelty, is not entitled to a family allowance, the probate homestead, or assignment of personal property exempt from execution, since the judgment that the marriage be dissolved was based on the fault of the wife which rendered the husband no longer liable for her support. Probate Code, §§ 660, 680.

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Proceeding in the matter of the estate of Robert E. Egeline, deceased, wherein Mazie Egeline filed petition for family allowance, the setting apart to her of the probate homestead, and of certain personal property exempt from execution, opposed by Wm. G. Hagelstein, as administrator with the will annexed. From orders denying her petition, petitioner appeals.

Orders affirmed.

Gerald L. Shannon, of Mount Shasta, for appellant.

Tebbe & Correia, of Yreka, for respondent.

GOODELL, Justice pro tem.

This is an appeal from orders denying the petitions of Mazie Egeline for (a) a family allowance, (b) the setting apart to her of a probate homestead, and (c) the setting apart to her of certain personal property exempt from execution.

The decedent, Robert E. Egeline, and the appellant Mazie Egeline, had been married for some years. In 1937 he filed a complaint for divorce against her. They were already separated, and summons was served upon the wife by publication. She defaulted, and on April 5, 1938, an interlocutory judgment was awarded to the husband on the ground of her extreme cruelty from which no appeal was taken. On March 16, 1939, the husband died.

As in Re Estate of Ruiz, Cal.App., 127 P.2d 945, just decided, the appellant is, of course, the decedent's widow, and the record shows that she has no income except that produced by her own labor; she is therefore within the letter of sections 660 and 680 of the Probate Code.

In this case a property settlement agreement was entered into the day after the hearing of the case, wherein the community property therein inventoried (with the exception of certain articles of wearing apparel and of personal adornment assigned to the wife), was transferred to the husband as his separate property. This was followed by a deed from wife to husband quitclaiming the same property. The agreement expressly provided for a separation of the parties. The interlocutory judgment approved and confirmed the settlement.

The appellant states the two questions involved herein as follows:

"1. Does a property settlement in which no specific waiver of widow's rights appear, forfeit the rights of the widow to a widow's allowance, probate homestead, and the setting aside of exempt property?

"2. Can a finding in a judgment in a divorce action, in which the defendant was served by publication, bind the defendant in a probate proceeding in which the defendant in the divorce action is the widow petitioning for a family allowance, setting aside the probate homestead, and the setting aside of exempt property?"

With respect to the first question: The language of the agreement is that the community property therein transferred to the husband "shall belong to the said husband as his personal estate and free from all rights of the said wife." It is not necessary to answer or decide this question for we are satisfied that the answer to the second—which must be in the affirmative—is decisive of this appeal. The respondent relies upon In re Estate of Fulton, 15 Cal.App.2d 202, 59 P.2d 508, cited and discussed by us in Re Estate of Ruiz, supra. In the Ruiz case, wherein the Fulton case was followed, we held that where it had been judicially determined that the marriage should be dissolved under conditions rendering the husband no longer liable for the wife's support, the surviving wife—although technically within the letter of section 680, Probate Code—was not entitled to a family allowance. Here, as in the Ruiz case, the husband was awarded the decree on the ground of his wife's extreme cruelty. The two cases are not distinguishable.

For the reasons and upon the authorities appearing in Re Estate of Ruiz, Cal.App., 127 P.2d 945, and in Re Estate of Fulton, supra, the three orders appealed from are, and each of them is, affirmed.

PETERS, P. J., and WARD, J., concurred.

53 Cal.App.2d 317

MORTIMER v. YOUNG et al.

Civ. 13065.

District Court of Appeal, Second District, Division 3, California.

July 8, 1942.

1. Execution 🔑222(1)

Where plaintiff's cause of action against defendants was levied upon and sold under execution issued on judgment awarded to defendants for costs of appeal from an order granting defendants new trial, vacating execution sale on ground that plaintiff had no notice of sale was improper where plaintiff had made no demand that notice of sale be given to her by registered mail as provided by statute and in absence of such demand, no obligation rested on any one to give her notice. Code Civ.Proc. § 692a.

2. Execution 🔑251(2)

Where plaintiff's cause of action for damages for fraud was levied upon and sold under execution issued on judgment awarded to defendants for costs of appeal from order granting defendants new trial, setting aside sale on ground of palpable inadequacy of price and irregularity was not proper where the cause of action was of doubtful value, notice of such sale was sent to plaintiff although not required and dealings between plaintiff and defendants' counsel showed no obligation to delay or give further notice. Code Civ.Proc. § 692a.

3. Execution 🔑47, 132

A cause of action for a tort, not reduced to judgment, is not a "debt" within meaning of garnishment statute and such cause of action may be levied upon and sold on execution and the proper mode of levy is by notice to the person asserting the tort claim as owner thereof, since it is a "thing in action" within provision of statute for selling "things in action" of judgment debtor on execution. Code Civ.Proc. §§ 542, 691.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt" and "Thing in Action".

4. Execution 🔑3

The 1941 amendment to statute providing that no cause of action or judgment as such shall be subject to levy or sale on execution has no application to sales which took place before the act took effect. Code Civ.Proc. § 688.

5. Execution 🔑255

Where plaintiff's cause of action against defendants was levied upon and sold under execution issued on judgment awarded to defendants for costs of appeal from an order granting defendants new trial, and after satisfying judgment for costs the surplus was paid to plaintiff, in subsequent proceedings to vacate the sale plaintiff should be required as a condition of relief to return surplus to the purchaser.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Alice Mortimer against George D. B. Young and another wherein a judgment of nonsuit as to one defendant and order granting other defendant new trial were affirmed on appeal and upon obtaining judgment for costs of appeal, defendants had execution issued and levied on plaintiff's cause of action by service upon plaintiff and county clerk under which the causes of action were sold to one L. E. Alimisis. From orders denying motion of Alimisis to be substituted as plaintiff and sustaining a countermotion of plaintiff to vacate the execution sale, Alimisis appeals.

Orders reversed.

L. E. Alimisis, of Los Angeles, in pro. per., for appellant.

Y. B. Arsen, of Los Angeles, for respondent.

SHAW, Justice pro tem.

Plaintiff brought this action against the defendants Young and Rodes and obtained judgment against Rodes, but was nonsuited as to Young. The trial court then granted a new trial to Rodes. Plaintiff appealed from the judgment of nonsuit and the order granting a new trial. Both were affirmed and the defendants were awarded their costs of that appeal. See Mortimer v. Young, 1940, 37 Cal.App.2d 164, 98 P.2d 1061. The defendants had execution issued on their judgment for costs of appeal and levied it on the plaintiff's causes of action in this action by service of the execution and notice upon plaintiff and the county clerk. Following this levy the causes of action were sold to L. E. Alimisis, the appellant on the present appeal. Alimisis made a motion to be substituted as plaintiff herein and plaintiff made a counter motion to vacate the execution sale. Orders were made granting the plaintiff's motion and denying that of Alimisis, from which the latter appeals.

[1] The grounds of plaintiff's motion to vacate the sale, as stated in the notice thereof, were "that said sale was optained by fraud, misrepresentations, of the defendants and that no notice of such or any sale was ever given or served upon the plaintiff and that the plaintiff ha*ve* had no information or knowledge o*r* said sale or any sales of plaintiff's interests in said action, and for the further ground that said sale is oppressive, totally inadequate and inequitable." The motion was supported by plaintiff's affidavit that she had no notice of the sale until after it occurred and hence was not present. This fact does not show irregularity or unfairness. Under the provisions of section 692a of the Code of Civil Procedure she might have required notice of the sale to be given to her by registered mail, but her affidavit does not show that she did this. Unless she so demanded notice, no obligation rested on anyone to give her such notice, and her lack of it is no ground for vacating the sale, especially where a stranger to the proceedings is the purchaser. Rauer v. Hertweck, 1917, 175 Cal. 278, 282, 165 P. 946; Bock v. Losekamp, 1919, 179 Cal. 674, 179 P. 516.

[2] Plaintiff now defends the orders appealed from on the rule laid down in Odell v. Cox, 1907, 151 Cal. 70, 74, 90 P. 194, 196, that while an execution sale will not be set aside for mere inadequacy of price, yet "where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought." The difficulty with plaintiff's argument is that the factors necessary to the application of this rule do not appear here. Plaintiff sued to recover damages for fraud and recovered on the first trial $3,210 from defendant Rodes. The new trial was granted for insufficiency of the evidence, and there was evidence tending to show that plaintiff suffered little damage, even if defrauded. The causes of action sold for $110. This is doubtful, as a showing that the price was grossly inadequate. But if it can be regarded as sufficient for that purpose, yet there was no evidence at all of unfairness or irregularity. On the contrary, it appears that advance notice of the sale was sent to plaintiff, in the manner provided by section 692a of the Code of Civil Procedure, above cited, although legally she was not entitled to it, and that it failed of its purpose only because she was absent from home and for that reason did not receive it in time. During the hearing plaintiff's counsel expressed a desire to become a witness and testify to certain facts which he now urges upon us as if they showed fraud or unfairness. He did not in fact testify at all. If the facts stated by him as those to which he would testify are to be regarded as before the court, they were merely that "some time in September" (the execution sale was on September 23) defendants' counsel called him by telephone and said, "Say, are you going to pay this judgment or not?" to which plaintiff's counsel replied, "Oh, why don't you wait until the case comes on for trial?", this being "very soon," and then defendants' counsel said, "No, I think you had better pay this judgment," to which plaintiff's counsel said, "Well, I think I can get in touch with my client and get the money for you. You are entitled to the judgment." Plaintiff's counsel tried to notify his client but failed to reach her. He did not say he communicated this fact to opposing counsel or asked for further time to pay. Nothing fraudulent or unfair appears here. Apparently defendants' counsel tried to get payment without execution, but failing in that and hearing nothing more from plaintiff's counsel, proceeded with an execution sale. The conversation as reported does not show any obligation resting on defendants' counsel to delay or to give further notice of his action in the matter.

[3, 4] One of the reasons urged on the trial court for granting the plaintiff's motion to vacate the sale was that her cause of action here was not subject to sale on execution, in support of which Sunset Realty Co. v. Dadmun, 1939, 34 Cal.App.2d Supp. 733, 88 P.2d 947, was cited, and this argument appears to have been given much weight by that court. The case at bar, however, is distinguishable from that just cited, and from the various other decisions therein cited and relied on, in that all of them concerned "debts," upon which levy had been made by giving notice to the persons owing the debts, and it was held that such debt, or in some of the cases the judgment evidencing it, could not be sold on execution. The mode of levy above mentioned is commonly called a garnishment, and it is limited in its application, by the terms of subdivision 6 of section 542

of the Code of Civil Procedure, to "debts." A cause of action for a tort, not reduced to judgment, is not a debt, within the meaning of such a statute. Johnson v. Lamping, 1867, 34 Cal. 293, 299; Arp v. Blake, 1923, 63 Cal.App. 362, 372, 218 P. 773; see, also, note in 93 A.L.R. 1088; 28 C.J. 137. In the case at bar the plaintiff's cause of action was for a tort, and the levy was made by notifying, not the supposed debtor, but the plaintiff herself. On these facts the case is substantially like Everts v. Will S. Fawcett Co., 1937, 24 Cal.App.2d 213, 74 P.2d 815, 816, where it was held that a cause of action for tort may be levied upon and sold on execution and that the proper mode of levy is that resorted to here, that is, a notice given to the person asserting the tort claim as owner thereof. This, the court held, is in accordance with the provisions of section 542 of the Code of Civil Procedure that a levy on property not capable of manual delivery, other than a debt, is to be made by giving notice to the person having such property "in his possession, or under his control," that person being, in the case of a cause of action, the plaintiff who is suing on it. A cause of action for tort is, as held in the case last cited, a "thing in action." It is therefore within the provision of section 691 of the Code of Civil Procedure for "selling the things in action" of the judgment debtor on execution. We see no good reason for refusing to follow Everts v. Will S. Fawcett Co., supra. It is plainly applicable here, and the case of Sunset Realty Co. v. Dadmun, 1939, supra, 34 Cal.App.2d Supp. 733, 88 P.2d 947, on which plaintiff relied below, distinguishes itself from the Everts case on the ground that in the Dadmun case the attempted levy was on a debt. The 1941 amendment of section 688 of the Code of Civil Procedure, providing that "no cause of action nor judgment as such, shall be subject to levy or sale on execution," took effect after the sale in question and is not applicable here. Under it, apparently no such case can arise in the future.

[5] The sheriff's return shows that after satisfying the judgment and costs he had a surplus of $4.87, which he paid to plaintiff, and apparently she still has it. If the court should on further proceedings again vacate the sale, it should require plaintiff, as a condition of relief, to return this amount to the purchaser. Stanley v. Westover, 1928, 93 Cal.App. 97, 110, 269 P. 468.

The orders appealed from are reversed and the cause is remanded for such further proceedings as the parties may be advised to take on the respective motions.

SCHAUER, P. J., and SHINN, J., concurred.

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53 Cal.App.2d 353

MILLER v. WALDEN et al.

Civ. 2740.

District Court of Appeal, Fourth District, California.

July 9, 1942.

Rehearing Denied Aug. 6, 1942.

Hearing Denied Sept. 1, 1942.

1. Bills and notes ⊂⇒103(1)

Where trial court did not find that payee of note representing money converted from payee or converter had made untrue statements to converter's relatives, the makers, or suppressed any true fact or acted to deceive makers and note was executed and security posted in belief that payee would refrain from instituting criminal proceedings, but there was no agreement to that effect, makers were not entitled to rescind on ground of fraud.

2. Bills and notes ⊂⇒104

Where there was no arrest or confinement of converter of money from payee, but note was executed and security posted by converter's relatives in the belief that payee would refrain from criminal proceedings, although there was no agreement to that effect, makers were not entitled to rescind on ground of "duress". Civ.Code, § 1570.

See Words and Phrases, Permanent Edition, for all other definitions of "Duress".

3. Contracts ⊂⇒95(3)

Under statute defining "duress" as unlawful confinement of a party or his husband or wife, or fraudulent confinement lawful in form, and "menace" as a threat of duress or of injury to the character of the previously specified persons, duress and menace arise by virtue of unlawful action, and menace is made out by an unlawful threat which must be more than some statement or act from which the guilty party becomes apprehensive of prosecution and a threat to exercise a valid legal right is not duress. Civ.Code, §§ 1569, 1570.

See Words and Phrases, Permanent Edition, for all other definitions of "Menace".

4. Bills and notes ⚷104

Where payee of note had employed an attorney, consulted the district attorney, and demanded payment of money converted from him but made no threats before posting of security and execution of note representing the money by converter's relatives in the belief that payee would refrain from instituting criminal proceedings, but there was no agreement to that effect, makers were not entitled to rescind on ground of "menace" under statute defining menace as a threat of duress or of injury to character. Civ.Code, §§ 1569, 1570.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by Herman Miller against Elton A. Walden and another on a note and to foreclose certain collateral security, wherein defendants filed a cross-complaint against Lawrence Holzman, as trustee of Forrest C. Walden, a bankrupt, and as trustee of Bertha M. Murphy, a bankrupt. From an adverse judgment and order vacating a judgment previously rendered, plaintiff appeals.

Reversed and remanded with directions.

J. L. Hofflund, of San Diego, for appellant.

Sloane & Steiner and Weinberger & Miller, all of San Diego, for respondents.

WEST, Justice pro tem.

Two appeals are involved in this matter. One is an appeal from a judgment in favor of Elton A. Walden and Clara L. Walden, who were defendants and cross-complainants, and in favor of Lawrence Holzman, Trustee, cross-defendant, and the other is an appeal from an order of the trial court, granting a motion to vacate a judgment previously made in favor of appellant, and entering a new judgment against such appellant. The appeals are taken on the judgment roll alone.

The facts as they appear are as follows:

Bertha M. Murphy, since about the year 1930, was the owner of all of the assets of the Joseph W. Murphy Mortgage Company, which company dealt in mortgage loans and acted as a mortgage broker, using as its capital therein monies furnished by Mrs. Murphy to Forrest C. Walden, who was the manager and operator of the organization.

The true nature of the business relation which existed on December 22, 1938, between Bertha M. Murphy and Forrest C. Walden is not entirely clear. It was found that Mrs. Murphy was the owner of all of the assets of the Joseph W. Murphy Mortgage Company on said date, and for some time thereafter, and that Forrest C. Walden operated the organization through the use of assets loaned to him by Mrs. Murphy, and that he was the sole manager, but without any actual ownership of the assets used in the business; nevertheless, other findings made clearly indicate that when the adjudications in bankruptcy of Mrs. Murphy and of Forrest C. Walden were made, both of said parties were treated as though each of them, individually, were doing business as Joseph W. Murphy Mortgage Company and Murphy Realty Company. It seems apparent that no point of such inconsistency was made in the trial court, in view of a stipulation signed by counsel for all parties that the findings prepared in such form and containing such apparent inconsistency might be signed by the trial court in the form as presented.

Appellant Miller had invested funds with the company over a period of years, subsequent to 1930. He had a total credit of $6,500 with the company, which sum Forrest C. Walden, without the knowledge or consent of appellant, had converted to his own use. Appellant from time to time demanded of Walden the return of this sum, and finally notified the office of the district attorney of San Diego County. Walden was called into the district attorney's office and was interrogated with respect to the money. He became impressed with the fear that Miller would cause criminal prosecution to be started, and thereupon communicated with Respondents Elton A. Walden and Clara L. Walden and solicited their assistance in extricating himself from his difficulty. The trial court found that at no time did appellant or anyone on his behalf expressly agree or state that if the obligation owing him from Forrest C. Walden were paid or secured, he would refrain from instituting criminal proceedings. It was found that appellant by his words and conduct caused the Waldens and Mrs. Murphy to understand that immediate criminal prosecution would ensue unless the obligation were paid or secured. The record fails to disclose how such words and conduct on the part of the appellant were used, or what appellant said or did, but it does appear that acting in pursuance to the fear of prosecution and in the belief that if a note were executed and adequate security posted, prosecution would be avoided, Forrest C. Walden, Elton A. Walden and Clara L. Walden on the 22d day of December, 1938, made and executed a promissory note in the sum of $6,500, payable to appellant, and that contemporaneously respondents Elton A. Walden and Clara L. Walden assigned in blank and delivered to appellant various stocks and bonds owned by them to secure the payment of the note. On the same day, the Waldens made an agreement with Bertha M. Murphy whereby Mrs. Murphy agreed to secure Elton A. Walden and Clara L. Walden against loss by causing certain real property, of which she was the beneficial owner, to be conveyed to them.

It appears clearly that the Waldens did not at the time of the execution of the note and the assignment of the collateral express to appellant that they were entering into the transaction in order to prevent the criminal prosecution of Forrest C. Walden, and likewise it appears that the agreement between the Waldens and Bertha M. Murphy with respect to the transfer of the real estate to the Waldens was without the knowledge of the appellant. It is true, however, that after appellant had received the note and stock, he notified the district attorney of San Diego County that satisfactory adjustment had been made, and that he did not thereafter communicate with the authorities regarding Forrest C. Walden's conversion of his money.

Shortly after the matters just referred to, and pursuant to her agreement, Bertha M. Murphy conveyed her real estate to Elton A. Walden and Clara L. Walden, which conveyance was accepted in trust by the grantees with the understanding that if Forrest C. Walden did not pay the promissory note theretofore delivered to appellant, the grantees should sell the real property and reimburse themselves as to any liability attaching to them upon the note, but that if the note were paid by Forrest C. Walden, they would convey the real estate back to Mrs. Murphy. This arrangement was likewise without the knowledge of the appellant.

On the 22d of December, 1938, Forrest C. Walden, Bertha M. Murphy and Murphy Mortgage Company were each and all insolvent, and each and all had been during all of that month. Forrest C. Walden was adjudicated a bankrupt in April, 1939, and Bertha M. Murphy, doing business as Joseph W. Murphy Mortgage Company and Murphy Realty Company was adjudicated bankrupt on June 22, 1939. Respondent Lawrence Holzman was appointed trustee in bankruptcy of both of said bankrupt estates. The bankrupt estates did not have assets sufficient to pay the claims of creditors.

The trial court found that on or about the 22d day of May, 1939, and with due promptness, respondents Elton A. Walden and Clara L. Walden gave notice purporting to rescind their promissory note and deposit of security. No notice of rescission was given by Forrest C. Walden or by Holzman as trustee in bankruptcy of the estates of Forrest C. Walden and Bertha M. Murphy.

One other fact appears which might well be mentioned, and which throws some light upon the reason for the transactions out of which the litigation grew.

The wife of Forrest C. Walden is a sister of Bertha M. Murphy. Elton A. Walden is a second cousin of Forrest C. Walden, and Clara L. Walden is the wife of Elton A. Walden. Appellant after said notice of rescission was given filed his action to enforce the payment of his promissory note, together with interest and counsel fees, and to cause sale of the collateral. The only defendants named were respondents Elton A. Walden and Clara L. Walden, who filed their answer to the complaint. They then secured an order of the Superior Court of San Diego County, joining as cross-defendants Lawrence Holzman, as trustee of Forrest C. Walden, doing business as Joseph W. Murphy Mortgage Company and Murphy Realty Company, a bankrupt, and Lawrence Holzman as Trustee of Bertha M. Murphy, a bankrupt. Respondents Elton A. Walden and Clara L. Walden by their cross-complaint alleged that the bankrupts had created a preference by the conveyance of the real estate. They also alleged that they had executed their promissory note and pledged their security upon the representation of Forrest C. Walden and appellant Miller that if they did not do so, criminal charges would be brought against Forrest C. Walden. They prayed that cross-defendants be required to set forth the nature of their claims upon the real estate, for rescission of the promissory note and for the return of their security. Holzman, as trustee of the estates in bankruptcy of Forrest C. Walden and Bertha M. Murphy, appeared and alleged the insolvency of Forrest C. Walden and Bertha M. Murphy as of December 22, 1938, and thereafter and alleged that appellant Miller knew of the insolvency of Forrest C. Walden and of Bertha M. Murphy, and that the effect of the transfer of the real estate to Elton A. Walden and Clara L. Walden was to make a preference under the provisions of the Federal Bankruptcy Act. He concurred in the rescission of the note and assignment of security and prayed that the real property theretofore conveyed to respondents Elton A. Walden and Clara L. Walden be recovered for administration of the bankruptcy estate being administered by him. The court concluded that the promissory note and assignment of personal property were valid and enforceable; that no rescission had been effectuated, and that no grounds therefor existed; that no preference or fraud of creditors resulted by virtue of the transaction; that appellant was entitled to judgment against Elton A. Walden and Clara L. Walden for the principal amount of the note, plus accrued interest and attorneys fees, and to have a sale made of the collateral security in enforcement of the judgment. A decree of foreclosure was thereupon made and entered.

Respondents Elton A. Walden, Clara L. Walden and Holzman, as trustee, thereafter, and in pursuance to sections 663 and 663a of the Code of Civil Procedure, moved to set aside and vacate the judgment and to enter another and different judgment on the ground that the conclusion of law, upon which the judgment was based, were not consistent with and supported by the findings of fact. The trial court granted the motion and drew new conclusions of law to the effect that the promissory note and pledge of personal property were voidable; that Elton A. Walden and Clara L. Walden, Bertha M. Murphy and Forrest C. Walden, and each of them, were entitled to rescind the note and all transactions and conveyances, and that each did duly rescind the note and other transactions; that no preference or fraud of creditors resulted by virtue of the execution of the note or of any of the other transactions; that respondents were entitled to judgment against appellant for cancellation of the promissory note, the return to respondents Elton A. Walden and Clara L. Walden of the securities posted by them as collateral to the note and for such interest as they had paid appellant on the note; that respondent Holzman was entitled to judgment against respondents Elton A. Walden and Clara L. Walden for delivery to him, as Trustee, of a quitclaim deed to the real property previously conveyed to indemnify Elton A. Walden and Clara L. Walden against loss. A judgment was duly entered in accordance with the new findings and the two appeals now before us followed.

Appellant attacks the judgment and order from which he has appealed on various grounds. However, in the absence of menace or duress or fraud, respondents cannot prevail. We deem it unnecessary to consider any questions other than the existence in or absence from the record of any finding of such elements.

If there is a finding of any one of them, the judgment appealed from must be affirmed. If there is not a finding of any of them, it follows that the first judgment which was vacated upon motion should be reinstated and the judgment and order appealed from reversed.

[1] The element of fraud may be easily disposed of. There was no finding made by the court that either appellant or Forrest C. Walden made any statement to the other Waldens either by way of suggestion, positive assertion or promise of that which was untrue, or that either of them suppressed any true fact or acted in a manner fitted to deceive as to the situation existing. On the contrary, it appears that the note was executed and the security posted because of the fear that the embezzler would be prosecuted and in the belief that if the security was given appellant would refrain from instituting criminal proceedings. It just as clearly appears, however, that appellant did not expressly agree or state that if the obligation were paid or secured he would refrain from instituting criminal proceedings, and if it were impliedly agreed, the findings do not disclose it. Nothing approaching fraud was found by the court.

[2] The question of duress is also one which can be quickly disposed of. There was no arrest and confinement of Forrest C. Walden on account of the transaction and therefore no duress. Civ.Code, § 1570;

Morrill v. Nightingale, 93 Cal. 452, 28 P. 1068, 27 Am.St.Rep. 207.

If respondents are to prevail, it must be because menace was exercised in the procurement of the promissory note and collateral security. Section 1569 of the Civil Code declares duress to consist in the "Unlawful confinement of the person of the party, or the husband or wife of such party," etc., or the "Confinement of such person, lawful in form, but fraudulently obtained * * *." Section 1570 provides that menace consists in a threat of the duress above specified or of the threat of injury to the character of any such person. For the purpose of determining whether there was menace as contemplated by section 1570, supra, we will briefly review the statement of facts, insofar as it throws light on the acts and conduct of the parties to the action leading up to the execution of the note and the posting of the security.

Walden converted money belonging to the appellant who demanded its return and employed counsel to collect it. Next, appellant notified the district attorney of San Diego County, who questioned Walden with regard to his embezzlement. As a result, Walden became apprehensive of prosecution and conveyed his fears to his second cousin and his wife, without any knowledge on the part of the appellant. The next step was that the cousin and his wife came to San Diego and a conference was had with appellant, in which conference appellant again demanded payment, and in which conference by his words and conduct, the nature of which are not disclosed, caused the parties who were signatory to the note to understand that appellant would cause immediate prosecution, unless restoration of the sums taken was made, and also by his words and conduct, the nature of which are likewise not disclosed, led the parties to believe that if a note and security were posted, he would take no steps to press prosecution, although it was not expressly so stated. Induced solely by the fear thus created through words and conduct of some character, the transaction was made, following which appellant notified the district attorney that the matter had been adjusted. Respondents have directed our attention to a number of cases which they contend are authority for holding that duress and menace are present by virtue of what occurred between the parties here. However, in our opinion, all of these cases may be clearly distinguished. We will consider a few of them briefly.

In Morrill v. Nightingale, supra, the defense to an action upon a promissory note given was menace, and it appeared that plaintiffs had fraudulently and illegally procured a warrant for the arrest of the defendant, not for the purpose of prosecuting or convicting the defendant of any crime, but for the purpose of frightening and intimidating him, and execution of the note was induced solely by well-grounded belief that he would be prosecuted if he refused to execute the same. In Woodham v. Allen, 130 Cal. 194, 62 P. 398, it was held that a complaint which alleged that defendant threatened plaintiff that if money were not immediately paid he would procure the arrest of plaintiff's husband on a charge of felony stated a cause of action. In People v. Beggs, 178 Cal. 79, 172 P. 152, where the defendant was being prosecuted for the crime of extortion it appeared that there was a threat to prosecute clearly shown, and the menace exerted on his victim was clear. In Merchants' Collection Agency v. Roantree, 37 Cal.App. 88, 173 P. 600, the evidence showed that there was a threat to have the defendant arrested for embezzlement if he did not pay a sum claimed to have been taken. No exception can possibly be taken to the rule laid down in any of the cases cited by respondents, but in all of them there were wrongful threats and those threats clearly appeared either by virtue of having caused the issuance of criminal process or by specific language used to consummate the improper purpose of the guilty party. In the case before us, we have been unable to find any finding of any threat whatsoever. The real effect of the findings appearing in the judgment roll is that either the district attorney or the appellant said or did something which induced a fear of prosecution, and acting thereon the note was executed and the collateral deposited. We do not feel that any statement or act of appellant or of any other person acting in the matter comes within the legal definition of menace as contained in section 1570 of the Civil Code. Insofar as there was any action upon the part of appellant or any words used by him as reflected by the findings, the same is not with any degree of clarity shown to have been unlawful in any event. It is true that appellant employed counsel. It is true that he consulted the district attorney with regard to Forrest Walden's embezzlement. It is true that he demanded payment from Forrest Walden, and it is true that by some words and conduct of his all of the Waldens were led to the conclusion that whether or not the guilty party was prosecuted was dependent on the execution of the note, but certainly the threat which is necessary to constitute menace must be more than some statement or act from which a guilty party becomes apprehensive of prosecution. We are impelled to the conclusion that in this regard the findings of the court support the first conclusions of law drawn by the court, and do not support those drawn subsequently and upon which the judgment appealed from was predicated.

[3, 4] Sections 1569 and 1570 of the Civil Code make clear that duress and menace arise by virtue of unlawful action upon the part of some person, but we are unable to see where appellant indulged in anything unlawful or improper, so far as findings disclose. His visit to the district attorney, his employment of counsel, and his demand for the return of his money were all certainly proper and not in any manner inconsistent with his legal rights. If fear of prosecution resulted therefrom, and the execution of the note followed from such fear, no inference of illegality could arise therefrom. If thereafter there was other language used by appellant or other conduct on his part, unlawful either in form, or actually, the findings fail to express it. It might well be that knowing of the visit to the district attorney's office, the fear which induced the execution of the note could have followed any conduct or language, regardless of its character, even if such language merely was intended to and did constitute a threat to file a civil action. But it is the threat and not the apprehension which makes out the menace and that threat must be an unlawful and invalid one. A threat to exercise a valid legal right cannot be construed to be an act of duress. Santa Ana Sugar Co. v. Smith, 116 Cal.App. 422, 2 P.2d 866.

The situation reflected by the record here is somewhat similar to that found in the case of Murray Showcase & F. Co. v. Sullivan, 15 Cal.App. 475, 115 P. 259. There, one Sullivan, who was the manager of a business concern, appropriated goods and money of his employer, to which he was not entitled. He had procured a fidelity bond conditioned for the faithful performance of his duties. After his employment had terminated, he was called upon to adjust his affairs with his former employer, and was advised that unless he arranged such adjustment the matter would be placed in the proper channels for collection, and that his bond would be relied upon to collect the amount due. He was not threatened with criminal prosecution, nor was any promise made that no prosecution or arrest would be made if adjustment were effected, but he did cause notes to be executed by himself and a comaker in adjustment of the shortage. At the time the notes were executed Sullivan did not fear that his arrest and prosecution would be caused by his former employer, but did believe that his failure to deliver said notes might result through the bonding company in prosecution. When suit was brought on the notes a defense was interposed that they had been procured by threats. The contention made was that suggested procedure on the bond implied a threat to injure Sullivan's character, as well as a threat of arrest and imprisonment. The court on appeal held that such contention was without merit. In the case before us, it is true that the Waldens feared prosecution of Forrest Walden at the instance of appellant, but such fear does not appear to have followed any threat but only "words and conduct" of an undisclosed nature. Such a finding is insufficient to imply either a threat of injury to character or of prosecution.

In view of what has been said, we think it unnecessary to consider any of the other contentions of appellant as contained in his brief, as they become immaterial. Since we conclude that the conclusions of law and the judgment appealed from are inconsistent with the findings of the court, the judgment and order appealed from are reversed, and the cause remanded, with directions that the court below enter judgment for plaintiff in accordance with the decree of foreclosure dated October 15, 1940.

BARNARD, P. J., and MARKS, J., concurred.

RUSSELL v. MILLER et al.

Civ. 11574.

District Court of Appeal, First District,
Division 1, California.

July 9, 1942.

Hearing Granted Sept. 3, 1942.

1. Mandamus 🔑168(3)

Reporter's transcript of proceeding had before Contractors' State License Board wherein a contractor's license was revoked, was admissible in trial of mandamus proceeding to secure restoration of license.

2. Mandamus 🔑187(9)

In mandamus proceeding to compel registrar of contractors to restore contractor's license, refusal to admit in evidence reporter's transcript of proceedings had before the State License Board was prejudicial error where the writ directing restoration of the license was issued on the ground that the charges against contractor were barred by limitation at the time complaint was filed, and such transcript, if introduced, would have shown that such charges were not so barred. St.1939, p. 391, § 7095, subd. c.

3. Licenses 🔑38

A decision of registrar of contractors suspending a contractor's license for a year "and until defendant makes restitution" to certain board of school trustees satisfactory to the registrar was invalid as neither "specific" or "just" within meaning of statute giving registrar power to impose upon licensee "such specific conditions as may be just" in that it did not inform licensee what he must do and gave registrar the discretion as to what must be done. St.1939, p. 391, § 7095, subd. c.

See Words and Phrases, Permanent Edition, for all other definitions of "Just" and "Specific".

4. Appeal and error 🔑781(4)

That decision of registrar of contractors, suspending a contractor for a year "and until defendant makes restitution" to satisfaction of registrar, was invalid because not specific within meaning of statute defining registrar's power of suspension, did not require a dismissal of registrar's appeal from judgment directing restoration of license, as "moot" in that the year of suspension had expired, where on retrial court might find that findings of board were properly supported whereupon proceeding should be remanded to board with permission to impose a proper condition. St.1939, p. 391, § 7095, subd. c.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding by Norman Russell against Allen Miller, as Registrar of Contractors, and others, for a writ of mandate to secure restoration of petitioner's license as a contractor. From a judgment issuing a peremptory writ of mandate directing defendants to restore petitioner's license and to dismiss the complaint against him, the defendants appeal.

Reversed.

Earl Warren, Atty. Gen., and Lucas E. Kilkenny, Deputy Atty. Gen., for appellants.

Geary & Geary and C. J. Tauser, of Santa Rosa, and Bradford M. Melvin, of San Francisco, for respondent.

PETERS, Presiding Justice.

The members of the Contractors' State License Board, and the registrar and deputy registrar of such board, appeal from a judgment of the superior court directing appellants to restore the contractor's license of respondent Norman Russell. The board suspended Russell's license, finding that he had "wilfully and deliberately disregarded the plans and specifications which were the basis of his contract with the Board of Trustees of the Napa Union High School to the prejudice of said Board and without their consent," and that he had, in the performance of the contract, "wilfully and deliberately disregarded and violated * * * the safety orders of the Industrial Accident Commission concerning electrical installation."

The complaint, filed by the registrar, charged that Russell, as a duly licensed contractor, entered into a contract with Villadsen Bros., general contractors, on February 10, 1937, to furnish labor and material for the electrical work to be installed in the reconstruction and alteration of the Napa High School, the same to be completed in accordance with certain plans and specifications; that work under the contract did not cease until December

15, 1937; that in the performance of that contract Russell wilfully departed from and disregarded the plans and specifications in nineteen specified particulars; that in the performance of the contract he violated the safety orders of the Industrial Accident Commission in eleven specified particulars. In his answer Russell admitted that most of the charged violations had been committed, but urged that, in the performance of such work, it is necessary to rely on the integrity and ability of the men selected by him to oversee the work; that in view of the flagrant violations of the safety orders and the poor workmanship discovered "defendant can only say that defendant misjudged the ability and integrity of the man defendant selected to oversee the work"; that he has made an honest effort to correct the faulty work; that when a list of violations and deviations from plans and specifications was furnished him on February 27, 1939, he proceeded to make corrections until stopped by order of the grand jury that was investigating the work; that the charged violations and deviations were neither wilful nor deliberate. The board found that Russell had committed the various violations charged, and, based on these findings, suspended his license for a fixed period, which has now expired, "and until defendant makes restitution to the Board of Trustees of the Napa Union High School satisfactory to the Registrar of Contractors. * * *."

In due course, Russell sought by writ of mandate in the superior court to secure the restoration of his license. After a trial of the mandate proceeding, the trial court found that certain specified violations of safety orders and deviations from the plans and specifications had occurred in the performance of such contract, but such violations and deviations were not committed within two years prior to the filing of the complaint against Russell, except one such violation which the court found to be neither wilful nor deliberate. Predicated on these findings, the trial court issued a peremptory writ of mandate directing appellants to restore Russell's contractor's license, and to dismiss the complaint against him. It is from that judgment that this appeal is taken.

Appellants' major contention on this appeal is, that the superior court improperly struck from evidence on motion of respondent, the transcript of the proceedings had before the administrative board. The entire transcript had been admitted into evidence at the request of appellants, but, upon respondent's motion, it was striken from the record. It was the theory of the trial court that the findings, complaint, answer, decision, and other documents that were before the board corresponding to the clerk's transcript were admissible, but that the reporter's transcript of the proceedings before the administrative board, and the exhibits then introduced, were not admissible over objection. This ruling was predicated on the trial court's determination that under the holding of the Supreme Court in the case of Drummey v. State Bd. of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, and, under the then recent decision of the appellate court in Laisne v. California State Board of Optometry, Cal.App., 101 P.2d 787, the petitioner, in such mandamus proceeding, is entitled to a trial de novo in the literal sense, and that on such a trial the reporter's transcript of the board's proceedings is not legal, competent evidence. Subsequent to the trial of the instant case, the Supreme Court granted a hearing in the Laisne case, and has since, by a divided court, rendered its decision in that case. See 19 Cal.2d 831, 123 P.2d 457.

[1, 2] The exact question as to whether the reporter's transcript is admissible on the trial of the mandamus proceeding has been determined adversely to respondent in the case of Dare v. Board of Medical Examiners of State of California, Cal. App., 127 P.2d 977, this day decided. It was there held that such transcript, at the request of either party, is admissible, and that it is error to refuse to admit it. That the error in excluding this evidence was prejudicial is obvious. The trial court found that all but one of the charged violations were barred by the statute of limitations. Appellants urge that the evidence produced before the board demonstrated that the statute had not run when the complaint was filed. This evidence, had it been introduced and believed by the trial court, would have warranted the trial court in sustaining the order of the board.

Respondent urges, however, even if error in excluding evidence was committed, that the matters presented on this appeal have become moot. This contention is predicated on the following facts: The registrar rendered his decision in February of 1940. By that decision the license of petitioner was suspended until February 19, 1941, "and until defendant makes restitution to the Board of Trustees of the Napa Union High School satisfactory to the Registrar of Contractors. * * *" The case proceeded to trial in April, 1940, and judgment was entered in July, 1940. Thus, when judgment was entered, the one-year period of suspension was still in effect. This judgment, when entered, was erroneous for reasons already stated. Respondent urges, however, that the condition attached to the suspension—i. e., make restitution "satisfactory" to the registrar—is void, and that, since the one-year period fixed in the order of suspension has expired, the issues presented on this appeal have become moot. The trial court held that the condition in question "imposes upon the petitioner compliance with conditions which are not specific and which are not just."

[3] We agree with the contention of respondent that the condition imposed is invalid. The board imposed such condition purporting to act under the provisions of section 7095 of the Business and Professions Code St.1937, p. 1229, as added by St.1939, p. 391, appertaining to contractors. That section authorizes the registrar, in a proper case, to suspend the license of a contractor for a fixed period, and under subdivision c, the registrar, in addition, may: "Impose upon the licensee compliance with such specific conditions as may be just in connection with his operations as a contractor disclosed at the hearing * * *." The contractor urges that the condition here imposed is neither specific nor just. It seems too clear to require extended argument that the condition in question in not specific. We have no doubt that, under the section in question, the registrar may require, as a condition, that the licensee perform the work or pay the other party the amount spent by it in having the work completed in accordance with the contract, or other reasonable condition, as long as such condition informs the licensee specifically what he must do. Such condition, no doubt, would be "specific" and "just." But to provide that restitution must be made "satisfactory" to the registrar is certainly not to inform the licensee with definiteness what must be done before he can have his license restored. Such condition directly violates the terms of the grant of power. The section requires the condition to be "specific." The condition here imposed is indefinite, unrestricted, inexplicit and unparticularized. It places in the hands of the registrar the discretion to determine what conditions must be performed by the licensee.

[4] This holding, however, does not require a dismissal of the appeal. If, on the retrial, the trial court shall find that the findings of the board are supported, the trial court should then, by writ of mandate, remand the proceeding to the board with instructions to impose, if it be so inclined, a proper condition, or to dismiss the proceeding. The administrative mandamus proceeding with which we are here dealing is equitable in nature, and is as broad in scope as the exigencies of the case require. Drummey v. State Bd. of Funeral Directors, supra, 13 Cal.2d page 82, 87 P.2d 848. The ends of justice require that if respondent is guilty of the violations charged, and if such violations are not barred by the statute of limitations, and if the board believes, in its discretion, that some condition should be attached to the order of suspension, that such condition not entirely fail because the condition imposed was beyond the power of the board. The board, obviously, should be permitted to rectify its error.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

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53 Cal.App.2d 530

AMERICAN MARINE PAINT CO.
v. TOOLEY.
Civ. 11927.

District Court of Appeal, First District, Division 1, California.

July 24, 1942.
Hearing Denied Sept. 21, 1942.

1. Evidence 🔑458

Under written agreement between corporation and widow, who with her husband had owned practically all of corporation's stock, whereby widow agreed, at corporation's option, to transfer or pledge to corporation stock in value equal to past indebtedness of widow and her husband to corporation and future advances, evidence of the circumstances under which the parties contracted was admissible to determine issue whether prior debts and those incurred subsequent to date of the agreement were in fact debts of the widow as against contention that under "parol evidence rule" written agreement must be considered as containing all the parties' agreement. Code Civ.Proc. § 1860; Civ.Code, § 1647.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

2. Payment ⚷16(1), 21

Ordinarily, acceptance of a note or a check does not discharge an existing debt, but is, in effect, an agreement designating the manner of its payment, including the suspension of the debt until maturity of the note or presentation of the check for payment, at which time, if unpaid, the debt is revived.

3. Contracts ⚷1

Parties may acknowledge by contract that money has been advanced, and may agree that past and future advances be paid in a specified manner, such as by the transfer of stock to secure the indebtedness, at a designated time and place or on demand.

4. Contracts ⚷245(2)

The entering into a written contract that past and future advances be paid in a specified manner, such as by the transfer of stock to secure the indebtedness, supersedes all negotiations which preceded or accompanied its execution, subject to proof in a proper case of the circumstances under which it was made. Code Civ.Proc. § 1860; Civ.Code, § 1625.

5. Pleading ⚷34(7)

Where record did not disclose that a demurrer was interposed to the complaint because of alleged lack of essential allegations, complaint would be liberally construed on appeal in aid of judgment for plaintiff.

6. Contracts ⚷172

Where widow, who with her husband had owned practically all of corporation's stock, and corporation entered into a contract whereby widow in consideration of past advances by corporation to her and her husband and for future advances should, at corporation's option, transfer to corporation shares of corporation's stock of value of advances by corporation or execute notes of value of advances and pledge stock in amount of advances, corporation was not entitled to a money judgment against the widow for advances made with the optional right to satisfy it from the stock.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the American Marine Paint Company against Homer H. Tooley, as executor of the estate of Carrie M. Botts, deceased, to recover on a written contract executed by Carrie M. Botts, deceased, whereby in consideration of advances already made and others to be later made by plaintiff, Carrie M. Botts, deceased, agreed to transfer or pledge to the plaintiff stock in value equal to amount of indebtedness. From a judgment in favor of the plaintiff, the defendant appeals.

Judgment reversed with instructions to modify findings and conclusions, and to enter judgment in accordance with opinion.

Byron Coleman, Abraham Setzer, Carl E. Day, and Robert E. Hatch, all of San Francisco, for appellant.

Lillick, Geary, Olson & Charles, Ira S. Lillick, and Kent A. Sawyer, all of San Francisco, for respondent.

WARD, Justice.

A rehearing was granted in this case solely because counsel urged in their petition that the cause of action sounded basically in equity and that this court, therefore, had no jurisdiction of the appeal. The appeal has since been transferred to the Supreme Court and retransferred by that court to this court. We are satisfied that our former disposition of this case was correct, and for that reason adopt as the opinion of this court the former opinion in the case, which is as follows:

"Appeal by defendant, as executor of the estate of Carrie M. Botts, from a judgment awarding plaintiff the sum of $36,108.27, and decreeing that such shares of the stock of plaintiff corporation as have come into the hands of the executor are, by reason of a contract, subject to plaintiff's right to require the transfer to it of an amount thereof of sufficient value to cover an indebtedness in the above sum, or a pledge thereof to secure the same.

"Several cases involving in some respects the background of the present action have been heard on appeal. Dollar v. Tooley, 46 Cal.App.2d 832, 117 P.2d 39; Lorber v. Tooley, 47 Cal.App.2d 47, 117 P.2d 421; Tooley v. Parker, 51 Cal.App.2d 542, 125 P.2d 66. The present action is one wherein there appears to be no particular dispute as to the facts.

"The plaintiff corporation was formed in 1903 by James M. Botts and his wife Carrie M. Botts. They managed the corporation and held practically all of its stock. Many years prior to the death in 1934 of Mr. Botts he made a will, in which he bequeathed to his wife her community interest in his estate; to John Parker, an employee of plaintiff corporation for many years, and at the time its manager, he bequeathed 20 per cent of the stock of the company standing in Mr. Botts' name at the date of his death, and to R. Stanley Dollar the sum of $20,000. The residue of the estate was by said will given to his brothers and sisters. Mr. Dollar was named executor of the estate. However, several months prior to the death of Mr. Botts he and his wife placed in joint tenancy all their stock individually owned. At the time of his death Mr. Botts was rather involved financially—the assets of his estate exclusive of any stock in plaintiff corporation being appraised at only $1,969.92 (Dollar v. Tooley, supra), and while ordinarily the stock which stood in his name prior to its change to ownership in joint tenancy would have passed to the survivor, it was, with Mrs. Botts' consent, included in his estate and probated therein.

"During the lifetime of Mr. Botts, both he and his wife carried separate accounts with plaintiff, against which the latter charged advances made and credited dividends paid on the stock, etc. The account of Mr. Botts at the time of his death showed an indebtedness to the company of $15,163.49; and the account of Mrs. Botts a net indebtedness of $5,425.

"Following the death of Mr. Botts, a question arose as to whether stock in plaintiff corporation was owned by him and his wife as community property or in joint tenancy. If held in joint tenancy it constituted no part of his estate, which would then have been insufficient to meet his obligations. In this situation there would undoubtedly have been an attack by the creditors of Mr. Botts' estate upon the joint tenancy arrangement involving stock valued at in excess of $200,000 standing in Mr. Botts' name a little more than six months before his death. If held as community property, a large part of it would have to be sold for the benefit of his creditors. Mrs. Botts indicated her desire to pay off the obligations of her deceased husband, and particularly wished to retain control of the corporation. To this end, as stated, the stock standing on its books in the name of Mr. Botts was included as an asset of his estate. Mrs. Botts gave certain creditors of her husband her personal notes and received from them assignments of their claims against his estate. She arranged with plaintiff to advance a sufficient amount to take care of the indebtedness of other creditors, expenses of probate, the payment of the above two legacies, together with inheritance taxes thereon, etc. It is conceded that Mrs. Botts understood she might not be legally liable for such debts and expenses. Subsequent to Mr. Botts' death and up to July 30, 1934, the plaintiff advanced the sum of $2,970 in order to meet certain of his obligations. On that date the company and Mrs. Botts entered into written agreement whereby in consideration of the advances already made and others to be later made, she agreed, at the option of the company, to transfer or pledge to it stock in value equal to the amount of such indebtedness. Thereafter the company continued to make advances to Mrs. Botts, part of which she used for the payment of her husband's debts. The company also directly paid some of his creditors, as well as the expenses of administration of the estate, the legacies, and the inheritance taxes on the two legacies, which would ordinarily have been payable by the legatees, taking assignments from such creditors or legatees.

"The amount of $15,163.49 owing plaintiff by Mr. Botts at the time of his death had been made the subject of a creditor's claim against his estate. Mrs. Botts requested the approval of this claim and it was subsequently discharged by plaintiff's entry of satisfaction thereof in the probate proceedings. This amount as well as advances above enumerated were carried on the books of the company against Mr. Botts' account, which was kept open. A month prior to the death of Mrs. Botts in 1938 the amounts advanced Mr. Botts during his lifetime as well as the later advances were transferred to the account of Mrs. Botts. At the time of her death, the account showed an indebtedness of $104,315.77, representing advances to both Mr. and Mrs. Botts before and subsequent to Mr. Botts' death, less a credit to Mrs. Botts of $68,207.50, leaving due the sum of $36,108.27, for which plaintiff filed a claim against Mrs. Botts' estate. The claim was rejected, and plaintiff brought the present action and recovered judgment for the full amount thereof.

"It might be well to mention at this point that the plaintiff carried life insurance on Mr. Botts to insure itself against business losses which might result from his death. Such insurance was originally carried by Mr. Botts for others, and he had obtained loans against it; the premiums were about $5,000 a year and he had decided to lapse the policies. Plaintiff, with Mr. Botts' consent and that of the beneficiaries, kept the policies in force.

"Appellant contends that the insurance was 'more than ample to repay the company everything which it had advanced to him [Mr. Botts] or advanced to other creditors of his after his death'; also that by the contract of 1934 between Mrs. Botts and plaintiff, the former 'agreed to pay the company only her own indebtedness and this was more than cancelled by credits.'

There is no claim that legally the company was bound to satisfy Mr. Botts' indebtedness from the proceeds of the insurance policies. And the agreement of 1934, providing for the assignment or pledge of stock of a sufficient value to satisfy 'the amount of the indebtedness of the first party [Mrs. Botts]', specifically mentioned the amount due the company by Mr. Botts at the date of his death as well as the amount due by Mrs. Botts at the time of the agreement, the sum advanced by the company prior to the date thereof in payment of some of Mr. Botts' debts and 'further advances' that 'may be made by the second party [the corporation] for the first party's [Mrs. Botts'] use and in connection with the administration of the estate of said J. M. Botts and with the payment and settlement of claims against said J. M. Botts and his estate and otherwise.'

"Appellant further contends that the judgment was excessive in the sum of $22,159.92, made up of the amount advanced Mr. Botts prior to his death, $15,163.49; the sum of $2,970 paid creditors immediately following his death, and the inheritance tax on the two legacies, amounting to $4,026.43. These items are directly or indirectly a part of the indebtedness assumed by Mrs. Botts under the agreement of 1934. The corporation suffered an immediate detriment by satisfying a claim which it was still carrying on its books, and by the payment of amounts to Mr. Botts' creditors. Mrs. Botts, for herself and her assignors, including the brothers and sisters of Mr. Botts, received the benefit of an orderly settlement of Mr. Botts' estate without unnecessary sacrifice, and the ultimate distribution thereof to her. Relative to the assumption by her of the payment of inheritance taxes on the Parker and Dollar legacies, if her settlement with them included the payment of such taxes, as the record indicates, there is nothing inequitable about the claim of respondent for the sums advanced by it for this purpose.

[1] "Appellant urges that under the parol evidence rule the written instrument must be considered as containing all the terms of the agreement of the parties. In the present case it was necessary to determine whether prior debts and those incurred subsequent to the date of the contract were in fact debts of Mrs. Botts. Accordingly the circumstances under which the parties contracted were material to a determination of that issue. Code Civ. Proc. § 1860; Civ.Code, § 1647; Weinstein v. Moers, 207 Cal. 534, 279 P. 444; Balfour v. Fresno Canal & Irr. Co., 109 Cal. 221, 41 P. 876; Raisch v. County of Monterey, 140 Cal.App. 627, 35 P.2d 587; People v. Ganahl Lumber Co., 10 Cal.2d 501, 75 P.2d 1067.

"The real problem in this case is whether respondent is entitled to a money judgment for the amount due or is limited in the matter of repayment as specified to the options as provided in the agreement. The agreement provides: 'At any time or times required by the second party the first party shall, at the option of the second party, either: (a) Endorse, transfer and deliver to the second party a number of shares of the capital stock of the second party, the aggregate value of which, at the value thereof to be fixed by the Inheritance Tax Department of the State of California for inheritance tax purposes, shall be the amount of the indebtedness of the first party to the second party at the time of the exercise of said option, less any then existing balance of the above mentioned credit to the first party of $9,225.00.' The credit of $9,225 to the account of Mrs. Botts at the time of the agreement [she had, as stated, a net indebtedness of $5,425], had increased, at the time of the trial of the present action, to more than $68,000. The agreement continued: 'or (b) Make, execute and deliver to the second party her promissory note or notes in a sum or sums which shall be equal to the amount of the indebtedness of the first party to the second party at the time of the exercise of said option, less any then existing balance of said credit of $9,225 and make, execute and deliver to the second party as security for said note or notes, a pledge or collateral security agreement or agreements pledging a number of shares of the capital stock of the second party the aggregate value of which, at the value thereof to be fixed by the Inheritance Tax Department of the State of California for inheritance tax purposes, shall equal the amount or amounts of said note or notes and endorse and deliver said shares of stock to the second party pursuant to said pledge or collateral security agreement or agreements and as security for the payment of said note or notes.'

"The agreement further provides that any promissory note or notes given under the agreement shall be demand notes, without interest, and that there shall be no right to a deficiency judgment in the event the pledged stock shall not yield the amount of the note or notes for which it is given as security. Mrs. Botts was given the right to reduce, by the payment of cash, any indebtedness 'which shall not theretofore have been the subject of the exercise of option (a) or option (b).' The agreement includes the following provisions: 'If for any reason it shall be unlawful for the second party to have said stock endorsed and transferred to it by the first party or pledged to it by the first party or acquired by it pursuant to foreclosure of such pledge, or if the first party shall not at any time have a sufficient amount of said stock to accomplish the terms and conditions of this agreement, nothing herein contained shall be construed as constituting a waiver of any portion of the indebtedness of the first party to the second party or as preventing the second party from exercising any other remedy for the collection of any such indebtedness or any part thereof.'

[2-4] "It is the theory of respondent that the agreement should be construed as giving the corporation a correlative right to sue for cash; that there is nothing in the agreement that expressly abridges the right to secure a money judgment, and that the provision for options is merely collateral or additional security; that the exercise by the corporation of such provisions of the agreement should not destroy the remedy that respondent would otherwise have to secure a money judgment. In brief, that the paragraph last quoted from the agreement was intended to make certain that a remedy by money judgment would be available. In support of this theory, respondent cites cases from California and other jurisdiction 'that the acceptance of a note for a debt does not discharge the debt unless expressly agreed to be payment.' Comptoir D'Escompte de Paris v. Dresbach, 78 Cal. 15, 20, 20 P. 28, 30; Van Vleit v. Jones, 20 N.J.L. 340, 43 Am.Dec. 633; Henry v. Nubert, Tenn. Ch., 35 S.W. 444; Stucker v. Shumaker, 290 Pa. 348, 139 A. 114; Bonestell v. Bowie, 128 Cal. 511, 61 P. 78; Selig Cahn, Inc., v. California Wrecking Co., 9 Cal.2d 617, 71 P.2d 1113. By analogy respondent argues that 'If a promissory note containing an express agreement to pay a preexisting indebtedness does not merge such indebtedness, we are at a loss to see how it can be held that an agreement reciting certain obligations and giving the creditor optional methods to secure liquidation or security therefor does so.' Ordinarily acceptance of a promissory note or a check does not discharge an existing debt, but is, in effect, an agreement designating the manner and method of its payment, including the suspension of the debt until the maturity of the note or the presentation of the check for payment, at which time, if unpaid, the debt is revived. Selig Cahn, Inc., v. California Wrecking Co., supra; Comptoir D'Escompte de Paris v. Dresbach, supra, 78 Cal. page 21, 20 P. 28. Of course the liability on the note upon non-payment, and the revived liability on the original indebtedness exist at the same time. There is no legal rule prohibiting parties from acknowledging by contract that money has been advanced and agreeing that past and future advances be paid in a specified manner, such as the transfer of stock to secure the indebtedness, at a designated time and place or upon demand. The entering into of such a contract in writing supersedes all negotiations which preceded or accompanied its execution, Civ.Code, § 1625, subject to proof in a proper case of the circumstances under which it was made. Code Civ.Proc., § 1860. We conclude that there was an indebtedness due the corporation by Mrs. Botts, and that the terms of the agreement provided the method of its payment.

"Appellant objects to the forms of action adopted by respondent. The complaint is in four counts. Respondent does 'not contend that a money judgment * * * was entered under the count upon the contract.' The ascertainment of the debts required a separately alleged cause of action.

Whether the count on the open book account, the one on an account stated, the common count or the count for money advanced at the special instance and request of Mrs. Botts was particularly appropriate, considering the facts, is immaterial if under any or all of them the amount due was ascertainable.

[5] "The prayer of the complaint was to obtain a judgment for $36,108.27, and that the trial court 'make and enter herein its order and judgment that 308 shares of the capital stock of American Marine Paint Company, a corporation, have come into the hands of the defendant as executor of the last will and testament and of the estate of Carrie M. Botts, deceased, subject to, and impressed with, the right and option of plaintiff to require the endorsement, transfer and delivery of said 308 shares of stock to plaintiff or the pledge and endorsement thereof and the execution of a collateral security agreement as security for the payment of a demand promissory note or notes to be executed by said defendant, as executor, in the sum of $36,108.27.' The record does not disclose that a demurrer was interposed to the complaint. Under such circumstances, in the absence of a claim of lack of an essential allegation, on appeal the pleadings should be liberally construed in aid of the judgment. Barnaby v. Barnaby, 100 Cal.App. 195, 279 P. 1064; Ohio Electric Car Co. v. Le Sage, 182 Cal. 450, 188 P. 982; Garrison v. Hogan, 112 Cal.App. 525, 297 P. 87; Jones v. Re-Mine Oil Co., 47 Cal.App.2d 832, 119 P.2d 219. Appellant states that the action is for specific performance and that the requirements for such action are not alleged. The contention might have been addressed to the trial court on demurrer, but need not be considered on this appeal.

"The amount was fixed. The construction to be placed upon the terms of the contract is the only question remaining. The reasonable construction is that the corporation did not waive any portion of the indebtedness if for any reason it should be unlawful to endorse and transfer or pledge the stock, or if in the event of the exercise of the option Mrs. Botts at any time should not have stock of sufficient value to accomplish the terms and conditions of the agreement, but that otherwise, as the first step to secure payment of the indebtedness, respondent is bound, by the terms of the agreement, to exercise the option.

[6] "The judgment, however, is erroneous. By paragraph one a money judgment against the estate of Carrie M. Botts in the sum of $36,108.27 is granted plaintiff. That portion of the judgment reads as follows: '* * * do have the recover judgment against defendant Homer H. Tooley, as executor of the last will and testament of Carrie M. Botts, in the sum of $36,108.27, together with costs, in favor of plaintiff, American Marine Paint Company, and against said defendant in the amount of $151.70.' By paragraph two of the judgment it is provided: '* * * that such shares of the capital stock of American Marine Paint Company, a corporation, plaintiff herein, as have come into the hands of said defendant, as said executor, are subject to and impressed with the right and option of plaintiff herein to require the endorsement, transfer and delivery thereof, or the pledge or indorsement thereof to pay or secure the indebtedness of said defendant, as such executor, as herein adjudged in the sum of $36,108.27, in the manner provided in that certain contract dated July 30, 1934, entered into by Carrie M. Botts and plaintiff.'

"As we read the above, plaintiff is granted a money judgment with the optional right to satisfy it from the stock owned by the estate of Carrie M. Botts. That is not what the agreement provided. Unless it was unlawful for Mrs. Botts to endorse and transfer or pledge the stock to the plaintiff, it was intended that her indebtedness, or that of her estate, should be satisfied from the stock owned by her, which stock should be valued either at the amount fixed by the Inheritance Tax Appraiser or at $85 a share. If she or her estate had unencumbered stock it was never intended, as we read the agreement, that a money judgment except for a deficiency should be secured against her. If she executed a promissory note secured by the stock (which was never done) a deficiency was waived, but otherwise the plaintiff was required to satisfy its claim from the stock, if possible, and only as to the balance, if any, was Mrs. Botts or her estate to be personally liable.

"The agreement did not give the plaintiff three options, i. e., the right to a money judgment, the right to demand a promissory note secured by the stock, or the right to demand stock as security. The agreement required the plaintiff to exercise one of two options granted to it by the agreement, unless it was unlawful for Mrs. Botts to endorse the stock. In this connection the agreement provides: 'At any time or times required by the second party the first party shall, at the option of the second party, either * * *.' Reasonably interpreted, in view of the background and obvious intent of the parties, that provision required plaintiff to exercise one of the options before seeking a money judgment. For these reasons it was erroneous to grant a personal judgment against the defendant."

The judgment is reversed with instructions to the trial court to modify its findings and conclusions as herein indicated, and to enter the limited judgment outlined in this opinion. Both parties are to bear their own costs on this appeal.

PETERS, P. J., and KNIGHT, J., concurred.

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53 Cal.App.2d 310

LUIZ v. QUEEN OF ANGELS HOSPITAL.

Civ. 12906.

District Court of Appeal, Second District, Division 3, California.

July 8, 1942.

1. Appeal and error 🔑1010(1)

Where there is any substantial evidence supporting the judgment of the court, such judgment must be affirmed.

2. Appeal and error 🔑931(1)

In determining whether there was sufficient evidence to support a judgment of the trial court, all reasonable inferences supporting the judgment must be given effect.

3. Appeal and error 🔑989

In determining whether there was sufficient evidence to support a judgment of the trial court, the appellate court is not concerned with conflicts in the evidence.

4. Gifts 🔑47(3)

In administrator's action against hospital corporation to recover property transferred to hospital by decedent while a patient therein, administrator had burden of establishing alleged confidential relationship between hospital and patient as a fact, since it did not exist as a matter of law.

5. Gifts 🔑49(2)

In an administrator's action against a hospital corporation to recover money and property transferred by deceased to the hospital while deceased was a patient therein and shortly before her death, evidence supported finding that no confidential relation between the hospital and decedent in fact existed.

6. Trusts 🔑283(1)

The statutory presumption that transactions between the trustee and his beneficiary, by which trustee obtains any advantage from beneficiary, are without sufficient consideration under undue influence is a disputable presumption. Civ.Code, §§ 2219, 2235.

7. Gifts 🔑38

A transfer of property by an aged woman in ill health to a hospital, in return for agreement to furnish her with life home in hospital and expenses incident to her death, was properly upheld as against her administrator where, even assuming existence of a confidential relation making available the statutory presumption of insufficiency of consideration and undue influence, evidence supported finding that she was mentally competent, understood nature of transaction, acted without undue influence or persuasion on part of hospital, and the transaction was not strictly a business proposition, but also in the nature of a gift. Civ. Code, § 2235.

8. Gifts 🔑49(2)

In administrator's action to recover property transferred to hospital by deceased shortly before death in return for agreement to furnish her with life home in hospital, that deceased only lived three months, that property was worth $6,500 and that hospital authorities failed to tell her she only had a few months to live, did not compel conclusion that deceased was overreached in a business transaction, where evidence supported finding that deceased also regarded transaction in the nature of a gift, that it was voluntarily made, that deceased was mentally competent and not unduly influenced.

9. Gifts 🔑38

In determining whether undue influence induced transfer of property to hospital by patient in return for agreement to furnish life care, the presence or absence of independent advice is not necessarily a decisive factor.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Albano Valerio Luiz, as administrator with the will annexed of the estate of Mary McLeod, deceased, against Queen of Angels Hospital, a corporation, to recover property and money transferred to defendant during deceased's lifetime. From a judgment for defendant, plaintiff appeals.

Affirmed.

Marcus, Rabwin & Nash, of Los Angeles, for appellant.

Joseph Scott and J. Howard Ziemann, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

[1-3] Following the course set by the familiar principles "that if there is any substantial evidence supporting the judgment it must be affirmed, that all reasonable inferences supporting the judgment must be given effect, and that with conflicts in the evidence, this court is not concerned. * * *" (Gates v. McKinnon, 1941, 18 Cal.2d 179, 180, 114 P.2d 576, 577), we have arrived at the conclusion that in this action to recover property and money transferred to the defendant the judgment denying the plaintiff any relief should be affirmed.

There is no great conflict in the direct evidence; such conflict as exists is found mostly among the inferences. Mrs. Mary McLeod, for whose estate the plaintiff appears as administrator with the will annexed, entered the hospital of the defendant corporation on April 19, 1939. As Mrs. McLeod had no physician of her own, Dr. Charles M. Hayes, whose name was next upon the list of the hospital's attending staff, was called by the hospital and took charge of her case. Mrs. McLeod, when she entered the hospital, was somewhere around 75 years of age, quite feeble and very sick, indeed so sick that during the first few days after her entry she was, at times, irrational, and at all times was physically weak. On May 12, she entered into an agreement, prepared by the defendant's attorney, wherein it was recited that Mrs. McLeod desired to buy and the defendant was willing to sell her a "life home" in the hospital, and whereby the defendant agreed to provide room and board, medical care, "including doctors bills, drug supplies," etc., and to defray all necessary expenses incident to the death of Mrs. McLeod, in consideration of her deeding to the defendant a parcel of land and of her transferring to the defendant her savings account. On the afternoon of the same day the savings account in the sum of $2,729.31 was effectively transferred to the defendant and ten days later Mrs. McLeod executed a grant deed conveying to the defendant the property on which she had made her home for over thirty years, an improved lot worth $3,500. Mrs. McLeod died June 9, 1939.

We shall presently note further evidence, but this suffices as a background for the major premise of most of plaintiff's argument, a premise which is best expressed in the language of section 2235, Civil Code: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Having in mind the provisions of section 2219, Civil Code, that: "Everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter * * *" plaintiff's minor premise is that the defendant was a trustee, with Mrs. McLeod its beneficiary, because of the relationship of hospital and patient that existed.

[4, 5] Plaintiff's counsel cite no authority for the proposition that the relation of a hospital and patient is a confidential one, and indeed, in their reply brief, they depart from the argument earlier made, by stating "The relationship of hospital and patient is not per se a fiduciary or confidential one." We are in accord with this statement. That the relations of physician and patient, and of attorney and client, are per se confidential is well recognized. 12 Cal.Jur. 713, et seq. It is for this reason that corporations cannot act as physicians or attorneys, as appears in this quotation from 6A Cal.Jur. 1260, found in Pacific Employers Ins. Co. v. Carpenter, 1935, 10 Cal.App.2d 592, 596, 52 P.2d 992, 994: "A corporation is incapable of the relation of personal confidence and trust requisite to the attorney's relation to his

client, and this is also true of the other professions in which there is a personal confidence." We entertain no doubt that a hospital-corporation may, through its officers or other agents, gain and abuse the confidence of one of its patients, entitling that patient to relief. In an action seeking relief, however, the patient has the burden of establishing the confidential relationship as a fact; it would not appear to exist as a matter of law, as in the case of an attorney and client or physician and patient. As will appear from the evidence about to be reviewed, the trial court was warranted in concluding, as we must infer that it did, that no confidential relation between the defendant and Mary McLeod in fact existed. (No allegation that it existed was made in the complaint, so that no express finding was required and none was made on the subject.)

[6, 7] We do not find it necessary, however, nor are we content, to rest our decision solely on the conclusion that no confidential relation was shown to exist between the hospital-corporation and Mary McLeod. It is clear that even if we should assume that there was a confidential relation which would give plaintiff the benefit of the presumption that the consideration for the transfer of her property was inadequate and the agreement the result of undue influence, even so the judgment withstands plaintiff's challenge. The presumption of section 2235 is a disputable one. Schurman v. Look, 1923, 63 Cal.App. 347, 356, 218 P. 624; Brown v. Canadian Indus. Alcohol Co., 1930, 209 Cal. 596, 599, 289 P. 613. In the case under review the trial court found against it. Among other like findings we note this one: "It is true that at the time of the execution of said agreement of May 12, 1939, and at the time of transfer of said sum of $2,729.31 and at the time of the execution and delivery of said deed to said defendant, Mary McLeod was mentally capable and competent to execute said transactions and knew and fully understood and appreciated the full nature and extent of said transactions, and that she acted of her own free will and at her own instance without any undue influence, coercion inducement or persuasion by or of the defendant or its agents or employees."

There is ample evidence to support this finding. In making it the trial court doubtless recalled that there was not a word of testimony to suggest that anybody had planted in Mary McLeod's head the idea of transferring her property to the hospital, but that all of the testimony was to the contrary. Dr. Hayes testified that after Mrs. McLeod had been in the hospital a few days or a week "she told me that she wanted to give her property and her money to the Sisters to keep her * * * for the rest of her life." "She wanted me to have the good Sister * * * come up." No suggestion about the matter had been made by the doctor, and he "didn't pay a whole lot of attention to it on the first occasion." She spoke of the matter and the doctor told Sister Alberta, the sister superior in charge of the administration of business affairs of the hospital, about Mrs. McLeod's desire. Sister Alberta did nothing about it until after Dr. Hayes spoke to her a second time three or four days later. Sister Alberta then called on Mary McLeod, whom she saw on only three occasions while she was in the hospital, and heard from her lips that she wished to stay in the hospital, and "you will take care of me, will you, for what I will give you?" As the sister left the room Mrs. McLeod's parting words were: "Call your lawyer."

The trial judge was warranted by the evidence in concluding not only that the idea originated with Mrs. McLeod, but that it continued to remain her idea, and further that she was mentally competent as she carried it into execution. That evidence which could have cast a doubt on her ability to comprehend what she was doing came mostly from the plaintiff. He told the trial court that Mary McLeod was mentally capable on April 22, when she made a will naming the plaintiff, who was, possibly, a distant relative, as her sole legatee, and she was still competent May 5, when she gave him a power of attorney to draw on her commercial bank account, but thereafter she failed steadily and was not competent on May 12 or subsequently. Two of her neighbors, after several visits at the hospital, occurring near but none of them on May 12 or 22, concurred in the view that she was not competent.

The trial court, however, also heard the accounts of Dr. Hayes, of the sister superior, of the attorney who drew the agreement, of the bank teller who talked with her before he turned over the proceeds of the savings account, of the attorney who acted as notary when she executed the deed, as to what she said and responded as they conversed with her about her property and her reiterated desire to make a "gift" of it to the defendant. The trial judge heard that her attention had been called to the effect of the documents she was about to or had just signed, and that to repeated questions she replied that she knew what she was doing and desired to do it. Not on just one occasion but at intervals of days she evinced her knowledge of what property she owned, of her desire to agree, then of her knowledge that she had agreed, to transfer it to the defendant. "* * * it does not follow from the mere fact that a person has reached or passed the allotted three score and ten years in age that he has become mentally weak to the extent that he is rendered incapable of attending to his important business affairs intelligently, or with full understanding of the nature thereof. * * * Nor does the fact that the grantor was afflicted with a serious physical malady at the time of executing the grant itself warrant the conclusion that he was mentally incompetent to transact the business culminating in the execution of the grant." Johnson v. Studley, 1926, 80 Cal.App. 538, 559, 252 P. 638, 646. From the witnesses' narration of what took place the trial judge could properly infer that one who showed the grasp of her affairs that Mrs. McLeod did, although physically weak, ill and tired, was sufficiently strong mentally to comprehend what she was doing. In addition to the inference he could draw from what he had been told of Mrs. McLeod's responsiveness, the trial judge had Dr. Hayes' unequivocal statements that Mrs. McLeod was "perfectly rational" and "absolutely rational," except for a few days when she first entered the hospital and then a few days before her death.

[8] The plaintiff argues that the defendant dealt unconscionably with Mrs. McLeod because Dr. Hayes and Sister Alberta knew that Mrs. McLeod had not long to live, a few months at the most, but failed to tell her so; and that the consideration that the defendant could render, in view of her short span of life was grossly inadequate for the transfer of property worth almost $6,500. Had the trial court taken the view of the transaction which the plaintiff takes, that is that it was "purely a business one," the argument would be more persuasive. But it is apparent that the trial judge with reason could, and did, view the transaction in a different light. To him it appeared that Mrs. McLeod acted not with unmixed motives; that while her desire to be cared for for the rest of her life was a motive, it was not the sole material one. She had, it will be remembered, three days after entering the hospital made a will in which the plaintiff was named sole legatee. Thereafter, according to the testimony of Dr. Hayes, she stated that her primary purpose in giving a part of her property to the defendant was to keep it from going to the plaintiff. Mrs. McLeod, was, moreover, a member of the religious organization that controlled the hospital. In her frequent use of the word "give," with respect to the transfer of her home and the savings account to the defendant, the trial court could perceive that Mrs. McLeod was not interested in obtaining care at the lowest price possible, not because she was not mentally capable of being interested in making a good bargain but because that was not what was on her mind. She wanted to be sure that upon her death proper steps would be taken, and that until her death she should receive proper care, it is true, but she wanted more than this; she wanted the defendant and not the plaintiff to receive that which she considered to be not merely a payment but essentially also a gift. In the premises it is not for us to say that the trial court erred; that the deal was a business transaction in which Mary McLeod was overreached. Nor do we doubt that the trial judge concluded correctly that the failure of Dr. Hayes and Sister Alberta to tell Mrs. McLeod that in their opinion she was about to die was not, under all the circumstances, a reason for setting her gift aside.

[9] The plaintiff further calls attention to the fact that the defendant knew that the plaintiff had been authorized to pay her bills, and argues that he should have been notified that she was intending to and had conveyed most of her property to the defendant. It must have seemed obvious to the trial court that under the circumstances, as related to it, the defendant was under no duty of notifying the plaintiff that Mary McLeod desired to and had accomplished the purpose of reducing the amount he was to receive on her death. If the idea back of this contention is the same as that argued elsewhere, that it was denying Mrs. McLeod independent advice, it carries no conclusive weight. In the first place, the plaintiff himself was a frequent visitor, and if she declined to converse with him that was her privilege, not the defendant's fault. Two neighbors also called. There were present from time to time in addition to Sister Alberta, Dr.

Hayes and Mr. Ziemann, a notary public (from Mr. Ziemann's office, it is true) and the bank teller. "The claim that independent advice is a prerequisite in such a transaction, even if sound, is amply overcome by evidence that the decedent acted advisedly and in the presence of witnesses in making the gift. * * * Besides, independent advice is but a circumstance, and is not necessarily a determining factor in such a transaction. Brown v. Canadian, etc., Co., 209 Cal. 596, 289 P. 613." Burnham v. Witt, 1933, 217 Cal. 397, 398, 18 P 2d 949.

We are not persuaded that the judgment should be reversed. It is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

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53 Cal.App.2d 272

MANN et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 13537.

District Court of Appeal, Second District, Division 2, California.

July 7, 1942.

Rehearing Denied Aug. 5, 1942.

As Amended July 15, 1942.

Hearing Denied Sept. 3, 1942.

1. Parties 🔑47

An intervener, who joins the plaintiff in a representative suit under statute permitting one of the class in behalf of which the suit has been brought to intervene therein, does so in subordination to and in recognition of the propriety of plaintiff's case. Code Civ.Proc. §§ 382, 387.

2. Costs 🔑98

Parties 🔑47

Intervener in stockholder's derivative suit does not, by mere entry into the case to join the plaintiff, underwrite plaintiff's expense in preparing the case for filing and for trial and his personal liability extends only to taxable statutory costs accruing after his intervention.

3. Parties 🔑47

A plaintiff, in the absence of a contract, cannot recover from an intervener any expense incurred by plaintiff or his counsel in connection with the trial.

4. Parties 🔑47

In a stockholder's derivative suit, interveners who have joined the plaintiff are deemed to accede to the plaintiff's theory of recovery and to representation by plaintiff's counsel except where it is shown to the court that the action is not being prosecuted to the best interests of the stockholders in whose behalf as well as that of the plaintiff, the suit was instituted.

5. Parties 🔑48

An attorney for an intervener who joined the plaintiff in a stockholder's derivative suit cannot participate in the presentation of the main case except as counsel for plaintiff may consent or the court otherwise order.

6. Corporations 🔑214

Where attorney for plaintiff in stockholder's derivative suit consented to active participation therein by attorneys for interveners who had joined plaintiff, attorneys for interveners, by such participation, did not become entitled to any fee out of any recovery that ensued as a result of the action unless it was affirmatively shown that their contribution was separate, distinct, and of a character which was not, could not or would not have been made by attorney for the original plaintiff.

7. Corporations 🔑214

Where attorneys for plaintiff and one intervener could have tried stockholder's derivative suit to successful conclusion without assistance of attorney for second intervener, award of compensation to attorney for second intervener was discretionary with trial court and could properly have been denied.

8. Costs 🔑103

The reasonable costs and expenses incurred by a party in recovering or preserving a fund in a suit in equity are chargeable upon the fund.

9. Attorney and client 🔑155

In a representative suit, to recover or preserve a fund, attorney fees may be allowed out of the fund recovered and made payable ratably directly to counsel rather than to their clients.

10. Corporations 🔑214

In a successful stockholder's derivative suit, attorney fee judgments against the corporation must be limited so as not to impose a greater liability upon the corporation than would be imposed by charging attorney fees ratably as a lien on the fund recovered.

11. Costs ⚷219

In a stockholder's derivative suit in which a fund was recovered for corporation, the right of the corporation and of individual stockholders in their capacity as plaintiff or interveners with reference to the award of attorney fees was limited to challenging either the total allowed for attorney fees or the form of the judgment and not as to the manner in which the fees allowed were allocated.

12. New trial ⚷10

Where intervener in stockholder's derivative suit joined corporation in stipulation under which corporation's right to move for a new trial was waived, intervener "waived" any right she may have had as a stockholder to move for a new trial on behalf of corporation.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

13. New trial ⚷10

Where intervener in stockholder's derivative suit had joined with corporation in stipulation under which corporation's right to move for new trial was waived and where trial court had fixed total attorneys' fees and apportioned them between attorneys for plaintiff and intervener, intervener's motion for new trial, which sought relief only against other counsel and to increase the proportion of the fee awarded intervener's attorney, was purely personal to intervener and trial court was without jurisdiction to entertain the motion.

14. New trial ⚷2

In the absence of a statute so providing, a litigant has no inherent right to file a motion for a new trial in an equity case or have an adjudication thereon.

15. New trial ⚷1

Where the Legislature has provided the specific instances in which a new trial may be granted, the trial court is without power to grant it in other instances.

16. New trial ⚷2

Where attorney fees were awarded in stockholder's derivative suit to attorneys for plaintiff and interveners upon motions and supporting affidavits, there was no issue of fact arising upon a material allegation of the complaint or upon new matter in the answer upon which a new trial could be awarded to an intervener who objected to the apportionment of attorney fees. Code Civ.Proc. §§ 590, 656.

17. New trial ⚷2

A new trial cannot be granted upon an issue of fact brought forward by a motion. Code Civ.Proc. §§ 590, 656.

◆

Proceeding to review an order of the Superior Court of Los Angeles County granting a new trial to an intervener.

Proceeding by Samuel Mann and others against the Superior Court of Los Angeles County and others, to review an order of the respondent court granting a new trial to respondent Mayer, an intervener in a stockholder's derivative suit, on the issue of the apportionment of attorney fees.

Order annulled.

Hanna & Morton and Lewinson & Armstrong, all of Los Angeles, for petitioners.

Moidel, Moidel & Moidel, in pro per., for respondents.

HANSON, Justice pro tem.

In this case we issued a writ of review and stayed the proceedings below in order that we might consider the action of the trial court in granting a new trial to an intervener upon the single question as to whether there should be a reallocation of attorneys' fees between counsel for the various parties concerned. The principal question for decision is whether the trial court had jurisdiction to entertain the motion for a new trial. A subsidiary question is whether the motion for new trial lies to an order allowing attorney fees, granted as an incident to a recovery in a stockholder's derivative suit and not upon an issue joined by the pleadings. A brief history of what transpired in the suit will be sufficient for its decision here.

In September, 1938, plaintiff Mann, who was the owner of 332 shares of the preferred stock of the defendant Hearst Consolidated Publications, Inc., instituted this stockholder's derivative suit in equity. A detailed and searching demurrer was filed to the first complaint and sustained. Upon the second amended complaint, consisting of 78 pages and filed April 15, 1939, the defendants joined issue by filing answers. Before the instant suit was instituted and before he sought and was granted leave to intervene in this action, intervener Gans, who was the owner of stock in Consolidated and who had been an editorial employee of one of the newspapers owned by it, instituted a stockholder's derivative suit in New York, on or about June 9, 1938. Similar suits in that state by other stockholders, among them one by O'Neill, subsequently an intervener herein, by order of the New York court were not only consolidated with the Gans suit but his counsel was appointed to act for all the parties plaintiff in the consolidated New York litigation. In September, 1939, what we shall designate as the O'Neill group sought and was granted permission to intervene in the instant action by adopting the pleadings of Mann. In the complaint in intervention the O'Neill group alleged they were parties to similar suits in other jurisdictions. On April 18, 1940, Mrs. Mayer, owning six shares of the preferred stock of Consolidated, through her counsel, Milton J. Levy, of New York City, and the firm of Moidel, Moidel & Moidel of Los Angeles, sought and was granted permission to intervene as a plaintiff by adopting the pleadings of Mann. Meantime Gans, becoming concerned over a rumor that settlement was pending in the instant case between the parties thereto, sought and on May 13, 1940, was granted permission to intervene as a plaintiff in the case below. However, while Gans adopted the bill of plaintiff Mann, he augmented it by setting forth twelve additional causes of action in his complaint of intervention. Subsequently counsel for Gans represented the O'Neill group of interveners as well as Gans in the trial below. One Mrs. Heaney, a shareholder of Consolidated, it appears, was represented at the trial by her counsel, Penprase, but so far as we have discovered from the record she did not formally intervene in the case.

In the early stages of the trial, which began on May 14, 1940, the court below properly ruled that the case in behalf of plaintiff Mann and the various interveners should be presented and conducted by counsel for Mann. At the conclusion of the trial, which continued intermittently but rather constantly over a period of more than a year, and during which testimony was taken in open court totaling 5851 pages of transcript and 11482 pages by deposition, the cause was submitted for decision on July 15, 1941. On October 23, 1941, the trial court announced its decision in writing, finding against certain of the named defendants and for others, and directed that formal findings be prepared in accordance with its decision.

As none of the pleadings had made any claim for attorneys' fees out of any fund that might be recovered, except for the prayer in plaintiff Mann's second amended complaint, plaintiff Mann, intervener Mayer and intervener Gans (joined by the O'Neill group) each separately filed on October 27, 1941, a motion for an allowance of attorneys' fees. Thereafter, on October 30, 1941, the respective motions were presented and heard in open court by the trial judge in the case, and pursuant to the request of all the counsel involved the motions were thereupon submitted for determination as to the amount to be allocated to counsel for each of the moving parties. No requests were made by any of the counsel for the respective parties for permission to introduce evidence as to the value, detail or extent of the legal services rendered, but instead the motions as submitted were based upon the files, minutes and records of the case, except for such affidavits as were attached to the respective motions or by order of the court permitted to be attached not later than the following day. On November 5, 1941, the trial judge announced in open court, at a hearing attended by the parties, that notwithstanding that the amount of the judgment to be rendered against the defendants found liable had not then been definitely calculated by him, he proposed to allow, as the aggregate for all the attorneys' fees, an amount equivalent to 20 per cent on the first two million dollars recovered, 15 per cent on the second two million dollars and 10 per cent on any excess over four million dollars. He further stated that out of said aggregate sum he would order, after a payment of $1,000 to attorney Penprase, that a sum equivalent to 2 per cent of the remainder should be paid to counsel for Mayer, 30 per cent to counsel for the Gans and O'Neill group and the remaining 68 per cent to counsel for plaintiff Mann. The amount for which judgment should be entered against the defendants found liable therefor having been calculated on November 10, 1941, the trial judge on that day signed and filed his formal findings and conclusions of law.

In these findings, and consistent with his oral announcement, the trial judge found that by reason of the efforts of counsel for plaintiff and interveners an award of reasonable attorneys' fees should be made to them; that the total should be a percentage of the principal amount of the judgment, and that the amount thus arrived at should be apportioned to the counsel for the several groups of parties as indicated above. In the general judgment entered upon the findings and conclusions (filed on the same day as the latter) the court rendered separate, distinct and several judgments in favor of the various counsel groups. As a result, Milton J. Levy, and Moidel, Moidel & Moidel, counsel for intervener Mrs. Mayer, were awarded judgment for 2 per cent of the total allotted to all counsel other than Penprase. The judgment also recited as follows: "It is further adjudged and decreed, that defendant Hearst Consolidated Publications, Inc., has in writing waived its right of appeal, as well as any right to move for a new trial, from each respective portion hereof awarding attorneys' fees on condition that the party entitled thereto does not move for a new trial or appeal from the provisions hereof awarding attorneys' fees to such party and the manner of payment of such fees as herein set forth. The right of any party to appeal or move for a new trial on any other issue is not affected hereby."

On November 12, 1941, the trial judge who heard the case from its inception to its conclusion resigned to accept an appointment as justice of another division of this court. Thereafter, on the morning of November 18, 1941, intervener Mrs. Mayer filed a motion for new trial, and in the afternoon she, along with her counsel, joined all the other parties (including Consolidated) and their counsel in executing and filing a written waiver of their rights, if any, to request a new trial, but excepting from the operation thereof the motion for new trial filed by her and reserving the further right of all parties to take an appeal from the judgment. The amended motion for new trial by intervener Mayer sought a modification, or, in the alternative, a new trial, of the findings and judgment only in respect to the apportionment which had been made between counsel, and not as to the total amount which had been allocated as attorneys' fees for counsel in the case. The amended motion for new trial was supported by an affidavit of two of the Moidels, which was directed to showing that the apportionment made to them of the over-all fee was inadequate and unjust. The trial judge (Shinn, J.) being no longer a judge of the superior court, the presiding judge of the court ordered that the amended motion should be heard by Superior Judge McIntosh (assigned). Accordingly the motion was heard by him and taken under submission on December 31, 1941. Upon that hearing counsel for plaintiff Mann and the interveners Gans and the O'Neill group submitted an affidavit of the trial judge, made by him after he had assumed his duties as justice of the district court of appeal. In this affidavit he stated that from the very outset of the trial he had in mind that if the action should prove successful he would be asked to allow fees, and for that reason he had made it a point to observe closely the contributions of counsel in the case as it progressed. We quote from the affidavit as follows: "In coming to my determination in the matter of counsel fees, and the amount thereof to be awarded to each of the various counsel, I had in mind the entire record, the arguments of various counsel to the court on the evidence and law, the benefits to Hearst Consolidated Publications, Inc., produced by each of the several counsel for the plaintiff and the interveners, the ability of the various counsel for plaintiff and interveners as exemplified by their activity and accomplishment in said case, the efforts made by various counsel in connection with the presentation of the case and the degree of success with which such efforts met, and the contributions of skill and effort of various counsel and the time expended by each of them in the preparation and presentation of the case. My conclusions as to the just total fee award and the amount of fee to be awarded to counsel for each of the plaintiff and the various interveners was reached after and based upon my thought given to the subjects as aforesaid, and the allocations were made so as to fully compensate each and all of the various counsel for such effort as was made by them and such benefit as was secured by them for Hearst Consolidated Publications, Inc., as a result of the prosecution of the litigation. I fully considered also the time expended by counsel, the necessity therefor, and the contribution which the expenditure of time and effort made to the general result."

On January 6, 1942, Judge McIntosh entered an order granting a new trial on all the grounds stated in the motion, unless on or before January 12, 1942, counsel for plaintiff Mann and counsel for the interveners Gans and the O'Neill group should each file a stipulation reducing their respective individual judgments for attorneys' fees by 5 per cent and consenting that respondent Mayer might have judgment for the resultant 10 per cent (the same being in addition to the 2 per cent which had been awarded to her as attorneys' fees by the trial judge). No stipulation having been filed, respondent Mayer served and filed a motion to have the attorneys' fee issue set for trial. This motion in turn coming on for hearing before the presiding judge on February 3, 1942, plaintiff Mann and interveners Gans and the O'Neill group appeared to oppose it on the ground that the order for new trial theretofore made by Judge McIntosh was in excess of his authority and jurisdiction. The motion nevertheless was granted and the cause set down for trial. Subsequently, as heretofore stated, we issued the writ of review upon which the matter is now before us.

In the presentation of the case to us counsel for respondent Mayer devote the major portion of their argument, not to the question whether the court below had jurisdiction to grant a new trial, but to a defense on the merits in support of its action. In that connection they contend with great earnestness that the error of the trial judge, who heard the case from its inception to its conclusion, lay in the fact that he allotted their fee without proper regard to the legal research made and the time devoted by them to the case. Moreover, they point out that some one of the three members of the firm of Moidel, Moidel & Moidel was in almost constant attendance at the trial and in the taking of depositions used therein. Hence on that basis they contend that the fee allotted to them in representing respondent Mrs. Mayer was wholly disproportionate to that awarded counsel for the plaintiff and interveners Gans and the O'Neill group. Such a complete misconception of the supposed rights of interveners and their counsel with respect to attorneys' fees—seemingly too generally held—deserves discussion here, even though it is not an issue before us for determination.

[1-6] Our statutes authorize a representative suit such as this derivative suit (Code Civ.Proc., sec. 382), and permit one of the class in behalf of which the suit has been brought by a plaintiff to intervene therein (Code Civ.Proc., sec. 387) However, it is elemental that an intervener who comes into the case to join a plaintiff does so in subordination to and in recognition of the propriety of plaintiff's case. Necessarily this is so, because it is the plaintiff who has made himself liable to his counsel for legal services and has had to carry the brunt of all the expenses involved in preparing the case for filing and for trial. These obligations and expenses incurred are not underwritten by an intervener merely because he comes into the case, and none of the costs antedating his intervention may be taxed to him. Intervener's personal liability extends only to taxable statutory costs accruing after his intervention. Aside from contract, no expense incurred by plaintiff or his counsel, such as for accountant's fees, the taking of depositions, reporter's or other expenses in connection with the trial, may be recovered from an intervener by the plaintiff except by contract, express or implied. In the instant case, aside from any liability incurred by respondent Mayer in respect to attorneys' fees to her personal counsel, she did not incur or pay any items of expense save and except the sum of $44.50 for overtime stenographic service to her personal counsel and the sum of $177.53 expended by him in travel to, and hotel bills, at San Francisco, which total of $222.03 was allowed by the trial judge. In a case of this character, as in any case, the plaintiff must be permitted through his counsel to dominate and control the suit to its conclusion, unfettered by the views of the interveners, save and except where it is shown to the court that the action is not being prosecuted to the best interests of the stockholders in whose behalf, as well as that of the plaintiff, the suit was instituted. In short, the interveners are deemed to accede not only to the plaintiff's theory of recovery, but that plaintiff's counsel shall represent them along with the plaintiff. Questions pertaining to the depositions which should be taken, witnesses that should be examined, motions which should be made and the line the examination should take are but a few of the problems which face any counsel in the course of litigation for his client. Of necessity some counsel in the case must determine these and other problems, and where there are several counsel some one must be the absolute master of the litigation. Hence counsel for an intervener may not par-

ticipate in the presentation of the main case save as counsel for plaintiff may consent or the court otherwise order. Hallett v. Moore, 282 Mass. 380, 185 N.E. 474, 91 A.L.R. 572. Counsel for interveners are but volunteers in the main original cause. Even if counsel for plaintiff is agreeable to their active participation in the case they nevertheless do not by such participation become entitled to any fee out of any recovery that ensues as a result of the action, unless it be affirmatively shown that their contribution is separate, distinct and of a character which was not, could not or would not have been made by counsel for the original plaintiff.

A representative suit such as a stockholder's derivative suit, involving as it often does the possibility of large financial returns, is not an open sesame for fees to counsel for interveners. Whether or not they should be allowed fees depends wholly upon and is to be measured by the extent that their assistance results in the recovery achieved. Even though they participate consistently and constantly from the date of intervention to the date of decree, there is no obligation on the part of the court in allotting attorneys' fees from the fund to recognize their contribution to its recovery, save in the circumstances mentioned. Accordingly, interveners and their counsel run this risk when they voluntarily board the battleship of the plaintiff, with free passage, to do battle to the common enemy. They stand not in the front rank but as supernumeraries. They are but guests in the action despite their interest, and so must accommodate themselves to the situation in which they find themselves. It is only where counsel for plaintiff fails that counsel for an intervener may captain the ship; and it is only where a distinct contribution towards the recovery of a fund is made that interveners are equitably entitled to have their expenses made a charge upon it.

[7] The judge who heard the case below on its merits, and set the fees, necessarily was in an exceptional position to value the contribution of counsel and their abilities. By his affidavit he crisply indicates that counsel for plaintiff and another intervener together could have tried the case to a successful conclusion without the assistance of counsel for the complaining intervener, Mayer. Under those circumstances he would not have abused his discretion had he allowed nothing whatever to the intervener Mayer. But we have no occasion to pass on these questions, for, as has been indicated, the ruling to be here made is controlled by entirely different considerations.

The motion for a new trial as made below raised no question as to the total of the attorneys' fees allowed, or that the allowances should have been made in favor of the various parties rather than directly to their respective counsel, or the propriety of entering personal judgments for fees against the corporation benefited by the recovery, or as to any impropriety in making the personal judgments payable without regard to whether the basic judgment was paid in whole, in part or at all. Instead, as has been indicated, the sole ground relied upon for an order granting a new trial was that the total of attorneys' fees allowed had not been properly apportioned between the respective counsel. It short, that the fees in the circumstances of the case should be reallocated so that counsel for Mayer would receive more and counsel for the other parties less of the total allowed to all.

[8-10] While it is a doctrine long established in equity that the reasonable costs and expenses incurred by a party in recovering or preserving a fund are chargeable upon the fund (Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157), and although attorneys' fees may be allowed out of the fund recovered and made payable ratably directly to counsel rather than to their clients (Nolte v. Hudson Nav. Co., 2 Cir., 47 F.2d 166), yet we know of no precedent for the form which the judgment was permitted to take in this case. Even so, and conceding as we do that our decision must be kept within the bounds of the controversy submitted to us, we nevertheless feel impelled to make it plain, lest our failure to disapprove be misinterpreted, that we do not approve the nature, character or form of the judgments for attorneys' fees as entered in this case. While we see no objection, as such, to judgments of this character, whether made directly to counsel or to the parties, where they are properly limited so as not to impose a greater liability upon the recipient of the basic judgment than would be imposed by charging attorneys' fees ratably as a lien on any fund recovered, we do say they must at least be so limited. But where, as here, the allowances necessarily contemplated, in view of their size, full payment thereof

only in case the basic judgment was fully paid, the attorney-fee judgments should have contained restrictions with respect to the issuance of execution and for satisfaction which would have safeguarded the corporation to a liability measured by, and payable only after, such payments were made on the basic judgment. The mere fact that the parties may have contemplated that prompt payment could and would be made of the basic judgment—and it appears that at least two-thirds of it has now been paid—does not militate against the view here expressed that the form in which the judgments were cast is improper. To give approval to judgments of the type here involved would be to open the door not only to grave abuse but to possible serious financial detriment to corporations in behalf of which derivative stockholders' suits are instituted.

[11] That the plaintiff and the various interveners, equally with Consolidated, had a legal standing to object to a personal judgment for attorneys' fees against Consolidated, rather than a judgment payable out of the funds received on the basic judgment, cannot be gainsaid. Moreover, no valid personal judgments, of the character mentioned, could have been entered except by consent of Consolidated. If, in the opinion of Consolidated, it was to its interest or benefit to have personal judgments entered against it, but in no event payable until it had received its own proportionate recovery on the basic judgment along with the proportion representing counsel fees, there would, as we have said, seem to be no legal objection thereto. But even if a legal objection against such a judgment could be spelled out by the stockholders of Consolidated, it does not follow that they could act in that respect in behalf of Consolidated, which was represented by its own counsel, except by gaining permission to appear for it to raise the point. Likewise, while it is clear that not only Consolidated but its stockholders as a group were equally interested in the total amount of attorneys' fees allowed, whether payable out of the fund or by personal judgments therefor against Consolidated, properly limited as to their payment, it is obvious that neither could have an interest as to the manner in which the fees allowed were allocated. True it is that the individual stockholders who were parties to the action, aside from being parties thereto as a class along with their respective counsel, had such an interest; but even so, their interest in that respect was sharply individual and not in behalf of any other stockholders or of the corporation. The right, then, of an individual stockholder, in the capacity of a plaintiff or as an intervener, was limited to challenging either the total allowed for attorneys' fees or the form of the judgment, i. e., whether they were made payable out of the fund or as personal judgments against the corporation benefited.

[12, 13] Whatever rights intervener Mayer may have had in that regard or to have asked for a new trial in behalf of Consolidated, she definitely eliminated when she joined Consolidated in its stipulation waiving its rights to a new trial. By the waiver Consolidated eliminated any right it may have had to move for a new trial as to the amount or allocation of attorneys' fees or its personal liability therefor, and intervener Mayer in joining in the waiver necessarily eliminated any right she may have had to speak for Consolidated. Whether other stockholders could have done so we need express no opinion. Accordingly, as neither Consolidated nor its stockholders could ask for a different apportionment of attorneys' fees as set forth in the several personal judgments against it, so too intervener Mayer was likewise barred, except so far as she personally had such a right. Had the several judgments been against the fund, or had the amended motion for new trial sought additional attorneys' fees for counsel for Mayer, a different factual situation would have arisen. But whether a different principle would then be applicable we need not determine. As the motion sought relief only against other counsel, who held separate judgments not against the fund recovered but against Consolidated personally, the trial court was without jurisdiction to entertain or grant the motion, which was distinctly personal to Mayer and could not be made by her in behalf of other stockholders even though she purported to make it so. Cf. Glidden v. Cowen, 6 Cir., 123 F. 48, 59 C.C.A. 172.

[14-17] For an altogether different reason, resting wholly on our statutes, the trial court was without jurisdiction to grant the new trial. Apart from a statute so providing, a litigant has no inherent right to file a motion for new trial in an equity case or to have an adjudication thereon. Moreover, even in actions at law, as well as in

equity, the Legislature may restrict, enlarge or abolish new trials. Where the Legislature has provided, as it has in this state, the specific instances in which a new trial may be granted, the trial court is without power to grant it in other instances no matter how appealing the claim therefor may be. Our statute defines a new trial as "a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee" (Code Civ.Proc., § 656), and by a cognate statute provides that "An issue of fact arises—1. Upon a material allegation in the complaint controverted by the answer; and, 2. Upon new matters in the answer, except an issue of law is joined thereon" (Code Civ.Proc., § 590). The issue of fact in this case upon which intervener Mayer sought and obtained a new trial did not arise upon a material allegation in the complaint or upon new matter in any answer filed thereto, but by reason of motions filed in the case which it was sought to support by the record as made and, in certain instances, by supporting affidavits. That there may be no new trial upon an issue of fact brought forward by a motion in the case is settled law in this state and by the great weight of authority. Gray v. Cotton, 174 Cal. 256, 162 P. 1019; Alden v. Superior Court of Los Angeles County, 186 Cal. 309, 199 P. 29; 46 C.J. 63.

The order granting a new trial is annulled.

W. J. WOOD, J., concurred in the judgment.

MOORE, Presiding Justice (concurring).

I concur in the opinion except that part commencing on page 975, column 2, line 6 of 127 P.2d with the words "motion for a new trial" and concluding with line 21, column 1, page 976. In my opinion that part of the discussion is too much of a stricture upon the freedom of the trial judge in conforming his judgments with the circumstances peculiar to each separate action. While it is the ubiquitous rule that reasonable expenses out of a fund may be allowed to one whose efforts have conserved such fund, payable ratably strictly to counsel rather than to their clients, yet no sound reason appears why the parties to such an action as this may not stipulate to the entry of a personal judgment against the corporation for whose benefit the action is prosecuted. All parties approved of the form of the judgment and for valuable consideration, to wit: that the time of payment should be extended and that the judgment should bear interest at the rate of 4½ per cent instead of 7 per cent. Of course the probability of prompt payment of the fund recovered would not justify a personal judgment. But, in view of the unanimous accord of the litigants and of the mutual advantages granted, I think the form taken by this judgment was proper under the circumstances although it cannot be regarded as a precedent in cases where there is no stipulation.

DARE v. BOARD OF MEDICAL EXAMINERS OF STATE OF CALIFORNIA et al.

Civ. 11776.

District Court of Appeal, First District, Division 1, California.

July 9, 1942.

Hearing Granted Sept. 3, 1942.

1. Courts 🔑91(1)

The District Court of Appeal is an "intermediate appellate court," and, as such, is bound by majority rule laid down by the Supreme Court.

See Words and Phrases, Permanent Edition, for all other definitions of "Intermediate Appellate Court".

2. Mandamus 🔑168(3)

On mandamus proceeding by drugless practitioner against the State Board of Medical Examiners to have practitioner's license restored, record of board at hearing at which license was revoked was competent evidence which could be introduced at request of either the practitioner or the board, notwithstanding that the practitioner was entitled to a "trial de novo."

See Words and Phrases, Permanent Edition, for all other definitions of "Trial De Novo".

3. Mandamus 🔑173

On mandamus proceeding by drugless practitioner against the State Board of Medical Examiners to have practitioner's license restored, record of board at hearing at which license was revoked was not indispensable evidence and did not justify the trial court in refusing to proceed unless the practitioner produced the record.

4. Physicians and surgeons 🔑10

The section of the Business and Professions Code providing that any person who uses in any sign or in an advertisement the word "doctor," the letters or prefix "Dr.," the letters "M. D.," or any other term or letters indicating or implying that he is a physician and surgeon, physician, surgeon, or practitioner without having a valid, unrevoked certificate as provided in the Code, is guilty of a misdemeanor, is applicable to all persons other than physicians and surgeons who practice the healing arts on human beings. St.1937, pp. 1259, 1295, §§ 2142, 3098; Chiropractic Act, St. 1923, p. XXIV, § 15.

See Words and Phrases, Permanent Edition, for all other definitions of "Doctor" and "Dr.".

5. Physicians and surgeons 🔑2

A statute requiring all practitioners, except physicians and surgeons, to indicate the type of certificate held in connection with the use of the title "Doctor" or "Dr." is constitutional, as against contention that the classification is unconstitutional, since in common parlance the term "Doctor" is customarily used to refer to physicians and surgeons. St.1937, p. 1259, § 2142.

6. Physicians and surgeons 🔑10

The holder of a license as a drugless practitioner who allegedly had in his window a sign which had the letters "Dr." before his name was guilty of violating the statute requiring certain licensed persons who used the title "Doctor" or "Dr.," such as drugless practitioners, to indicate the type of certificate held. St.1939, p. 1682, § 2409.

7. Physicians and surgeons 🔑5(4)

"Naturopathy" is a form of drugless practice within the statutory definition in the Business and Professions Code providing that drugless practitioner's certificate authorizes the holder to treat diseases, injuries, deformities, or other physical or mental conditions without the use of drugs or what are known as medical preparations, and without in any manner severing or penetrating any of the tissues of human beings except the severing of the umbilical cord. St.1937, p. 1258, § 2138.

See Words and Phrases, Permanent Edition, for all other definitions of "Naturopathy".

8. Physicians and surgeons 🔑10

If drugless practitioner possessed the degree of Doctor of Naturopathy, as claimed by him, his use of the letters "N. D." did not constitute a violation of Business and Professions Code providing that the use by the holder of any certificate of any letters, words, or terms indicating that he is entitled to practice a system or mode of treating the sick or afflicted for which he is not licensed in the state constitutes unprofessional conduct. St.1937, p. 1276, § 2395.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Mandamus proceeding by John Franklin Dare against the Board of Medical Examiners of the State of California and others to have petitioner's license as a drugless practitioner restored. From a judgment denying the petition, the petitioner appeals.

Judgment reversed.

Harry G. Henderson and M. Jas. McGranaghan, both of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Thomas I. Coakley and J. Albert Hutchinson, Deputy Attys. Gen., for respondents.

PETERS, Presiding Justice.

The record discloses that petitioner is duly licensed as a drugless practitioner by the State Board of Medical Examiners; that, by complaint duly filed, he was charged by the board with two violations of the Business and Professions Code; that, after a hearing, the board found petitioner guilty of the two offenses charged and ordered his license revoked, but also provided that, if petitioner would sign a stipulation that he would use no kind of advertising excepting the words "drugless practitioner" on his professional card, he should have his license restored and be placed on five years' probation; that, thereafter, by petition for writ of mandate, petitioner sought to have his license restored; that the trial court denied the petition. It is from the judgment denying the petition for mandate that this appeal is taken.

At the commencement of the trial of the mandamus proceeding, the judge suggested that the transcript of all proceedings had before the administrative board should first be introduced into evidence. Petitioner refused to produce such transcript, contending that under the rule announced in Drummey v. State Bd. of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848, and by the appellate court in the then recent case of Laisne v. California State Board of Optometry, 101 P.2d 787, hearing granted by Supreme Court, see 19 Cal.2d 831, 123 P.2d 457, he was entitled to a trial de novo without reference to the evidence produced before the board. The trial court took the position that the introduction of the transcript was a jurisdictional prerequisite to hearing any evidence in the mandate proceeding; that the only evidence that could be introduced by the petitioner in such proceeding, other than the transcript of proceedings had before the board, was after-discovered evidence, or evidence improperly excluded by the administrative board. The trial court ruled that, unless petitioner first produced the board's transcript, no other evidence could be introduced.

Petitioner urges that, when a licensee has had his license revoked by an administrative board exercising state-wide functions, and seeks by mandamus to have it restored, he is entitled to a trial de novo in the literal sense, and that the record produced before the administrative board is incompetent for any purpose. The respondents urge that on the trial of the mandate proceeding the record of the board's proceedings must be introduced as a condition precedent to the further exercise of jurisdiction, and that the only additional evidence that may be introduced is subsequently discovered evidence, or evidence improperly excluded by the board. Under the petitioner's theory the mandamus trial would be comparable to the trial of a criminal case on "appeal" to the superior court after conviction in the justice's court. Under respondents' theory, such trial would be so limited that it would approach the limitations of a trial on a writ of certiorari, except that respondents admit that in the mandamus proceeding the trial judge must exercise an independent judgment on the facts. In our opinion neither contention is entirely sound.

The question as to the exact scope of the hearing that will be afforded to a licensee after he has been deprived of his license by an administrative board exercising state-wide functions when such licensee seeks to be restored to his license by writ of mandate, has not, as yet, been finally determined by the courts of this state, although some related problems have been discussed in a series of cases decided in recent years. The first of these cases is Standard Oil Co. v. State Board of Equal., 6 Cal.2d 557, 59 P.2d 119. That case involved the constitutionality of a statute providing that a taxpayer dissatisfied with the determination of the State Board of Equalization in certain tax matters could proceed directly in the Supreme Court by certiorari to secure a review of the board's determination. The court held that the statute was unconstitutional, for the reason that administrative boards exercising state-wide powers do not, and constitutionally cannot, exercise judicial or quasi judicial powers. It was held, therefore, that the writ of certiorari, which can be used only to review judicial action, could not be used properly to review administrative determinations. This decision was predicated partially on the earlier cases of Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874, and Dept. of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076.

The Standard Oil Company decision, supra, was followed by Whitten v. California State Board, etc., 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1, in which it was held that the writ of prohibition could not be used to restrain administrative action, even though it was alleged that such board was acting in excess of its powers. The decision was predicated on the same premise as the Standard Oil Company case, supra, that is, that such boards do not exercise judicial or quasi judicial powers, and that the writ of prohibition can be used only to restrain a threatened improper exercise of judicial power. See, also, Cullinan v. Superior Court, 24 Cal.App.2d 468, 75 P.2d 518, 77 P.2d 471.

In Drummey v. State Bd. of Funeral Directors, supra, the court determined that the remedy available to one aggrieved by an administrative ruling depriving him of his license was the writ of mandate. It was also held that in such proceeding the trial court must exercise an independent judgment on the facts. In McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, it was held that where one was denied a license by an administrative board, mandate was the proper remedy to secure a "review" of the determination, but that in such proceeding the question was whether the board had abused its discretion, and, since there was substantial evidence to support the board, no abuse of discretion had been shown.

In the two cases last cited, the parties had stipulated that the court from which mandate was sought could decide the case on the record produced before the board. No additional evidence was sought to be introduced before the court, and no question was presented as to the admissibility of the record produced before the board.

[1] The next problem presented to the Supreme Court in this field was whether the court in the mandamus proceeding may take evidence in addition to that produced before the administrative board. That problem was directly presented in the Laisne case, supra. By a divided court, the Supreme Court held that the petitioner in the mandamus proceeding is entitled to a trial de novo in which the trial court must exercise an independent judgment on the facts, and that in such proceeding the petitioner is not limited to the record made before the board, that is, he may introduce in the mandamus proceeding, evidence in addition to that produced before the board. This court, as an intermediate appellate court, is bound by the majority rule laid down in that case.

The majority opinion in the Laisne case stands squarely for the proposition that the petitioner in the mandate proceeding in that case should have been permitted to introduce evidence other than the record of the proceedings before the board. The trial court was reversed because it refused to permit the introduction of such additional evidence. It will be noted that none of the cases above discussed directly passed on the question as to whether the introduction of the board's record is indispensable in the mandamus proceeding. In fact, none of the cases heretofore decided has expressly determined whether, in the absence of stipulation, the board's record is legal, competent evidence so as to be admissible in the mandamus proceeding over the objections of one of the litigants.

The solution of the problem as to the exact scope of the trial in the mandamus proceeding, really depends upon the answer to two questions. First, is the board's record legal, competent evidence on such trial so as to be admissible at all over objection of either litigant? Second, if the board's record is legal, competent evidence and so admissible, is it indispensable evidence so as to justify the trial court in refusing to proceed unless the petitioner produces it?

[2] The answer to both questions revolves about the proper meaning of the term "trial *de novo*" as that term was used in the Drummey and Laisne cases, supra. So far as the first question is concerned—i. e., whether the board's record is legal, competent evidence on the trial of the mandamus proceeding, and, therefore, admissible over objection—we have no doubt that such record is admissible.

If the phrase "trial *de novo*," as used in the above mentioned cases, should be interpreted in its literal sense it would mean that the board's record would be admissible only for purposes of impeachment, and would not be admissible on the merits. A reading of the Drummey case, and the opinion of the majority of the court in the Laisne case, demonstrates, however, that the phrase in question was not used in that literal sense in referring to the "review" of administrative determinations. Thus, in the Laisne case, the court stated that the appellant there contended "that he had the right to require the trial court in the *mandamus* proceeding to conduct what would be in substance and effect a trial *de novo,* in the course of which the parties *would not be limited* to the record made before the board." 19 Cal.2d at page 833, 123 P.2d at page 459. Italics added. The court also stated that the trial court compelled the petitioner to submit his case "solely" upon the record and proceedings before the board. In discussing the Drummey case the court said at page 834 of 19 Cal.2d, at page 459 of 123 P.2d: "* * * it was held that the court must consider all material evidence and was not confined to the record of the proceedings before the board. If the court were so confined, it would not be exercising an independent judgment on all the facts material to the issue."

It should be here noted that the court does not say that the record of proceedings before the board is not admissible, or admissible only pursuant to stipulation. It merely says that the court is not "limited" or "confined" to the record of proceedings before the board.

The majority opinion in the Laisne case further states at page 835 of 19 Cal.2d, at page 460 of 123 P.2d: "If, in the instant case, the superior court in the mandate proceedings were limited to the evidence presented before the board, or if the findings of fact by the board were conclusive on the court, then the board would be exercising the complete judicial power reserved to the enumerated courts." The court also states at page 843 of 19 Cal.2d, at page 464 of 123 P.2d: "On the authority of the Drummey case the only type of review that would afford appellant his full constitutional rights would be a *complete trial de novo as outlined in the decision in that case.*" (Italics added.) It would seem that the concluding phrase is of special importance in indicating that the record of proceedings before the board is admissible, without the consent of the parties.

It is true that the court also states at page 844 of 19 Cal.2d, at page 464 of 123 P.2d that the person whose license has been revoked "has the right to a trial *de novo* in a superior court" and that "the petitioner must be given a trial *de novo* on the issues involved." 19 Cal.2d page 845, 123 P.2d page 465. That language, if read alone, might imply that the "trial *de novo*" referred to is a complete and new trial in the literal sense. But that language does not stand alone. It is qualified by the language above quoted. To hold that because petitioner, in such proceeding, is entitled to a trial de novo means that the proceeding before the superior court must go forward as if no action had ever been had before the board, except for the findings, etc., of that board, would be to fly directly in the face of language in the Drummey case, which the court quotes with approval in the Laisne case. Immediately following the statement in the Laisne case that the petitioner is entitled to a complete trial de novo, the court quotes the following language from the Drummey case, with the added comment as shown: "'The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence.' Undoubtedly, the court in this reference to the 'evidence' contemplated *not only the record of the proceedings before the board, but such additional evidence as either party desired to introduce before the trial court.*" 19 Cal.2d at page 843, 123 P.2d at page 464. Italics added.

As we read the Drummey and Laisne cases, supra, both of them affirmatively recognized that the transcript of the proceedings before the board is legal, competent evidence, and is admissible in the mandate proceeding. The numerous statements that the petitioner is not to be "limited" or "confined" to the record before the board, and the statement appearing in both cases that the findings of the board come before the court with a "strong presumption" of their correctness can be explained only on the theory that the Supreme Court did not mean that the trial de novo to which the person dissatisfied with the board's ruling is entitled is to be a complete new trial without reference to what occurred before the board. How can the trial court give any intelligent weight to the "strong presumption" referred to unless it knows the evidence upon which the findings were based?

The Drummey case also stated, 13 Cal.2d at page 85, 87 P.2d at page 854: "This does not mean that the preliminary work performed by the administrative board in sifting the evidence and in making its findings is wasted effort"; and again at page 86 of 13 Cal.2d, at page 854 of 87 P.2d: "Obviously, considerable weight should be given to the findings of experienced administrative bodies made after a full and formal hearing, especially in cases involving technical and scientific evidence." Unless the transcript of proceedings is admissible at the request of either party, how can any benefit be secured by the trial court from the "sifting the evidence" by the board? How can the trial court secure the benefit of the technical and scientific skill of the board unless the evidence is part of the record?

The rule that permits the complete record before the board to be introduced in the trial court by stipulation, or at the request of either party, is not only supported by the clear implications of the opinions in the Drummey and Laisne cases, supra, but is supported by several practical considerations. If the record cannot be introduced over objection, the determination by the board, where the licensee is deprived of his license, would be so much wasted effort. The courts would be deprived of the expert and technical knowledge possessed by such boards. A rule excluding the record of proceedings had before the board, except upon consent of all concerned, would stultify every state-wide board. There would be no justification at all for proceedings before such administrative boards consuming both time and money, if the record is not admissible in the mandate proceeding. There would be no reason for the licensee to introduce any evidence in his defense before the board. The only practical effect of a board hearing would be to disclose the board's case without requiring the accused licensee to divulge his case.

It may be somewhat anomalous to say that the petitioner is entitled to a trial de novo in the superior court and to also hold that the record compiled before the board is admissible, but such anomaly is inherent in the peculiar nature of the mandamus proceeding sanctioned by the decisions of the Supreme Court above mentioned. As we read the above cases the important holding therein was not that a trial de novo must be had, but that in the mandate proceeding constitutional provisions require that the trial judge exercise an independent judgment on the facts. Such independent judgment can be exercised whether the transcript is admissible or not. The holding of the majority of the court in the Laisne case, supra, that petitioner in the mandate proceeding may introduce evidence in addition or cumulative, or identical to that produced before the board, affords the petitioner all the protection required by law. We, therefore, conclude that the board's record is legal, competent evidence in the mandamus proceeding which may be introduced at the request of either litigant.

[3] This holding, however, does not determine that such transcript is indispensable evidence which must be introduced by the petitioner before the trial court has jurisdiction to proceed. We are of the opinion that, like other competent evidence, its production depends upon the desires of the litigants. If produced by either it must be admitted, but if neither produces it, the trial court has no power to compel its production, or to refuse to proceed unless introduced.

To hold that the introduction of such transcript is an indispensable prerequisite to the jurisdiction of the lower court to try the mandamus proceeding, and that the only evidence that can be introduced other than the transcript is after-discovered or improperly excluded evidence, would be to convert the mandamus proceeding into a modified certiorari proceeding. Such determination would be directly contrary to the holding of the majority of the court in the Laisne case, supra. According to that opinion, the petitioner in the mandate proceeding may introduce in that trial any competent evidence even though it may be identical to, cumulative of, or in addition to, that produced before the board. It is clear, therefore, that the trial court was in error in holding that before it would, or could, proceed the transcript must be introduced.

Petitioner urges that, even though no evidence was introduced, the allegations of the petition for mandate and the answer and return thereto, demonstrate, as a matter of law, that no offense warranting discipline was committed by him, and that it appears from such pleadings, as a matter of law, that the board was without legal right to revoke his license. In view of the fact that the judgment must be reversed for reasons already stated, these points should be passed on for the guidance of the trial court on the retrial.

The petition for writ of mandate avers, and the answer and return thereto admits, that the complaint filed before the board was in two counts; that count one charged that petitioner used the prefix "Dr." in a window sign in connection with his name without otherwise indicating the type of certificate possessed by him; that petitioner did not hold a physician's and surgeon's certificate; that count two charged that petitioner used the letters "N.D." as a suffix to his name in a window sign, which indicated that he was entitled to practice naturopathy; that at the time he was not licensed to practice naturopathy.

Count one is based on section 2409 of the Business and Professions Code, St. 1937, p. 1229, as added by St.1939, p. 1682, which provides as follows: "Unless a person licensed and authorized under this chapter or any preceding medical practice act to use the title 'doctor' or the letters or prefix 'Dr.,' holds a physician's and surgeon's certificate, the use of this title or these letters or prefix without further indicating the type of certificate he holds, constitutes unprofessional conduct within the meaning of this chapter." This section was added to the Code in 1939. Petitioner urges that the section is unconstitutional class legislation. This contention is predicated on the following facts: Chapter 5 of division II of the Business and Professions Code, which chapter is entitled "Medicine," authorizes the Board of Medical Examiners to issue four types of certificates: (a) Physician's and surgeon's certificates; (b) drugless practitioner's certificates; (c) certificates to practice chiropody; (d) certificate to practice midwifery. § 2135, Bus. & Prof. Code, St. 1937, p. 1258. Other licenses, such as those to practice dentistry, optometry, etc., are issued under other chapters of the Code by other boards, or under special statutes by a special board. Petitioner urges, therefore, that, by section 2409 of the Business and Professions Code, supra, of all the licensed persons who use the title "Doctor" or "Dr.," only drugless practitioners and chiropodists (and midwives) are required to indicate the type of certificate held. This, according to appellant, constitutes an unconstitutional classification.

Petitioner's major premise—i. e., that drugless practitioners and chiropodists are the only persons engaged in the healing arts required to indicate the type of certificate held, is not in accordance with the fact. While such contention may be sound, so far as section 2409 of the Business and Professions Code is concerned, there are other sections dealing with the same subject matter which must be read together with the section in question. Section 3098 of that Code requires that optometrists must use the word "optometrist" in connection with the title "Doctor" or "Dr." Section 2142 of the Business and Professions Code provides: "Any person, who uses in any sign or in an advertisement the word 'doctor,' the letters or prefix 'Dr.,' the letters 'M. D.,' or any other term or letters indicating or implying that he is a physician and surgeon, physician, surgeon, or practitioner under the terms of this or any other law, or that he is entitled to practice hereunder, or under any other law, without having at the time of so doing a valid, unrevoked certificate as provided in this chapter, is guilty of a misdemeanor."

In addition, the Chiropractic Act, Stats. 1923, p. xx; Deering's Gen.Laws, 1937, Act 4811, provides that chiropractors shall not use the word "doctor" or the prefix "Dr." without the words "chiropractor" or "D. C." immediately following the name. (§ 15.)

[4] While it is true that there are non-medical uses of the title in question, such as doctors of divinity, doctors of jurisprudence, doctors of philosophy, and other holders of religious or academic degrees, with these uses of the title statutes dealing with the healing arts are not concerned. State v. Michaels, 226 Wis. 574, 277 N.W. 157. Section 2142, supra, would seem to apply to all persons other than physicians and surgeons who practice the healing arts on human beings.

[5] The constitutionality of statutes requiring all practitioners, except physicians and surgeons, to indicate the type of certificate held in connection with the use of the title "Doctor" or "Dr.," is not open to question. There is a reasonable ground for such distinction. In common parlance the term "doctor" is customarily used to refer to physicians and surgeons. The Legislature was justified in believing that the use of such title by others without descriptive designation would tend to indicate to the public that the user is a physician or surgeon. Cases from other states have upheld the constitutionality of legislation similar in character. State v. Michaels, supra; State v. Pollman, 51 Wash. 110, 98 P. 88; Green v. Rawlings, 290 Mich. 397, 287 N.W. 577; State v. Yegge, 19 S.D. 234, 103 N.W. 17, 69 L.R.A. 504, 9 Ann.Cas. 202.

Petitioner also urges that, from the facts shown by the pleadings, he has not violated section 2409 of the Business and Professions Code. In the petition for a writ of mandate he alleges that his conviction was based entirely on evidence that he had in his window a sign reading as follows:

> "Excelsior Clinical Laboratory
> Dr. J. Franklin Dare"

[6] Petitioner also alleges in his petition that he holds licenses as a chiropractor, issued by the Chiropractic Board, and as a clinical laboratory assistant, issued by the State Board of Health, in addition to his drugless practitioner's license issued by the Medical Board. The allegation that he holds these additional licenses is denied on information and belief, and it is also denied that the conviction on this count was based only on the use of the above sign. These disputed questions of fact, of course, cannot be passed upon at the present time. But, even if it be assumed that the conviction under count one rested entirely on the use of that sign, it is clear that petitioner has violated section 2409 of the Business and Professions Code. Neither chiropractors nor clinical laboratory assistants are permitted to use the title without designation. Such use violates section 2142 of the Code, supra, and, in the case of chiropractors, violates the law applicable to chiropractors, supra. The sign in question plainly indicates that appellant holds himself out as a physician and

surgeon operating a clinical laboratory. It follows, therefore, that petitioner, a drugless practitioner, according to the admissions in his pleading has used the title "Dr." in violation of section 2409 because he has not indicated that he holds a certificate as a drugless practitioner.

The petition for a writ of mandate alleges, and the answer and return admits, that the second count of the complaint filed with the board charged petitioner with using the letters "N.D." as a suffix to his name in a window sign, which indicated that he was entitled to practice naturopathy, and that he was not so licensed. This count is based on section 2395 of the Business and Professions Code which provides: "The use by the holder of any certificate of any letter, letters, word, words, or term or terms either as prefix, affix or suffix indicating that he is entitled to practice a system or mode of treating the sick or afflicted for which he is not licensed in this State constitutes unprofessional conduct within the meaning of this chapter." The petition for writ of mandate alleges that petitioner testified at the hearing before the board that he used the letters "N.D." indicating the degree of Doctor of Naturopathy, which he had earned. The answer to the petition admits that he so testified.

Petitioner admittedly was licensed as a drugless practitioner. Section 2138 provides that: "The drugless practitioner's certificate authorizes the holder to treat diseases, injuries, deformities, or other physical or mental conditions without the use of drugs or what are known as medical preparations and without in any manner severing or penetrating any of the tissues of human beings except the severing of the umbilical cord."

[7, 8] It seems quite clear to us that naturopathy is a form of drugless practice within the statutory definition above quoted. The exact nature of naturopathy was the subject of discussion in Millsap v. Alderson, 63 Cal.App. 518, 219 P. 469, which recognized naturopathy as a system or mode of treating the sick. It was held in that case that naturopathy is a system or mode of treating the sick taught in a college established in 1904 in Los Angeles by the Incorporated Association of Naturopaths of California. The Medical Practice Act of 1907, Stats. of 1907, p. 252, provided, in section 6, for three forms of certificates a certificate to practice medicine and surgery, a certificate to practice osteopathy, and a certificate to practice "any other system or mode of treating the sick or afflicted not referred to in this section." An amendment of 1909, Stats. of 1909, p. 418, gave express recognition to naturopaths by providing that one who held a certificate issued by the board of examiners of the association of naturopaths of California, and who was practicing under the laws of the state prior to passage of the amendment, should be entitled to practice naturopathy, and that the board of medical examiners should endorse his certificate. The board contends, in the present proceeding, that only the class of naturopaths who were such before the amendment of 1909, and whose certificates were indorsed by the medical board, hold a certificate to practice naturopathy and may use the letters "N.D." This analysis is clearly wrong. The Statute of 1907, in effect until 1913, provided for a form of certificate authorizing the holder to practice "any other system or mode of treating the sick or afflicted" not otherwise referred to (i. e., other than medicine and surgery and osteopathy). Apparently, certificates issued under this statute after 1909, and until 1913, specified the system or mode, as, for example, naturopathy. The act of 1913, Stats. of 1913, p. 722, Deering's Gen.Laws, 1937, Act 4807, provided for the two forms of certificates the physician's and surgeon's, and drugless practitioner's. According to petitioner herein, the report of the Board of Medical Examiners to the Governor concerning the proposed act of 1913 tabulated twenty-five drugless cults who would thereafter secure licenses under the drugless practitioner's provision. Thus it appears that the law has provided, and continues to provide, for a drugless practitioner's certificate, which must be held to include naturopathy and other drugless systems of treating the sick, to practice which only a drugless practitioner's license is required. It is quite apparent, therefore, that if petitioner possesses the degree of Doctor of Naturopathy, as he alleges, that by the use of the letters "N.D." he has not violated the provisions of section 2395 of the Business and Professions Code. That is a question of fact which must be decided by the trial court.

In the petition for mandate it is alleged that the board found petitioner guilty on both counts, and, as to each count, ruled that petitioner's license should be revoked on condition that, if he would immediately sign a stipulation that he would use no kind of advertising excepting the words "drugless practitioner" on his professional card, he should have his license restored, and then be placed on five years' probation. These allegations are admitted by failure to deny them in the answer and return. It is obvious from what has been said in this opinion, that, under the admitted facts, petitioner has violated the provisions of section 2409 of the Business and Professions Code. As to whether he has violated section 2395 of that Code, that depends upon whether he possesses the degree of Doctor of Naturopathy. If he does, he has not violated the section. That must be determined by the trial court on the retrial.

Because the trial court erroneously refused to proceed unless the board's record was produced by petitioner, and for the other reasons stated, the judgment is reversed.

KNIGHT and WARD, JJ., concurred.

MERING v. YOLO GROCERY & MEAT MARKET et al.

Civ. 6721.

District Court of Appeal, Third District, California.

July 9, 1942.

Hearing Granted Aug. 27, 1942.

1. **Trade-marks and trade-names and unfair competition** ⇨68(2)

The section of the Unfair Practices Act prohibiting price discrimination by merchants between different sections, communities or cities, with intent to destroy or prevent competition, is constitutional. Gen. Laws 1937, Act 8781, § 1.

2. **Trade-marks and trade-names and unfair competition** ⇨68(1)

The Unfair Practices Act is an attempt by the Legislature to regulate business as a whole by prohibiting practices which constitute unfair trade practices, to safeguard the public against monopoly and to foster free competition. Gen.Laws 1937, Act 8781, § 1 et seq.

3. **Trade-marks and trade-names and unfair competition** ⇨97

Where injunction against violation of the Unfair Practices Act by retail grocers provided that the sales enjoined should be for the purpose of injuring the grocers' competitors or destroying competition in the trade, the judgment was not void on ground that it exposed the grocers to contempt by mere proof of sale without evidence of intent to violate the injunction, but the injunction would not be violated unless the future offense was for the purpose of injuring competitors. Gen.Laws 1937, Act 8781, § 1 et seq.

4. **Trade-marks and trade-names and unfair competition** ⇨97

Where injunction against violation of Unfair Practices Act by retail grocers restraining them from selling all articles defined by the statute was clearly intended to apply only to the grocers in the conduct of their trade, injunction was not so broad as to be void as a blanket provision restraining the grocers from violating the act in general terms, and the injunction was not required to be limited to the specific articles shown to have been sold below cost. Gen.Laws 1937, Act 8781, § 1 et seq.

5. **Injunction** ⇨189

If one has been found to have committed acts in violation of a law, he may be restrained from committing other related unlawful acts.

6. **Injunction** ⇨114(2)

A private individual cannot maintain a suit for injunction against violating a statute unless he suffers special injury different from that suffered by the public at large, but the state may grant permission to a citizen to maintain such action.

7. **Trade-marks and trade-names and unfair competition** ⇨92

Under section of Unfair Practices Act providing that any person might maintain an action to enjoin violation of the act without alleging or proving actual damage plaintiff was entitled to maintain suit to enjoin violation of the act by retail grocers without alleging or proving special damage, notwithstanding that he was not a competitor of the grocers or a resident of their county. Gen.Laws 1937, Act 8781, § 1 et seq.; § 10.

8. Evidence 🔑373(1)
Trade-marks and trade-names and unfair competition 🔑93(2)

Under section of Unfair Practices Act defining distribution cost as invoice or replacement cost, whichever is lower, wholesalers' original invoices of merchandise sales to retail grocers when testified to by wholesalers' district managers, were material and admissible in suit to enjoin violation of the act by grocers. Gen.Laws 1937, Act 8781, § 1 et seq.; § 3.

9. Trade-marks and trade-names and unfair competition 🔑93(3)

In suit to enjoin violation of Unfair Practices Act by retail grocers, where grocers did not prove that specified brand of milk had not been purchased from designated wholesalers, evidence that grocers had purchased the same brand of milk from the wholesalers from January 4 to March 22 at designated prices, and sold the same brand for lower prices on March 25 and 27, sustained trial court's finding that the milk was sold by the retailers at less than cost. Gen. Laws 1937, Act 8781, § 1 et seq.

10. Constitutional law 🔑55

The Legislature is authorized to create presumptions and prima facie evidence.

11. Constitutional law 🔑311
Trade-marks and trade-names and unfair competition 🔑68(2)

Where evidence sustained finding that sales of a variety of articles were made by retail grocers below invoice and replacement cost over a period of time to the injury of grocers' competitors, there was a rational relationship between the facts proved and the statutory presumption of intent to injure competitors or destroy competition, and hence statute creating the presumption was not invalid as operating to deprive a party of a reasonable opportunity to present his defense. Gen.Laws 1937, Act 8781, § 1 et seq.; § 5.

12. Trade-marks and trade-names and unfair competition 🔑93(1), 100

The presumption of intent to injure competitors or destroy competition created by section of Unfair Practices Act from proof of sales below cost and injurious effect thereof is rebuttable, and it is for the trial court to determine whether it has been overcome by other evidence of the case. Gen.Laws 1937, Act 8781, § 1 et seq.; § 5.

13. Trade-marks and trade-names and unfair competition 🔑100

In suit to enjoin violation of Unfair Practices Act by retail grocers by sales below cost, where facts raising statutory presumption of intent to injure competitors or destroy competition were proven, whether sales were made with such intent became a question for trial court. Gen.Laws 1937, Act 8781, § 1 et seq.; § 5.

14. Trade-marks and trade-names and unfair competition 🔑93(3)

In suit to enjoin violation of Unfair Practices Act by retail grocers, evidence of sales below cost and injury to grocers' competitors supported trial court's finding that sales were made with the intent to injure competitors or destroy competition, in view of statutory presumption of such intent from the facts stated as proven. Gen.Laws 1937, Act 8781, § 1 et seq.; § 5.

15. Trade-marks and trade-names and unfair competition 🔑92

In suit to enjoin violation of Unfair Practices Act by retail grocers, where complaint did not allege unlawful sales after a specified date, trial court properly refused to admit advertisements of grocers' competitors after the date, offered to show that sales below cost were to meet competition. Gen.Laws 1937, Act 8781, § 1 et seq.

16. Constitutional law 🔑70(3)

The Legislature and not the courts determines the wisdom of economic policy, and it is not the duty of the courts to determine whether the policy of the Unfair Practices Act is wise, but the power of the courts is limited to determining whether the subject of the legislation is within the state's power, and whether the means adopted have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory. Gen.Laws 1937, Act 8781, § 1 et seq.

17. Trade-marks and trade-names and unfair competition 🔑68(1)

The Unfair Practices Act was enacted in an attempted exercise of the state's police power. Gen.Laws 1937, Act 8781, § 1 et seq.

18. Constitutional law 🔑47

In determining constitutionality of statute enacted in attempted exercise of state's police power, inquiry is limited to determining whether object of statute is one for which the police power may legitimately be invoked, and if so whether the statute bears a reasonable and substantial relation to the object sought to be attained.

19. Constitutional law 🔑81

The police power of the state extends not only to the preservation of the public health, safety and morals, but also extends to the preservation and promotion of the public welfare.

20. Constitutional law 🔑81

The proper application of the police power of the state cannot be measured by past precedents, but the test is present-day conditions.

21. Trade-marks and trade-names and unfair competition 🔑68(2)

The provision of the Unfair Practices Act prohibiting sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition is not unconstitutional on ground that means adopted were not reasonably designed to accomplish the object of the statute, since question was fairly debatable, and hence determination of Legislature thereon was conclusive. Gen.Laws 1937, Act 8781, § 3.

22. Constitutional law 🔑47

In determining whether means adopted by Unfair Practices Act prohibiting sale of commodities below cost as defined in the act for purpose of injuring competitors and destroying competition were reasonably connected with legitimate object of statute, that fourteen states had passed similar legislation was entitled to same weight. Gen.Laws 1937, Act 8781, § 3.

23. Trade-mark and trade-names and unfair competition 🔑68(2)

A provision of the Unfair Practices Act prohibiting sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition is constitutional as a reasonable attempt by state to accomplish a valid object. Gen.Laws 1937, Act 8781, § 3.

24. Trade-marks and trade-names and unfair competition 🔑68(1)

Although the state may not have power to regulate all trade practices affecting competition, it has power to restrict or prohibit trade practices which on reasonable grounds it determines are predatory, vicious, unfair and anti-social.

25. Trade-marks and trade-names and unfair competition 🔑68(2)

The provision of the Unfair Practices Act prohibiting sale of commodities below cost as defined in the act for the purpose of injuring competitors and destroying competition was not unconstitutional as applied to prevent retail sale of groceries below cost. Gen.Laws 1937, Act 8781, § 3.

◆

Appeal from Superior Court, Yolo County; Arthur Coats, Judge Assigned.

Suit by Charles Mering against the Yolo Grocery & Meat Market and others to enjoin violation of the Unfair Practices Act, as amended, Gen.Laws 1937, Act 8781, § 1 et seq. From a judgment for plaintiff, defendants appeal.

Affirmed.

Huston, Huston & Huston, of Woodland, for appellants.

Sumner Mering, of Sacramento, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment restraining appellants from violating the so-called Unfair Practices Act, as amended in 1937. The precise terms of the injunction will be hereinafter set forth.

It is necessary to a proper understanding of the issues involved upon this appeal that we give a brief summary of the pertinent provisions of the act.

[1] Section 1 prohibits merchants, manufacturers, producers and distributors, with intent to destroy competition or to prevent competition of any new dealer, from discriminating as to price between different sections, communities or cities, and likewise prohibits the giving of special rebates or the use of any other device to accomplish this result. This portion of the act, although reenacted in 1935 and 1937, has been an integral part of our law since 1913, when the original Unfair Practices Act was adopted. Stats.1913, p. 508, Deering's Gen.Laws 1937, Act 8781. It is predicated upon a similar statute first adopted in South Dakota. The constitutionality of such provision is beyond question. State v. Central Lumber Co., 24 S.D. 136, 123 N.W. 504, 42 L.R.A.,N.S., 804; Central Lumber Co. v. South Dakota, 226 U.S. 157, 33 S.Ct. 66, 57 L.Ed. 164.

Section 3 of the act is the provision against which the main attack of appellants is directed. It provides:

"It shall be unlawful for any person engaged in business within this State, to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition, and he shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in section 11 of this act for any such act.

"The term 'cost' as used in this act as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution 'cost' shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

"The 'cost of doing business' or 'overhead expense' as used in this act is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

"The prohibitions of this act shall be deemed among the other purposes and objects of the act to also prohibit the practice of using any article or product as a 'loss leader.' Loss leader, as used herein, shall mean any article or product sold at less than cost as herein defined to induce, promote or encourage, the purchase of other merchandise, or which may have the tendency or capacity to mislead or deceive purchasers or prospective purchasers, or which diverts trade from or otherwise injures competitors.

"The prohibitions of this section shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby a sale below cost is effected in violation of the spirit and intent of any of the provisions of this act."

Section 4 prohibits the seller, in establishing his cost of an article at less than present replacement cost, from using the invoice cost paid by him at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade, unless the article so purchased is kept separate from goods purchased in the ordinary channels of trade, and unless said article is advertised and sold as merchandise purchased at a forced, bankrupt, or closeout sale.

Section 9 provides that any contract made in violation of the act is illegal and no recovery thereon shall be had. Section 10 authorizes any person, corporation or trade association to maintain an action to enjoin a continuance of acts in violation of the statute, and if injured thereby, to recover actual damages sustained, and provides further that it shall not be necessary for the plaintiff in such action to allege or prove damage to himself.

Section 11 makes the violation of sections 1 to 7 a misdemeanor, and provides that proof of average overall cost of doing business for any particular inventory period when added to the cost of production of each article or product, as to a producer, or invoice or replacement cost, whichever is lower, of each article or product, as to a distributor, shall be presumptive evidence of cost as to each such article or product involved in any action brought under this act and involving the violation of any provisions of section 3 and 5 of this act.

Section 12 contains the usual severability clause.

Section 13 provides that the legislature declares that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. It also provides that this act shall be liberally construed, that its beneficial purposes may be subserved.

Section 14 provides that the act shall be known as the Unfair Practices Act.

Sections 15, 16 and 17 contain provisions not involved in this case.

[2] This act is an attempt on the part of the legislature to regulate business as a whole by prohibiting practices which the Legislature has determined constitute unfair trade practices. Its stated purpose (§ 13) is to safeguard the public against the creation or perpetuation of monopolies, and to foster free, open and fair competition. So far as the instant case is concerned, the practice prohibited by the statute is selling below cost, and this practice is prohibited only when performed "for the purpose of injuring competitors or destroying competition."

This action was commenced by respondent to obtain an injunction under the act. Respondent's amended complaint alleged in substance that appellants were conducting a retail grocery business in Woodland, and that on various dates set forth in detail in the complaint appellants advertised, offered for sale, and sold to retail customers articles of merchandise, the invoice cost and replacement cost of each of which articles was in excess of the selling price thereof; that none of said offers for sale, or sales, were in the course of the discontinuance of the business of appellants, or to prevent loss to appellants by spoilage or depreciation; that none of said sales, or offers for sale, were made, and none of said advertising for sale was done in good faith to meet the legal prices of a competitor, but were for the purpose of destroying competition and injuring competitors.

Appellants' answer did not deny that most of the articles set forth in respondent's complaint were advertised and sold at the prices set forth, but denied the other allegations hereinabove referred to. Appellants also set forth the special defense that any and all sales made by appellants were to meet the reduced prices at which other competing merchants in Woodland sold the same or similar articles, and with the sole purpose of advertising their business, improving their trade, and meeting such competition, and not with the intent of injuring any competitor or destroying competition. Appellants also set up the further defense that respondent was not a competitor of appellants, did not reside in the county of Yolo, was not injured or damaged by any acts of appellants, and was not invoking the jurisdiction of a court of equity in good faith.

The trial court found substantially in accordance with the allegations of the amended complaint, and found that the allegations of appellants' affirmative defenses were untrue, and from said findings concluding that appellants had violated the Unfair Practices Act, and that respondent was entitled to a judgment. Judgment was entered accordingly, by the terms of which appellants were "permanently enjoined and restrained from selling, offering for sale or advertising for sale, their articles or products (these words to have the definition given to them in Sec. 16 of the Unfair Practices Act of the State of California) in the State of California at less than the invoice or replacement cost, whichever is lower, of said articles or products respectively, to the defendant vendor, plus the cost of doing business incurred in the conduct of their general retail grocery business, including, without limitation, the expense of labor (including salaries), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, credit losses, all types of licenses, taxes, insurance and advertising; or from giving, offering to give, or advertising the intent to give within the State of California their articles or products (using the words in the sense and breadth defined above) in their general retail grocery business; provided, however, that such selling, offering for sale, advertising for sale, giving, offering to give, or advertising the intent to give away, such articles or products be for the purpose of injuring competitors of the defendant partnership and the nine defendant members thereof, or of destroying competition in the retail grocery business; provided, further, that this order, judgment and decree shall not apply to any sale, offer for sale, or advertisement for sale of any such articles or products made under those circumstances or any of those circumstances specified and set forth in sub-paragraphs (a), (b), (c) and (d) of Section 6 of the Unfair Practices Act of the State of California."

Appellants raise the following points upon this appeal:

1. The judgment is void; 2. Respondents were not entitled to the remedy of injunction; 3. There is no proof of the cost of the articles sold; 4. There is no proof of intent to injure competitors or destroy competition; 5. The court erred in excluding testimony bearing upon the intent of appellants; 6. As applied to the facts of this case, the Unfair Practices Act is unconstitutional. We will discuss these contentions in the order of their statement.

[3] In urging their first point, appellants state: "* * * if this judgment is upheld, then the appellants would be exposed to the peril of contempt by mere proof of sale of some single article in the store without any further evidence showing that the sale was made with intent to violate the injunction."

However, we find that the injunction contains the following provision: "* * * provided, however, that such sale, offering for sale, * * * be for the purpose of injuring competitors of the defendant partnership and the nine defendant members thereof, or of destroying competition in the retail grocery trade."

It is therefore apparent that the injunction would not be violated unless it were proven that the future offense is for the purpose of injuring competitors or destroying competition, and that these elements must necessarily be proved in any contempt proceeding.

Appellants next point out that the injunction restrains them from selling all articles or products defined in section 16 of the act, which section defines "article or product" as including any articles, products, commodities, thing, the value of service or output of a service trade. Appellants contend that this provision is a blanket provision restraining appellants from violating the act in general terms, and in every particular, and is so broad as to make it void. A reference to the injunction shows it clearly intends to apply only to appellants in the conduct of their retail grocery trade. The trial court found that the appellants, in the conduct of their grocery business mentioned above, sold merchandise below cost, as defined in the Unfair Practices Act, for the purpose of injuring competitors or destroying competition. The injunction restrained them from continuing such practice.

[4] Appellants are in effect contending that the injunction should be limited to the sale of the articles shown by the evidence to have been sold below cost, and that future similar sales of other articles could only be dealt with in other and subsequent actions. Such a contention is not supported either by reason or authority. Such a construction of the act would encourage, rather than prevent, violations thereof.

In the case of Wholesale T. Dealers', etc., v. National Candy & T. Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486, a case in which the constitutionality of the Unfair Practices Act was considered and upheld by our Supreme Court, the injunction against defendant restrained it as follows:

"(1) From selling, or offering or advertising for sale its products at less than invoice or replacement cost, whichever is lower, plus its cost of doing business;

"(2) from discriminating as to price between different sections, communities or cities by selling its products to customers at a lower rate in one section, community or city than in another, after making proper allowance for grade, quality, quantity and costs of transportation; and (3) from secretly paying or allowing rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, to certain customers, not extended to all purchasers purchasing upon like terms and conditions, whether used to cover up sales below cost and discrimination between localities, or otherwise."

[5] In the case of People v. Black's Food Store (People v. Green Frog Food Emp.), 16 Cal.2d 59, 105 P.2d 361, the Supreme Court affirmed an order granting a preliminary injunction in the following terms: "Now, Therefore, It is Hereby Ordered, Adjudged and Decreed that during the pendency of this action, or until the final dismissal thereof, or until the court shall otherwise order, the defendants and each of them, their agents, servants and employees, shall cease and desist from selling, offering for sale or advertising for sale any of their products in violation of the Unfair Practices Act of the State of California." In National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 61 S.Ct. 693, 699, 85 L.Ed. 930, the Supreme Court of the United States said:

"It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. * * *

"A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past."

We conclude, therefore, that the injunction in the instant case merely restrained appellants from continuing the practice of selling articles of merchandise below cost, for the purpose of injuring competitors or destroying competition, and that said injunction was within the issues made by the pleadings and supported by the findings of the trial court.

Appellants' second contention is that respondent is not entitled to the remedy of injunction. In support of this contention appellants point out the admitted facts that respondent is not a competitor of appellants, is not a resident of Yolo County, and has neither pleaded or proved any damage to himself by reason of the acts of appellants.

[6] It is of course true that it is the general rule that a private individual cannot maintain a suit for an injunction unless he suffers a special injury different from that suffered by the public at large. However, it is also true that the state may grant permission to any citizen to maintain such

an action. Frost v. City of Los Angeles, 181 Cal. 22, 183 P. 342, 6 A.L.R. 468.

In the case of People v. Casa Co., 35 Cal. App. 194, at page 199, 169 P. 454, at page 457, it is said: "It is well established that the state may confer the right to bring an action to abate a public nuisance upon a private individual in addition to his existing right to bring such actions where there is a special injury to him. (State v. Fanning, 96 Neb. 123, 147 N.W. 215; Littleton v. Fritz [65 Iowa 488, 22 N.W. 641, 54 Am. Rep. 19], supra), and in this state this power is expressly conferred by section 369 of the Code of Civil Procedure, which states that a person expressly authorized by statute may sue without joining with him the person for whose benefit the action is prosecuted."

In 32 C.J., at page 48, it is stated: "In some states the general rule does not apply with reference to suits for injunction to restrain certain sorts of public injuries, because of statutes providing that any citizen may maintain a suit for injunction regardless of whether or not he will suffer particular injury."

In the instant case it is to be noted that section 10 of the Unfair Practices Act as amended by St.1937, p. 2398, provided:

"Any person * * * may maintain an action to enjoin a continuance of any act or acts in violation of any of the provisions of sections 1 to 7, inclusive, of this act and, if injured thereby, for the recovery of damages. * * * It shall not be necessary that actual damages to the plaintiff be alleged or proved."

[7] In Wholesale T. Dealers v. National Candy & T. Co., supra, it was held that said act is for the public welfare, is a part of its public policy, and constitutes a legitimate exercise of the police power. Our conclusion upon this point is that because of the specific provision in section 10 of the act, hereinbefore quoted, it was not necessary for respondent to allege or prove any special damage or injury to himself.

Appellants' third contention is that there is no proof of the cost of the articles sold. The record shows that respondent demanded that appellants produce their original invoices, and that appellants refused to do so, counsel for appellants stating: "We decline to produce it on the ground that there is no foundation laid for the demand. And on the further ground that we cannot be required to produce any book, paper or record here that can be used against us." Respondent thereupon called as witnesses the district managers of the various wholesale dealers who had sold merchandise to appellants, and upon each of them producing its original invoices, offered same in evidence. The following from the record is typical of the objections made by appellants to the various offers of the invoices:

"Mr. Huston: Now, we will object to this on the ground that the proper foundation has not been laid, and by that, I am not objecting on the grounds that this is a copy of the original invoice in their office but it is, primarily on the ground that there is no connection shown between the items in this invoice and any of the items alleged to have been sold on any date. There is no evidence of any witnesses who made the entries or who had any personal knowledge of the transactions at the time the entry was made and that it is hearsay.

"Mr. Mering: I will submit, your Honor, that that still is a true and correct copy of the original invoice that Mr. Huston has refused to surrender.

"The Court: The objection will be overruled and it will be admitted in evidence and marked next number."

[8] These invoices were admitted in evidence by the court over the objections of appellants. The various witnesses testified that these various invoices were on file in their respective offices, showing the various sales to appellants, and in view of the provision in section 3 of the act, that the term "cost," as applied to the distribution "cost," shall mean "the invoice or replacement cost, whichever is lower," etc., it must be held that such evidence was material, and that the invoices were properly admitted in evidence.

Appellants contend that there was no connection between the items of the invoices and the items claimed to have been sold by appellants; and that there was an absence of proof as to whether the goods purchased by the appellants on the dates of the invoices were the same goods as sold on subsequent dates, as found by the court.

In order to illustrate the manner in which respondent sought to prove his case, we will state what the record shows, with reference to the item of Sego milk. It was alleged in the amended complaint that appellants' offered for sale, and sold, on March 25, 1939, and March 27, 1939, three tall cans for 17 cents, and six tall cans for 33 cents. Respondent offered in evidence invoices of sales of cases, each containing 48 tall cans of Sego milk, to appellants, all at $2.65 per case, on the following dates: January 4, 10 cases; January 9, 10 cases; January 16, 5 cases; February 1, 15 cases; February 10, 18 cases; February 15, 15 cases; March 1, 10 cases; March 8, 15 cases; March 14, 10 cases, March 22, 22 cases.

It is clear that the price at which appellants sold the Sego milk was lower than the invoice price, as shown by said invoices. What has been said with reference to Sego milk may be stated to be equally true with reference to the other items of merchandise claimed to have been sold by appellants in violation of the act.

[9] Appellants argue that evidence such as above set forth does not have sufficient weight to sustain a finding that the merchandise sold by appellants was the same merchandise mentioned in these invoices. They argue that appellants could have purchased any or all of these articles in numerous places in California, and that said articles actually sold could have been in storage at the time of the purchase included in the invoices, as appellants carried a reserve stock. We believe that the trial court had a right to infer that the Sego milk sold on March 25th and March 27th came from the invoices aggregating 118 cases of 48 cans each of Sego milk purchased by appellants from January 4th to March 22d. It may be, as appellants assert, that the Sego milk sold could have been purchased elsewhere by appellants, and it may be that appellants had a reserve stock of Sego milk in storage at the time of the purchases included in the invoices, but there is no evidence in the record to that effect. If such were the fact, appellants could easily have proved it, but they did not choose to do so, and when called by respondent under section 2055 of the Code of Civil Procedure, they availed themselves of their constitutional right to refuse to testify, upon the ground that they might incriminate themselves. We are satified that the record supports the finding that the articles in question were sold by appellants at less than the cost thereof, in violation of the act.

Appellants' fourth contention is that there is no proof of intent to injure competitors or destroy competition.

Section 5 of the act reads as follows: "In all actions brought under the provisions of this act proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition."

[10] Appellants contend that a finding that they violated the act cannot be based upon this presumption. The power of the legislature to create presumptions and prima facie evidence, is well established. In the case of Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 52 S.Ct. 103, 107, 76 L.Ed. 136, 78 A.L.R. 826, the Supreme Court of the United States, speaking through Chief Justice Hughes, said: "The appellants make the further contention that the statute is invalid because of the provisions of § 8b (supra, p. 104) that 'the blowing, release or escape of natural gas into the air shall be prima facie evidence of unreasonable waste.' The state, in the exercise of its general power to prescribe rules of evidence, may provide that proof of a particular fact, or of several facts taken collectively, shall be prima facie evidence of another fact when there is some rational connection between the fact proved and the ultimate fact presumed. The legislative presumption is invalid when it is entirely arbitrary, or creates an invidious discrimination, or operates to deprive a party of a reasonable opportunity to present the pertinent facts in his defense. Mobile [J. & K. C.] R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 55 L.Ed. 78 [80], 32 L.R.A.,N.S., 226, Ann. Cas.1912A, 463 [2 N.C.C.A. 243]; Bailey v. Alabama, 219 U.S. 219, 238, 31 S.Ct. 145, 55 L.Ed. 191 [200]; Lindsley v. Natural Carbonic Gas Co., 220 U.S. [61], at pages 81, 82, 31 S.Ct. 337 [55 L.Ed. [369], 378, 379, Ann.Cas.1912C, 160], supra; Manley v. Georgia, 279 U.S. 1, 5, 6, 49 S.Ct. 215, 73 L.Ed. 575 [577, 578]; Western & A. R. Co. v. Henderson, 279 U.S. 639, 642, 49 S. Ct. 445, 73 L.Ed. 884 [887]. In the present case there is a manifest connection between the fact proved and the fact presumed, and under the construction placed upon the statute by the state court, there appears to be no deprivation of a full op-

portunity to present all the facts relating to operations within the field."

The evidence in the instant case is sufficient to sustain the finding that sales were made by appellants below invoice cost and below replacement cost. It also shows that the sales were not limited to one or two items, but covered a variety of articles. The evidence further shows that these low level prices continued over a period of time. The articles sold were advertised to be sold at said prices. The injurious consequences of the acts of appellants were established by the testimony of Roy Wyatt, a witness called by respondent. Mr. Wyatt operated a grocery store in the town of Esparto, in Yolo County. Mr. Wyatt testified, in substance, as follows: That he had been in business for some twenty-five years; that as a result of the low prices adhered to by appellants, trade was drawn away from him, and his business suffered; that customers who formerly bought of him, started to buy from appellants, and Mr. Wyatt had actually seen his customers in the store of appellants on several occasions. Appellants advertised in the Woodland Democrat, which was circulated in Esparto where Wyatt conducted his store.

[11] Having in mind the purposes of the act as declared by the legislature, we are convinced that under the facts shown by the record in this case, "there is a rational relationship between the facts proved and the ultimate fact presumed," and that the presumption of intent to injure competitors or destroy competition which section 5 of the act deduces from proof of sales below cost, together with proof of the injurious effect of such sales, "does not operate to deprive a party of a reasonable opportunity to present the pertinent facts in his defense."

[12, 13] The presumption created by section 5 of the act is, of course, a rebuttable presumption, and it is for the trial court to determine whether or not it has been overcome by the other evidence in the case. Where, as in the instant case, the facts were proved from which the court might properly hold that the presumption was created, the question of whether or not said sales were made by appellants with the purpose or intent to injure competitors or destroy competition, became a question for the trial court to determine. The case of Balzer v. Caler, 11 Cal.2d 663, 82 P.2d 19, was a case under the Unfair Practices Act before section 5 was amended in 1937 to contain the clause now under consideration. The trial court found that the acts of defendant in that case were not done with the "intent to injure competitors or destroy competition." While the appeal was pending, section 5 was amended to read as at present, and upon the appeal, it was contended by appellants that the existing law, rather than the law in force at the time of judgment, should be applied. In disposing of this contention the Supreme Court said, at page 665 of 11 Cal.2d, at page 21 of 82 P.2d: "Appellant contends that inasmuch as the cause involves a request for an injunction that the existing law rather than the law in force at the time of the judgment should be applied. In this connection it is pointed out that in 1937 the act was amended to clearly state that intent to injure competitors and lessen competition is a necessary element of the act prohibited, but that section 5 of the act was also amended to provide that in any action brought under the act the selling of an article below cost, together with proof of the injurious effect of such act 'shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition.' Stats.1937, ch. 860, pp. 2395, 2397. Even if this section were held applicable to the instant case it would nevertheless still have to be held that the only competent admissible evidence introduced on this issue rebutted the presumption."

It is to be observed that in the case just cited the Supreme Court recognized the presumption, but held that, even if applicable to the case then under consideration, it had been rebutted by other testimony.

[14] Our conclusion upon this point is that the record supports the finding of the trial court that the sales proved in this case were made by appellants "with the purpose or intent to injure competitors or destroy competition."

[15] Appellants' fifth contention is that the court erred in excluding testimony bearing upon the intent of appellants.

Appellants offered in evidence certain advertisements of certain of their competitors named in the testimony of respondent's witness Wyatt. The trial court admitted all advertisements prior to the last date on which sales were alleged in the amended complaint, towit, August 30, 1939, but excluded all advertisements of appellants' competitors after that date. Appellants contend that this was error, but cite no authorities supporting such contention.

It was not alleged in the amended complaint that appellants had made any sales in violation of the act after that date, and we cannot see how the advertisement of a competitor after that date could have affected the intent of appellants prior to that date. We are therefore of the opinion that the trial court properly refused to admit such advertisements in evidence.

Lastly, appellants contended that the Unfair Practices Act as applied to the facts of this case, is unconstitutional.

[16] Appellants make a general attack upon the wisdom and reasonableness of this legislation, and urge many of the arguments that those familiar with the history of this type of legislation have heard opponents of such legislation make in legislative halls for many years. Legislatures, not courts, determine the wisdom or lack of wisdom of economic policies. The members of a court may not agree with the economic philosophy of the Unfair Practices Act, but it is no part of the duty of a court to determine whether or not the policy embodied in the statute is wise or unwise. As was said by Mr. Justice Field, (later, a justice of the Supreme Court of the United States), in the early case of Ex parte Newman, 9 Cal. 502, 520: "It is not the province of the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution." The power of the court is limited to determining whether the subject of the legislation is within the State's power, and, if so, to determine whether the means adopted have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory.

[17-24] In the case of Wholesale T. Dealers v. National Candy & T. Co., supra, our Supreme Court, in upholding the constitutionality of the act now under consideration, said, at page 643 of 11 Cal.2d at page 9 of 82 P.2d, 118 A.L.R. 486:

"It is manifest that the statute was passed in the attempted exercise of the state's police power. That being so, the inquiry of this court is limited to determining whether the object of the statute is one for which the police power may legitimately be invoked, and, if so, whether the statute bears a reasonable and substantial relation to the object sought to be attained. These two problems involve substantially different considerations, and shall be separately discussed.

"That the avowed purpose of the act as stated in section 13 '* * * to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented' * * * is well within the state's police power cannot be seriously doubted. It has now become firmly established that the police power of the state extends not only to the preservation of the public health, safety and morals, but also extends to the preservation and promotion of the public welfare. In recent years the state, in promoting and advancing the general welfare of its citizens, has frequently and properly used this power to promote the general prosperity of the state by the regulation of economic conditions. This apparent extension of the police power is in fact no extension at all. The police power has not expanded. Its proper exercise has always been and still is confined to regulation in the public welfare, and has always been and still is subject to the standard of reasonableness in its relation to that interest. However, changed social, political and economic conditions have enlarged the field of conduct which may properly be subjected to regulation in order that the general welfare may be adequately protected. The proper application of the power cannot be measured by past precedents—the test is, of course, present day conditions. These principles have frequently been enunciated by this court and by the Supreme Court of the United States."

And, further, at page 646 of 11 Cal.2d, at page 10 of 82 P.2d, 118 A.L.R. 486, it is said:

"With these cases, and many others that could be cited, in mind, it is obvious that the object of the present statute is within the state's police power. That the prevention of monopolies and the fostering of free, open and fair competition and the prohibition of unfair trade practices is in the public welfare is obvious, and requires no further citation of authority. In fact this is not seriously challenged by appellant. The main arguments advanced by appellant are that the act is unconstitutional in that it curtails its previously enjoyed privilege or right of fixing the price at which it is willing to sell its goods and of selling them at such prices, and that the act unlawfully deprives it of its freedom of action; that it is unreasonable and will not accomplish the purposes intended. These contentions go to the reasonableness of the statute in its relation to its avowed object, and do not attack the validity of that object.

"So far as pertinent here, the present act prohibits the sale of commodities below cost as defined in the act (with certain enumerated exceptions) but, as will later appear, such sale is only prohibited when engaged in 'for the purpose of injuring competitors and destroying competition'. * * * In determining the validity of this provision (the object of the statute being within the police power of the state) we are limited in our inquiry to determining whether the act is one reasonably connected with its avowed purpose. In other words, are the means adopted reasonably designed to accomplish this purpose; do they have a real and substantial relation to the objects sought to be attained?"

And further, on page 650 of 11 Cal.2d, page 12 of 82 P.2d, 118 A.L.R. 486, it is stated:

"In discussing the question as to whether the statute is reasonably designed to accomplish its avowed purposes, the parties, and various amici curiae on their behalf, have written many briefs covering a wide field of discussion. On behalf of appellant it is urged that the means adopted by this statute—prohibiting sales below cost—cannot possibly prevent the creation of monopolies and will not foster free, open and fair competition. It is contended that this legislation in fact will stifle free and open competition and will foster monopolies and that it favors the large chain stores and large distributors as against the small merchant. On behalf of respondent the contrary is urged. It should be noted that amici curiae briefs have been filed on behalf of respondent by several of the trade associations representing the independent grocers and druggists of the state.

"It is not the province of this court to determine where the truth of this argument lies. If the subject is fairly debatable the determination of the legislature is conclusive. That the economic wisdom of such legislation is fairly debatable cannot be gainsaid. Courts have frequently commented on the destructiveness of price-cutting tactics. Nebbia v. New York, [291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469], supra; Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 55 S.Ct. 7, 79 L.Ed. 259; Highland Farms Dairy v. Agnew, 300 U.S. 608, 57 S.Ct. 549, 81 L.Ed. 835; Max Factor & Co. v. Kunsman, [5 Cal.2d 446, 55 P.2d 177], supra; Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 55 P.2d 495. The use of 'loss leaders' for the purpose of injuring a competitor has been condemned by many economists. It has been urged that their use is injurious to the consumer in that the losses so sustained will either have to be made up by higher prices charged on other commodities, or by the enforcing of various economies, such as the lowering of wages, discharge of employees, lowering of rents, depressing the wholesale prices, etc. It has many times been urged that such practices are destructive of competition and tend to create monopolies. See discussion in State v. Central Lumber Co., supra, and Central Lumber Co. v. South Dakota, supra. These arguments are mentioned not because we necessarily believe that they are sound, but to demonstrate that the practice condemned by this statute, according to the views held by a large portion of the body politic, tends toward the stifling of free and open competition, the creation of monopolies, and is injurious to the consuming public. It should also be mentioned that some 14 states have passed similar legislation. This is entitled to some weight in determining whether the means provided in the statute will tend to accomplish the valid and expressed purpose of the legislature."

On page 658 of 11 Cal.2d, page 17 of 82 P.2d, 118 A.L.R. 486, it is also stated:

"Other cases could be cited. We believe that these cases clearly establish the constitutionality of the statute here under attack. The statute must be held to be a reasonable attempt upon the part of the state to accomplish a valid object. It must be borne in mind that this statute does not regulate the selling of commodities—it is the predatory trade practice of selling below cost with intent to injure competitors which the legislature on reasonable grounds has determined is vicious and unfair that is prohibited. Such determination is clearly within the legislative power. The state may not have power to regulate all trade practices affecting competition, but it clearly has power to restrict or prohibit trade practices which upon reasonable grounds it determines are predatory, vicious, unfair and anti-social."

In the case of People v. Black's Food Store, supra [16 Cal.2d 59, 105 P.2d 362], a case in which a preliminary injunction granted under the "Unfair Practices Act" was involved, the court said:

"It has been held upon sound principle that the legislature has the authority, under its police powers, to regulate business for the general welfare of the public, by prohibiting merchants from selling products below cost 'for the purpose of injuring competitors or destroying competition'. Wholesale T. Dealers v. National, etc. Co., 11 Cal.2d 634, 82 P.2d 3, 8, 118 A.L.R. 486."

[25] It would, therefore, appear to us that the constitutionality of the Unfair Practices Act is settled in California, and that there is nothing in the facts of the instant case that would make the act unconstitutional as applied to the facts shown by the record here.

For the reasons hereinbefore set forth, the judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred

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53 Cal.App.2d 14

WILLIAMS v. KAWANAMI.

RICHFIELD OIL CO. v. SAME.

Civ. 2819, 2820.

District Court of Appeal, Fourth District, California.

July 20, 1942.

Hearing Denied Aug. 20, 1942.

Appeal and error 🔑832(1)

In action for damages sustained in collision between automobile driven by plaintiff and defendant's truck, where plaintiff testified that he did not think he had blown his horn, but one riding with plaintiff testified several times that plaintiff sounded horn, defendant's petition for rehearing after affirmance of judgment for plaintiff will not be granted on ground that appellate court's opinion contained untrue statement that evidence was conflicting with respect to whether plaintiff sounded horn.

◆

Appeals from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 127 P.2d 58.

Harry W. Horton and Reginald L. Knox, Jr., both of El Centro, for appellant.

Clarence B. Smith, of El Centro, for respondents.

PER CURIAM.

The appellant has filed a petition for a rehearing. With one exception, nothing is presented other than questions of fact. It is asserted, however, that the opinion contains an untrue statement in that it is there said that "the evidence is conflicting with respect to whether respondent sounded his horn." As pointed out, the respondent testified to the effect that he did not think he had blown his horn. But counsel has overlooked the fact that the witness Collett, who was riding with respondent at the time, testified at least four times that the respondent did sound his horn, which supports the statement made.

The petition for a rehearing is denied.

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53 Cal.App.2d 379

PEOPLE v. NEAL et al.

Cr. 3598.

District Court of Appeal, Second District, Division 1, California.

July 13, 1942.

1. Criminal law 🔑234

Where trial court permitted accused to introduce all his available evidence concerning means by which his confession of crime charged was obtained before finding him guilty thereof, error in magistrate's refusal to allow accused to introduce evidence on voir dire examination of police officers at preliminary hearing that confession was not free and voluntary was cured.

2. Criminal law ⚷1159(4)

It is not appellate court's function to pass on witnesses' credibility.

3. Criminal law ⚷1159(4)

Whether police officers' testimony or that of accused and his witnesses on question whether his confession of crime charged was free and voluntary should be believed was matter addressed to trial court's sound discretion.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Virgil Joseph Neal and Orville Steven Graham were convicted of second degree burglary, and defendant Graham appeals.

Affirmed.

Joseph K. Coady and J. Howard Sullivan, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant and his codefendant Neal were jointly charged in an information with crime of burglary in that on December 16, 1941, they entered the men's furnishing store operated by Harry F. Teeter at Hynes, California, with the intent "to unlawfully and feloniously commit theft." The cause was submitted to the trial court (sitting without a jury) upon the transcript of the preliminary hearing together with additional testimony concerning the purported confessions made by appellant Graham to the arresting officers.

From the judgments of conviction of the crime of burglary of the second degree, appeals were taken by both defendants. The appeal of defendant Neal was dismissed on June 22, 1942, leaving for the consideration of this court the appeal of defendant Graham from said judgment of conviction.

Appellant urges (1) that the court erred in finding him guilty before it determined whether his confession was free and voluntary; (2) that the evidence showed said confession to be involuntary and procured by fraud.

The record herein reveals that when Harry F. Teeter, who operated a men and boy's clothing store at Hynes, California, arrived at his store on the morning of December 17, 1941, he found articles of clothing, jewelry, etc., missing. Upon investigation he discovered the door to the store had been opened and a skylight broken. He testified that he locked the door before leaving the store the previous night and had given no one permission to enter the store; that he checked the items missing and estimated their value at $800; that on December 18, 1941, he recovered practically 100 per cent of the missing articles. On December 18th, Edward A. Fachman, a deputy sheriff, arrested appellant in company with the defendant Neal. At the preliminary hearing said officer was asked if he had a conversation with appellant and defendant Neal at the Norwalk police station after making the arrests (at which time appellant acknowledged he participated in the crime) to which question the witness replied in the affirmative and said that the statements made by appellant were free and voluntary. Appellant's counsel was permitted by the magistrate to propound a few questions to said officer on voir dire, after which appellant sought permission to put on evidence showing that the confession was not free and voluntary, to which latter request the objection of the prosecution was sustained. The hearing was continued to January 5, 1942, at which time appellant renewed his said request which was overruled, and at the conclusion of officer Fachman's testimony appellant's motion to strike on the ground that the alleged confession "was obtained by fraud and by duress and by blows," was denied.

On March 2, 1942, when the cause came on for hearing before the trial court, appellant offered to submit the same upon the transcript of the preliminary hearing together with the testimony of three witnesses (then present in the court room), in the event the trial court wished to interrogate them regarding the circumstances under which the appellant confessed to the crime charged against him. The prosecution stipulated that the cause might be submitted on the said transcript and that all prosecution witnesses might be excused except the officers who had testified at the preliminary hearing with respect to appellant's confession being free and voluntary.

After reading the transcript of the preliminary hearing, the trial court commented at length upon the conduct of the case, and, among others, made the following remarks:

"There is a very serious question in my mind, gentlemen, as to the ruling made by the magistrate who heard this matter. * * * In fact, the court won't hesitate at this time to state that the magistrate was absolutely in error in not allowing the defendants to put on evidence on voir dire as to whether or not these statements were free and voluntary statements. * * * I will have to have additional testimony * * * to clear up a very important point as to whether or not the fundamental rights of these defendants have been invaded here. * * * I assume you will put both your clients on the stand and they will positively pick out a certain man or men, as the case may be, as the man who did the beating up here, if there was any such thing done, and it is a fact those officers should be here to either deny it or admit it, that is the thing, and then it is up to the court to draw his own conclusions. You know, this idea of an officer beating up on a prisoner, sometimes they ask for it, smart kids sometimes go popping off at an officer and the officer will only take so much, but that is not any reason or grounds for an officer to beat a fellow into submission, where he makes the statement that he is going to involve himself. As I say, I want to get all the facts. I do not want to simply go on the statement of an officer here, so far as he is concerned, he does not know of anybody having beaten up these boys."

Thereafter, the witness Joe Hernandez testified that he and two friends were arrested on December 18th and about eight or eight-thirty that evening were taken to the sheriff's substation at Norwalk and confined in the "tank" there for about two hours, charged with possession of a gamecock. Said witness stated that when he was put in the tank he saw appellant and shortly thereafter officers took appellant away; that about thirty minutes later appellant was brought back and was then "full of blood * * * he says those cops hit him * * * I notice he got blood all over his mouth * * * he was spitting blood * * * and then he cannot speak very good, you see, he say he got some pain in the stomach where the cop hit him * * * and then he was sick"; that appellant was not bloody when taken from the tank.

The witness Garcia testifying through an interpreter stated appellant was in the tank when he arrived a few minutes after eight p. m. of the day in question; that appellant was all right when the officers took him out; that appellant returned in fifteen or twenty minutes "complaining with his hand on his cheek bleeding, and then with pain, pointing to his stomach or abdomen." Said witness stated he could not speak English and understood about one word in twenty. It was stipulated that the testimony of the third man, Valenzuela, would be the same as that of Garcia.

Appellant was examined on voir dire and testified in great detail as to the beating and ill treatment he received at the hands of the deputy sheriffs and officers attached to the Norwalk station; and that finally because he "was afraid they would take me out and really give me a good beating up, and I said, 'Yes, I was with him (Neal)', and they said, 'That is all we wanted', so then they took me over and put me back in the hold-over tank."

Two deputy sheriffs took the stand and denied using force or violence on appellant and stated they saw no one else use force or violence on him in order to secure his confession; that they saw no marks, bruises or blood on appellant's person and that he made no complaints to them that force had been used on him. Two officers and the desk sergeant at the station corroborated the testimony of the deputies.

Appellant while on the stand testified that one officer (Foell) punched him in the stomach, while he (appellant) was seated in the chair with his feet on the floor, and knocked appellant six or seven feet without knocking the chair over. Said officer denied this charge and testified he saw no one strike appellant; saw no marks or bruises on his face during the day or night of December 18th.

After argument the cause was submitted, whereupon the trial court commented as follows: "Well, I am satisfied in this case that there has been no force or violence used, and it does not take any particular courage for this court to say that. I don't know any reason why the court ought to go in the face of the evidence presented here, or to turn around and get a little false courage and say he does not believe the officers and he believes the Mexicans. * * * Therefore, the court now feels that these confessions are now properly before the court and must stand as they were related by the officers at the time."

[1-3] From the foregoing it conclusively appears that before the trial court found appellant guilty it permitted him to introduce all the evidence he had available con-

cerning the means by which his confession was obtained, thus effectively curing the error committed by the magistrate's ruling at the preliminary hearing. After hearing and considering the testimony of the police officers the court resolved the conflict created thereby against appellant, and concluded that his confession was free and voluntary. It is not a function of an appellate court to pass upon the credibility of witnesses, and the fact that the trial court believed the police officers rather than appellant and his witnesses was a matter addressed to the sound discretion of the trial court.

The evidence produced at the trial herein amply supports the trial court's judgment.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concurred.

53 Cal.App.2d 554

EGGERT et al. v. PACIFIC STATES SAVINGS & LOAN CO. et al. (EVANS, Building and Loan Commissioner, et al., Interveners).

Civ. 13671.

District Court of Appeal, Second District, Division 2, California.

July 24, 1942.

Rehearing Denied Aug. 17, 1942.

Hearing Denied Sept. 21, 1942.

1. Building and loan associations 🔑42(6)

Where building and loan commissioner took possession of assets of savings and loan companies, commissioner thereafter occupied status of a "trustee" of assets of each company and had the duty as trustee to take all reasonable means for protection of assets for benefit of companies, their stockholders, investment certificate holders and creditors.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

2. Building and loan associations 🔑42(6)

Where a savings and loan company's investment certificate holders commenced suit to have a trust imposed upon certain assets of another company, and building and loan commissioner thereafter took possession of latter company's assets, commissioner was bound to defend against attempt to impress a trust upon assets, and it was proper for commissioner to voluntarily intervene in the suit, and the trial court thereby acquired "jurisdiction in personam" of commissioner, which conferred upon the court plenary powers with reference to all matters directly or incidentally arising with respect to litigation.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction in Personam".

3. Trusts 🔑268

Generally, where for any reason a trustee fails to protect trust assets from adverse claims, a beneficiary may do so and may be awarded counsel fees out of the assets if the defense is conducted in good faith and on reasonable grounds, and a different rule does not apply even though beneficiary is unsuccessful in litigation.

4. Building and loan associations 🔑42(16)

Where a savings and loan company's investment certificate holders brought suit to have a trust imposed upon certain assets of another company, and building and loan commissioner thereafter took possession of latter company's assets, and holders were successful in the litigation, and commissioner intervened therein and remained neutral throughout trial, and it was necessary for defendant company's best interests that suit be defended, superior court properly awarded defendant company counsel fees, costs and expenses of litigation to be paid by commissioner.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Suit by John Eggert and others against Pacific States Savings & Loan Company and others to obtain a declaration that a certain agreement constituted a transfer of assets in trust for plaintiffs' benefit, wherein Ralph W. Evans, as Building and Loan Commissioner, intervened, and there was a judgment for plaintiffs. From an order directing Ralph W. Evans, as Building and Loan Commissioner, to pay fees of attorneys for Pacific States Savings & Loan Company, Ralph W. Evans, as Building and Loan Commissioner, appealed. After the transcript was filed, Ralph W. Evans resigned as Commissioner and Harley Hise, who was appointed Commissioner, was substituted as intervener and appellant.

Order affirmed.

See, also, 124 P.2d 815.

George S. Dennison, of Los Angeles, W. G. Harmon, of San Francisco, and Alan G. Campbell, of Los Angeles, for appellants.

O'Melveny & Myers, Louis W. Myers, Pierce Works, and W. B. Carman, Jr., all of Los Angeles, for respondents.

McCOMB, Justice.

From an order directing appellant building and loan commissioner to pay respondent's attorney's fees in the sum of $36,270, together with costs and expenses advanced by said counsel, in an action wherein respondent resisted an attempt to place a trust upon assets which had been transferred to respondent Fidelity Savings and Loan Company, appellant[1] appeals.

So far as material here, the undisputed facts are:

May 23, 1931, Fidelity Savings and Loan Company (hereinafter referred to as Fidelity) transferred all of its assets to the respondent, Pacific States Savings and Loan Company (hereinafter referred to as Pacific States), pursuant to a written agreement, which provided among other things that Pacific States should issue to Fidelity or its investors approximately $23,000,000 of so-called Fidelity Definite Term Certificates and approximately $7,500,000 nominal value of Fidelity Participating Certificates. The definite term certificates were to be paid five years after the date of the agreement and to bear interest at 6 per cent. The participating certificates were to be paid out of any net proceeds which were to be realized from the subsequent operation and disposition or other "valuation" as defined in the agreement, by Pacific States of the acquired assets.

The term of the original agreement was for five years or to May 23, 1936. By supplemental agreement the maturity date of the certificates was extended to May 23, 1938.

June 17, 1931, appellant as building and loan commissioner of the state of California took possession of the assets of Fidelity which consisted solely of the Master Fidelity Definite Term Investment Certificate and the Master Fidelity Participating Investment Certificate issued under the agreement of May 23, 1931, between Fidelity and Pacific States, and of any rights of Fidelity under said agreement.

After execution of the agreement, holders of Fidelity investment certificates exchanged them for definite term and participating certificates to such an extent that the face amount of the master certificates held by appellant is approximately $750,000. Pacific States did not pay the definite term certificates in full on May 23, 1936, or at any time thereafter. October 28, 1938, holders of Fidelity definite term certificates and Fidelity participating certificates brought the present action against Pacific States to obtain a declaration that the agreement of May 23, 1931, between Fidelity and Pacific States did not constitute an outright sale but in fact constituted a transfer in trust for the benefit of plaintiff. March 4, 1939, appellant as building and loan commissioner for the state of California took possession of the assets of Pacific States. March 6, 1939, pursuant to section 13.12 of the Building and Loan Association Act, St.1931, p. 540, Pacific States commenced an action in the Superior Court in and for the city and county of San Francisco, contesting the action of appellant in taking possession of its assets. October 30, 1939, pursuant to the same section appellant filed in said Superior Court a written notice of his determination to liquidate Pacific States. March 16, 1939, appellant filed a complaint in intervention in the present action. The main question presented remained the same as before the intervention, to wit: Did the transfer of assets from Fidelity to Pacific States by the agreement of May 23, 1931, constitute an outright sale of the assets of Fidelity to Pacific States or a transfer in trust for the benefit of Fidelity, its creditors, and certificate holders?

July 7, 1941, the trial court held in favor of plaintiffs' contention that the agreement constituted a transfer in trust for the benefit of Fidelity, its creditors, and certificate holders, and, pursuant to appropriate petition of Pacific States, made the following finding, upon which is predicated the order here questioned:

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[1] At the time the present action was instituted Ralph W. Evans was Building and Loan Commissioner for the State of California. After the transcript was filed herein he resigned as such commissioner and Harley Hise was duly appointed and qualified in his place and stead and by appropriate proceedings has been substituted as intervener and appellant in this case.

"2. The above entitled action was defended by Pacific States through its counsel of record, the firm of O'Melveny & Myers, in good faith and on reasonable grounds. The defense of said action was necessary for the proper protection and preservation of the business, properties and assets of Pacific States in the possession of intervener Ralph W. Evans, and said defense inured directly to the benefit of said business, property and assets in the possession of said intervener as Building and Loan Commissioner of the State of California and as well to the benefit of, primarily, the creditors and certificate holders of Pacific States and, secondarily, petitioner itself.

"3. Ralph W. Evans, intervener herein, heretofore intervened and appeared herein in the several capacities of (a) Building and Loan Commissioner of the State of California, (b) statutory liquidator of Fidelity Savings and Loan Association, (c) Fidelity trustee under order of this court dated on or about December 30, 1931, and (d) Building and Loan Commissioner in possession of the business, properties and assets of Pacific States. Said intervener in his various capacities has acted throughout the course of said action as a neutral and did not defend the above entitled action either on behalf of Pacific States, its business, properties and assets, or its creditors or certificate holders, or otherwise or at all.

"4. The reasonable value of the services rendered Pacific States, its business, properties and assets, and as well its creditors and certificate holders, in the defense of said action by said firm of O'Melveny & Myers was and is the sum of $36,270."

Appellant urges for reversal of the order two propositions, which will be stated and answered hereunder seriatim.

First: The Superior Court of Los Angeles County is without jurisdiction to direct appellant to pay attorney's fees of respondent's counsel from the assets of Pacific States.

[1, 2] This proposition is untenable. Appellant after taking possession of the assets of Fidelity and Pacific States, occupied the status of trustee of the assets of each of said corporations (Evans v. Superior Court, 14 Cal.2d 563, 573, 96 P.2d 107), and it was his duty as such trustee to take all reasonable means for the protection of these assets for the benefit of the respective corporations, their stockholders, investment certificate holders, and creditors. Hence, when plaintiffs sought to have a trust imposed upon certain assets of the Pacific States, it was appellant's duty to defend against this attempt to impress a lien upon the assets of the trust which he was administering. Hence, he properly voluntarily intervened in the present action and thereby the court acquired jurisdiction in personam over appellant, which conferred upon the court plenary powers with reference to all matters directly or incidentally arising with respect to the present litigation. (Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 197, et seq., 152 P. 542.)

Second: The trial court had no authority in an action of this nature to fix or allow respondent's attorney's fees.

[3] This proposition is also untenable. It is the general rule that, where for any reason a trustee fails to protect trust assets from adverse claims, a beneficiary may do so and may be awarded counsel fees out of the trust assets, if the defense is conducted in good faith and on reasonable grounds. (Trustees v. Greenough, 105 U.S. 527, 532, 26 L.Ed. 1157; see, also, Beach on Trusts and Trustees (1897), vol. 2, 1599, § 698.) See, also, for the application of the same principle to an analogous situation. (Anderson v. Great Republic Life Insurance Co., 41 Cal.App.2d 181, 190, 106 P.2d 75.) A different rule does not apply, even though the beneficiary is unsuccessful in the litigation. (Dingwell v. Seymour, 91 Cal.App. 483, 513, 267 P. 327.)

In the present case appellant as trustee of the assets of both Fidelity and Pacific States found himself on both sides of the present litigation with conflicting interests. It was to the interest of Fidelity that plaintiffs be successful; on the other hand, it was to the interest of Pacific States that respondent prevail. Therefore, appellant properly, after intervening in the action, remained neutral as between the conflicting claims and permitted respondent through its counsel to continue to contest the claim of plaintiffs. Plaintiffs were suing not as creditors of the Pacific States but as beneficiaries of an independent trust upon which they sought to impress a claim superior to any claim of the beneficiaries of the trust which appellant was administering as trustee of the Pacific States assets.

In view of the nature of plaintiffs' claim, the case of In re Pacific Coast Building-Loan Association, 15 Cal.2d 155, 99 P.2d 261, has no application, because in such case there was a contest between beneficiaries, both claiming under a single trust, while in the present case the parties had conflicting claims under independent trusts. Such case is likewise distinguishable from the present case, for the reason that in the Pacific Coast Building-Loan Association case, supra, the commissioner was in fact neutral, having no interest on either side but acting purely in his administrative capacity, while in the present case appellant had directly conflicting interests on both sides of the litigation.

[4] Applying the above rule to the facts of the instant case, since the trial court found, and it is not questioned that appellant remained neutral throughout the trial, that it was necessary for the best interests of respondent that the action be defended, and that it was defended in good faith and on reasonable grounds, it was proper for the trial court to award respondent counsel fees, costs, and expenses of the litigation.

For the foregoing reasons the order is affirmed.

MOORE, P. J., concurred.

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53 Cal.App.2d 490

JOE LOWE CORPORATION v. RASMUSSON.

Civ. 13168.

District Court of Appeal, Second District, Division 3, California.

July 21, 1942.

1. Appeal and error 🔑931(1)

In support of correctness of trial court's ruling, reviewing court was required to assume that all material facts which were in issue were decided by trial court in favor of respondent.

2. Venue 🔑7

Where contract for sale of business by defendant to plaintiff and for employment of defendant by plaintiff was executed in San Francisco county and defendant resided in Sacramento county, execution in Los Angeles county of supplemental agreement which merely extended time for payment of ⅔ of purchase price did not make action for breach of contract triable in Los Angeles county. Code Civ.Proc. § 395.

3. Domicile 🔑4(2)

The matter of "residence" is essentially one of intention.

See Words and Phrases, Permanent Edition, for all other definitions of "Residence".

4. Venue 🔑21

In action for breach of contract executed in San Francisco county, evidence established defendant's residence in Sacramento county rather than in Los Angeles county, and hence action was not triable in Los Angeles county. Code Civ.Proc. § 395.

5. Appeal and error 🔑958

Ordinarily, reviewing court is hesitant to disturb ruling denying right to amend, since trial court may withhold such right in its discretion.

6. Appeal and error 🔑1043(8)

In action for breach of contract executed in San Francisco county, brought against defendant who resided in Sacramento county, wherein court improperly ruled that case could be tried in Los Angeles county and denied motion for change of place of trial, denial of right to amend motion, which originally sought transfer to Sacramento county, so as to seek transfer to San Francisco county or other proper county, on ground that obligation sued on was incurred in San Francisco county, was erroneous and required reversal.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action for breach of contract by the Joe Lowe Corporation against Marlin B. Rasmusson. From an order denying defendant's motion for a change of the place of trial, defendant appeals.

Reversed with directions.

Johnson & Harmon and Wm. H. Henderson, both of San Francisco, and Cannon & Callister, of Los Angeles, for appellant.

Wright and Millikan, of Los Angeles, for respondent.

SHINN, Justice.

There is before us an appeal by defendant from an order denying his motion for change of place of trial. The action, which was brought in Los Angeles County, is for the recovery of damages for breach of contract. Defendant's motion as originally presented was for a transfer of the action to Sacramento County upon the ground that defendant resided in that county at the time of the commencement of the action.

[1] The law which controls in a case of this sort is found in section 395 of the Code of Civil Procedure, under the provisions of which the county in which the defendant resided at the time of the commencement of the action was the proper county for the trial unless defendant contracted to perform an obligation in a particular county, in which case either the county where performance was to be had or the county of defendant's residence was the proper one for the trial of an action founded on such obligation (the county where the obligation is incurred is deemed the county in which it is to be performed unless there is a special contract in writing to the contrary). It was necessary for the court to answer the following questions: (1) Did defendant reside in the county of Sacramento on March 7, 1941, the day the action was commenced? (2) where was the contract executed? and (3) was there a special contract in writing for performance other than in the county where the contract was executed? In support of the correctness of the court's ruling we have to assume that all of the material facts which were in issue were decided by the court in favor of plaintiff-respondent, namely, that defendant did not reside in Sacramento County at the time of the commencement of the action or that the obligation was incurred in Los Angeles County. The possible situation that the obligation may have been incurred in one county with a special contract in writing to perform it in another does not enter into the case, that is to say, there is no contention and, as will be seen from the contract itself, there could be none that performance was to be had in Los Angeles County.

According the greatest weight to the evidence which tends to support the implied findings in favor of respondent we think it showed without substantial conflict that the obligation was incurred in the county of San Francisco and that defendant resided at the time of the commencement of the action in the county of Sacramento. In either case Los Angeles County was not the proper county for the trial of the action.

The contract was dated November 15, 1939, and was executed by the contracting parties in San Francisco. In its material provisions it expressed an agreement between the parties as follows: (1) Defendant sold to plaintiff a going business in the manufacture and sale of frozen confections, to be paid for as follows: "The purchaser agrees to pay therefor the sum of $75,000, upon which the sum of $1,000 paid on signing this agreement shall be credited and the balance in cash or certified check payable on conveyance of title or when the seller may elect"; (2) plaintiff agreed to employ defendant for two years at a stipulated compensation plus actual and necessary expenses, and defendant agreed that he would to the best of his ability devote his whole time to increase and develop the business of the purchaser; (3) defendant agreed to reduce to writing certain new ideas about the business and to place the same in escrow with a bank at Sacramento, to be delivered to plaintiff within six months after the date of the agreement, defendant to receive 10 per cent of the net revenue derived from the use of said new ideas for a given number of years; (4) transfer of title and delivery of all papers should take place on the 22d day of November, 1939, at Sacramento, California, or at whatever other time or place was mutually agreed upon by the parties. On November 22, 1939, in the county of Los Angeles, a further agreement was entered into between the parties, which provided that instead of $75,000 cash plaintiff would pay $25,000 cash November 22, 1939, receipt of which was acknowledged by the agreement, that certain items which were to be prorated under the agreement, such as rentals, salaries, light, etc., should be adjusted within fifteen days after November 22, 1939; that $25,000 would be paid on or before May 15, 1940, and the entire balance, as adjusted, on or before May 15, 1941. Plaintiff agreed to deposit with a Los Angeles bank bonds satisfactory to the defendant sufficient to secure the deferred payments, the interest on the bonds to be paid to plaintiff. The adjustment was made, the bonds were deposited and transfer of title took place as agreed.

The complaint charged that the agreement had been breached by the defendant in certain respects, namely, that defendant for approximately a year prior to the commencement of the action failed and neglected to devote his time and ability to increase and develop the business and neglected said business, to plaintiff's damage, in the sum of $36,000; that defendant devoted a substantial part of his time and energies and resources to the development of a competing business, wilfully hindered plaintiff's business, and assisted a competitor by various alleged means and devices, to plaintiff's damage in the sum of $25,000, and that defendant failed, refused and neglected to reduce to writing his new ideas concerning said business and to deposit such writing in escrow for plaintiff's benefit, as provided by the agreement, to plaintiff's damage in the sum of $30,000. It will be noted that there was no breach of the agreement to transfer the business. It will also be noted that the obligations upon which the present action is founded were incurred by the terms of and at the time of the signing of the agreement which was executed in San Francisco. The agreement of November 22, 1939, which we will call the supplemental agreement and which was signed in Los Angeles, imposed upon the defendant no additional obligation except to forego the right to receive the total purchase price in cash and to accept payment upon other terms.

[2] Counsel are agreed that the trial court regarded the act of signing the supplemental agreement as the final act of the parties in the execution of the contract and held accordingly that the obligation upon which the action is founded was incurred in the county of Los Angeles, was to be performed there, since there was no written stipulation to perform it elsewhere, and that therefore the action was triable in Los Angeles County even though the defendant resided in another county at the time of the commencement of the action. We are not able to give the contract this construction and effect. The action is not founded upon any obligation of the defendant incurred by the supplemental agreement, if indeed, it could be said that he assumed an obligation at all, in a sense to be recognized here, in agreeing to extend the time for the payment of two-thirds of the purchase price. The supplemental agreement is so lacking in materiality to the issues involved that the case could be tried and determined without proof of the supplemental agreement itself. Respondent contends that the original agreement was incomplete, that the supplemental agreement "was an integral and necessary part of the contract between the parties and was the final act giving binding force and effect to the agreement of the parties." But if the supplemental agreement had never been made, the original agreement would have been complete and the purchase price, less $1,000, would have been payable in full in cash or by certified check on conveyance of title. The option was with defendant whether he would receive payment at some other time; his failure to stipulate a different time of payment would have detracted nothing from the completeness of the agreement. The action therefore could not properly have been held for trial in Los Angeles County upon the theory that the obligation was incurred in that county or upon the ground that it was to be performed there.

We now take up the evidence bearing upon the implied finding that defendant did not reside in Sacramento County. It was recited in the agreement of November 15, 1939, that defendant resided in Sacramento at that time and it is not disputed that he did reside there. Certain other facts were established without conflict by affidavits filed in support of and in opposition to the motion, namely, that defendant had resided in Sacramento from 1932 until after the date of the agreement; that he had three ice cream plants which he sold to plaintiff, one in Sacramento, one in Fresno and the third in Oakland, which he operated through a corporation, Frigid Process Company; that soon after plaintiff purchased these businesses a new corporation was formed under the name Frigid Process Corporation, which acquired the three mentioned plants and purchased one other in South Pasadena; that defendant became president and general manager of this new corporation; that at plaintiff's request he came to Los Angeles in December, 1939, managed the South Pasadena plant and the other plants as well; that he then took up his residence in Los Angeles and maintained an apartment there until December, 1940; that from April to July, 1940, he had headquarters in the South Pasadena plant but spent most of his time in Oakland, Sacramento, and other Northern California districts; while away from Los Angeles he was paid his traveling expenses by plaintiff; in July, 1940, the general home office of the Frigid Process Corporation was established in Los Angeles; from July, 1940, to December, 1940, defendant had no business headquarters; in December, 1940, at plaintiff's request, he established headquarters at a hotel in Oakland, where he lived until February 15, 1941, during which time he was paid his traveling expenses away from Oakland; that on the latter date he moved to Sacramento and continued to live there at the home of his brother-in-law, one Bertagna, and also rented an apartment in Sacramento, where he transacted his business, although he had callers, received his mail and telephone calls at the home of his brother-in-law; he did not charge to plaintiff and did not receive his expenses while in Sacramento subsequent to February 15, 1941.

It was not shown that defendant maintained a residence in Los Angeles at any time after December, 1940, when he moved to Oakland, nor whether he had any family other than his brother-in-law in Sacramento. It was not denied that from and after December, 1939, defendant spent the greater portion of his time away from Los Angeles on business of the company. No fact or circumstance was shown tending to prove that defendant expected to leave Sacramento after he moved there February 15, 1941, and to take up his residence elsewhere, or that he had any reason to do so. By affidavit he stated that it had always been his intention to return to Sacramento where he had always considered his home to be and tc keep that as his permanent home. His other residences in Los Angeles and Oakland were taken up at the request of his company and for business reasons. It was not shown that he owned any real estate either in Los Angeles or Sacramento counties. In support of the motion the brother-in-law, Bertagna, made affidavit that he had rented his home which he owned in Sacramento to defendant about February 15, 1941, and by affidavit of a witness on behalf of plaintiff it was shown that Bertagna had stated over the telephone to the witness that he, Bertagna, was renting the house himself and that the defendant was living there with him as his guest. Except in this minor particular the evidence bearing upon the question of residence was without conflict.

[3, 4] We do not find in the record any evidence which would support a finding that defendant resided in Los Angeles County rather than in Sacramento County. If his residence was not in one county it was in the other and all of the evidence is to the effect that it was in the latter county. The matter of residence is essentially one of intention. Defendant had resided in Sacramento seven years and had been engaged in business in that county for seven years before selling out to plaintiff. He returned there after a temporary absence due to the demands of business and the requests of the plaintiff. Upon this showing and except for an attempted amendment of the motion to change place of trial, the action in our opinion should have been transferred to the county of Sacramento.

[5, 6] We feel that we should add that in discussing the matter of residence we have had in mind that there is nothing in the record to show that the trial judge either believed or found that defendant did not reside in Sacramento County. We have been obliged to presume that he did so find because such a finding would have given support to the order. We doubt whether the order would have been the same had the decision depended solely upon the question of residence. In view of the admitted fact that the court construed the contract as one executed in Los Angeles County, the question of residence would have seemed immaterial as the action would then have been triable in Los Angeles County even though defendant lived in Sacramento County.

Another matter requires attention. Before a ruling was made on the motion defendant gave notice of an intended amendment so that his motion would request a transfer to the city and county of San Francisco or other proper county on the stated ground that the obligation sued on was incurred in San Francisco. Affidavits and counter affidavits were filed on the application for leave to amend. The motion for transfer to Sacramento County and the motion to amend came on for hearing at the same time and both were denied. As the right to amend is one which the court may withhold in its discretion we would be hesitant under ordinary circumstances to disturb such a ruling, but here there were unusual conditions. We believe the order must be reversed and that defendant's amendment should be allowed. There are several considerations leading to this conclusion. The most important one is that the case was improperly held in Los Angeles County for trial. We believe also that the court in declining to allow the amendment found that the execution of the supplemental agreement in Los Angeles County was decisive as to the proper county for the trial of the cause and that the city and county of San Francisco for that reason would not be the proper county for trial of the action. We believe defendant was shown to have the right to a transfer of the action either to Sacramento County or the city and county of San Francisco.

The order is reversed with directions that the action be transferred to the city and county of San Francisco unless defendant within a time designated by the court waives his right for transfer to the city and county of San Francisco, and if such waiver is made transfer shall be made to Sacramento County.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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53 Cal.App.2d 552

LYLE v. LYLE.

Civ. 13634.

District Court of Appeal, Second District, Division 2, California.

July 24, 1942.

1. Appeal and error 🔑882(1)

A party cannot successfully complain of error in the trial court which he himself has invited.

2. Divorce 🔑312

Where defendant suggested that court appoint an investigator on plaintiff's motion to modify an interlocutory decree of divorce granting custody of parties' minor children to defendant, the defendant could make no objection on appeal to court's receiving and acting upon investigator's report, since any error in the course followed by trial judge had been "waived".

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action for divorce by Ruth Lyle against Clayton H. Lyle, wherein an interlocutory decree of divorce was entered awarding to defendant the custody of the minor children of plaintiff and defendant. From an order awarding the custody of the parties' minor children to plaintiff on an application to modify the terms of the interlocutory decree, the defendant appeals.

Order affirmed.

Roy J. Farr, of Los Angeles, for appellant.

Arch G. McLay, of Huntington Park, for respondent.

McCOMB, Justice.

From an order awarding the custody of the parties' minor children to plaintiff on an application to modify the terms of an interlocutory decree of divorce, defendant appeals.

So far as material here, the essential facts are:

By an interlocutory decree of divorce the trial court awarded to defendant the custody of the minor children of plaintiff and defendant. Thereafter plaintiff made a motion to modify the decree by having the custody of the children awarded to her. At the time this motion came on for hearing the following colloquy occurred between counsel for plaintiff, Mr. Farr, and the court:

"Mr. Farr: I might state that we suggested Your Honor appoint an investigator. There are children involved.

* * * * *

"The Court: I understand that. I will have an investigator go into it."

Thereafter the court appointed an investigator who made a report which the court approved and the court thereafter ordered that the custody of the children be awarded to plaintiff. It is conceded that the entire evidence upon which the order was made consisted of an affidavit which plaintiff filed in support of her motion and the report of the investigator appointed by the court.

Defendant urges that the order should be reversed, for the reason *that the court was without authority to delegate to an assistant the duty of investigating the conditions surrounding the children and bas-*

ing its order upon the report of such assistant.

[1] Defendant may not urge the foregoing proposition as ground for reversal of the order of the trial court, for the reason that the law is established that a party cannot successfully complain of error in the trial court which he has himself invited. (Van Der Veer v. Winegard, 41 Cal.App.2d 518, 521, 107 P.2d 97; Reed & Co. v. Harshall, 12 Cal.App. 697, 706, 108 P. 719; 5 C.J.S. (1937), Appeal and Error, p. 173, § 1501; 2 Cal.Jur. 847, § 496.)

[2] In the present case it is evident that the investigator was appointed at the suggestion of defendant's counsel and that no objection was made to the court's receiving and acting upon the investigator's report. Therefore, defendant has waived any error in the course followed by the trial judge.

The opinion of this court upon the use of investigators in domestic relations cases is ably expressed by Mr. Justice Hanson in Washburn v. Washburn, 49 Cal.App.2d 581, 589, 122 P.2d 96, and the views therein expressed we again approve and commend to the careful consideration of the trial judges handling domestic relations cases.

For the foregoing reasons the order is affirmed.

MOORE, P. J., concurred.

53 Cal.App.2d 619

BRADLEY et al. v. PACIFIC EMPLOYERS INS. CO.

Civ. 11943.

District Court of Appeal, First District, Division 1, California.

July 28, 1942.

1. Insurance 🔑665(4)

Evidence that insured motorist drank intoxicating liquor to extent and within such close proximity of time to happening of accident that liquor was noticeable upon his breath half an hour after accident supported finding that motorist "had been drinking intoxicating liquor", within provision in automobile liability policy relieving insurer from liability in that event, without regard to fact that insured had been drinking intoxicating liquor, was proximate cause of the accident.

See Words and Phrases, Permanent Edition, for all other definitions of "Had Been Drinking Intoxicating Liquor".

2. Insurance 🔑435

The phrase "had been drinking intoxicating liquor", as used in provision of automobile liability policy relieving insurer from liability if insured or driver had been drinking intoxicating liquor at time of accident, did not require insurer to show that fact that insured or driver had been drinking intoxicating liquor was proximate cause of accident in order to be relieved from liability.

3. Insurance 🔑435

Where an automobile indemnity policy contained exclusion clauses exempting insurer from liability if an accident occurs while automobile is being used under any of conditions therein specified, proof alone of existence of any of those conditions at time of accident suspends coverage under policy, and insurer's exemption from liability does not depend upon condition becoming cause of accident or even contributing to the casualty.

4. Appeal and error 🔑999(3), 1008(1)

The question whether indulgence in intoxicating liquor by automobile driver has affected driver's observation, alertness, or sound judgment, or has encouraged recklessness or caused drowsiness, is a "question of fact" to be determined by trial court or jury from the evidence adduced in particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Insurance 🔑665(4)

Even if phrase "had been drinking intoxicating liquor", as used in provision in automobile liability policy relieving insurer from liability if insured or driver had been drinking intoxicating liquor at time of accident could be construed as relieving insurer from liability only upon showing that drinking had some influence upon insured or driver in operation of automobile, evidence

supported trial court's finding that liquor drunk by insured influenced his operation of automobile at time of accident, so as to relieve insurer from liability to injured person.

6. Insurance ⟹311(1)

An injured person suing upon a policy of public liability insurance is bound by limitations thereof to same extent as the insured.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Minnie Bradley and another against the Pacific Employers Insurance Company, as insurance carrier of William Schassler, to recover the amount of two separate judgments for damages theretofore obtained by plaintiffs against Schassler on account of injuries received by them in an automobile collision. From a judgment for defendant, the plaintiffs appeal.

Affirmed.

Van A. Neher, of San Francisco, and Phillips & Munck, and Robert M. Corson, all of Oakland, for appellants.

Weinmann, Quayle & Berry, of Oakland, for respondent.

KNIGHT, Justice.

The plaintiffs, Minnie Bradley and Georgia Wells, brought this action against the insurance carrier of William Schassler to recover the amount of two separate judgments for damages in the sums of $1,196 and $341 theretofore obtained by plaintiffs against Schassler on account of injuries received by them in a collision between an automobile owned and driven by Schassler and the one in which plaintiffs were riding. The defendant company denied liability upon the ground that certain conditions specified in the policy exempting the insurer from liability existed at the time of the accident. The trial court so found, and accordingly rendered judgment for defendant, from which plaintiffs appeal. Insufficiency of the evidence to support the findings and judgment is the ground of appeal. The points urged in that behalf are without merit.

The insurance policy sued upon is known as a "Non-Alcoholic Policy." It is issued in consideration of a reduced premium. On the outside of the policy, at the top, in large red type, appeared the notation "NON-ALCOHOLIC POLICY"; and at the top of the first page, inside, also in large red type, appeared the notation "This Policy Contains Alcoholic Exclusions: See Section 2 Paragraph 'E' of the Conditions." The exclusions thus referred to provided: "This Insurance is Subject to the Following Conditions, Limitations, and Agreements: * * * 2. EXCLUSIONS. It Is a Material Condition of This Policy: * * * (E) The Company shall not be liable under Section Two (2) of the Policy, (1), if at the time of the accident intoxicating liquor is being carried in or on the automobile covered herein; (2) if the Assured or Driver had been drinking intoxicating liquor; (3) if the Assured or Driver was driving while intoxicated. For the purposes of this policy all beverages of any alcoholic content (except those beverages which are commonly known as 'non-alcoholic') shall be considered intoxicating liquor. Conclusive proof of the carrying, transportation or use of intoxicating liquor shall be either or all of the following conditions: (1) By the statement of the Assured, Driver, or any other person having knowledge of such possession, use or transportation of said liquor; (2) By the findings and/or reports of Police Investigators; (3) By the statement and/or testimony of witnesses in any trial or prosecution of any claim arising out of the accident." The basic findings of the trial court were that "* * * at the time of and within one hour prior to said accident * * * said William Schassler had been drinking intoxicating liquor within the definition contained in said policy of automobile insurance as set forth in paragraph II of these findings, and that said William Schassler exhibited evidence of said drinking at the time and place of said accident, and subsequent thereto, and that said facts were conclusively established within the provisions of said policy of automobile insurance by written statements signed and approved by said William Schassler, and by statements of other persons having knowledge of such use of said intoxicating liquor." The evidence supporting the foregoing findings consists of the testimony of Schassler, who was called as a witness by plaintiff, two written statements made and signed by him after the accident, and the stipulated testimony of a doctor. Schassler's testimony and written statements were to the effect that he had been drinking intoxicating liquor before the accident, and the stipulation covering the doctor's testimony was that he examined Schassler half an hour after the accident and that Schassler then "had liquor or alcohol upon his breath which was noticeable to the doctor."

Plaintiffs contend, however, that the exclusion clause in question is ambiguous, and that construed most strongly against the insurer placed upon the defendant the burden of establishing not only that Schassler had been drinking intoxicating liquor, but also that the drinking thereof "had some influence" on him in the operation of his car, and "some relevancy" to the happening of the accident; and that since Schassler claimed in his testimony and written statements that the intoxicating liquor he drank did not affect his "sobriety" and that he was not intoxicated, defendant failed to bring the case within the scope of the exclusion clause relied upon.

[1-3] The evidence showing that Schassler drank intoxicating liquor to the extent and within such close proximity of time to the happening of the accident that the liquor was noticeable upon his breath half an hour after the accident, is legally sufficient to support the trial court's finding that Schassler "had been drinking intoxicating liquor within the definition contained in the policy." It is doubtless true and in fact defendant concedes that the phrase "had been drinking intoxicating liquor" should be construed to mean had been drinking at the time of the accident, and not at some time remote thereto; but it is quite certain that defendant was not required to show that the fact that Schassler had been drinking intoxicating liquor was the proximate cause of the accident, for as held in the following cases, where an automobile indemnity policy contains exclusion clauses exempting the insurer from liability if an accident occurs while the automobile is being used under any of the conditions therein specified, proof alone of the existence of any of those conditions at the time of the accident suspends the coverage under the policy; and the insurer's exemption from liability does not depend upon the condition "becoming the cause of the accident or even contributing to the casualty." Coolidge v. Standard Acc. Ins. Co., 114 Cal. App. 716, 300 P. 885, 888; Sears v. Illinois Indemnity Co., 121 Cal.App. 211, 9 P.2d 245; Conner v. Union Automobile Ins. Co., 122 Cal.App. 105, 9 P.2d 863.

And even considering the case from plaintiffs' viewpoint, that defendant was required to show that at the time of the accident Schassler was affected, to some extent at least, in the operation of his car by the liquor he drank prior to the accident, the evidence presented, including Schassler's version of the happening of the accident, was clearly sufficient to justify the conclusion that such was the case. It appears therefrom that at the time of the accident Schassler, a chemist, 50 years old, lived alone in Emeryville, and that the events leading up to the happening of the accident, as related by him, were these: Earlier that evening he drove his car on a pleasure trip out Dublin Canyon, and returned home about 8:30 o'clock. Soon afterwards he drove over to Berkeley to eat dinner at a place called "Spengler's"; and he there drank a bottle of beer. He finished eating his dinner about 10 o'clock and returned home, remained there until about 11:30 o'clock and then concluded to take another ride. He had no definite destination in mind, so he drove out the Eastshore Highway through Richmond, thence north on San Pablo Avenue; and around midnight he stopped at a night club, called "Sunnyside Inn," in San Pablo, to get a drink. He stayed through the "floor show" and during his visit there drank two "coke highballs" consisting of whiskey and coca-cola. He left about 15 minutes after the "floor show" was over to drive home, but lost his way; and after driving around aimlessly for some time he eventually arrived back at Sunnyside Inn. He did not go in, but "got his bearings" and again started home. The night club is located on Market and Kearney Streets, and he had not travelled far along Market Street when the collision took place. Plaintiffs were travelling along Twenty-third Street, which is an arterial, and the intersection at Market is protected by stop signs on Market Street. Schassler, according to his statement, stopped at the sign, looked in all directions; but despite the fact that plaintiffs' car was then approaching the intersection with the headlights burning, he saw no cars in the vicinity of the intersection and he started across at four or five miles an hour. Just after he started he saw plaintiffs' car as it neared the intersection, travelling, so he stated, about 45 miles an hour, and he attempted to cross in front of it. The impact immediately followed. As appears from his testimony and written statements, he was considerably confused as to the time he entered the Sunnyside Inn, the time he left there, and how long he drove around while "lost." In one of his written statements he stated that he arrived there about 12:30 o'clock; that after leaving there he drove around for about 10 minutes, and left there the second time "around 1:45" (the accident happened about 2 o'clock); whereas at the trial he testified that he was in the night club, drinking, "around 12 o'clock"; that he did not remember exactly what time he left there but that it was "around 12:30." When asked "How long do you think you were lost?" he replied, "It must have been at least an hour, maybe more than an hour." He was then asked this question: "Well, the accident happened about an hour then after you had these drinks, is that correct?" and he answered: "I do not know the time exactly. I had no watch going and I don't know what time it was. That is only my judgment, an hour or half an hour or two hours. I don't know exactly."

[4-6] In disposing of appeals in negligence cases the reviewing courts, on numerous occasions, have held that the indulgence in intoxicating liquor by the driver of an automobile may and often does have a tendency to affect his keenness of observation, alertness, or sound judgment, or to encourage recklessness or cause drowsiness; and obviously the question of whether in any given case a driver has been affected in any of the ways mentioned is one of pure fact to be determined by the trial court or jury from the evidence adduced in that particular case. In view of the somewhat erratic conduct on the part of Schassler after leaving the night club the first time, there is no legal ground upon which it may be held on appeal, as a matter of law, that his driving was not influenced, to some extent at least, by the indulgence in the intoxicants he acknowledged having taken before the accident. True, he claimed the liquor he drank did not affect him in any way in the driving of his car; and he may have honestly so believed. But, if material, that was the question of fact the trial court, rather than Schassler, was called upon to decide; and it is apparent that the surrounding circumstances were such as justified the trial court in disagreeing with Schassler's conclusion. It follows, therefore, that even though the exclusion clause here involved is susceptible of the construction contended for by plaintiffs, the evidence is legally sufficient to support the trial court's finding; and since an injured person suing upon a policy of public liability insurance is bound by the limitations thereof to the same extent as the assured (Western Machinery Co. v. Bankers I. Ins. Co., 10 Cal.2d 488, 75 P.2d 609), plaintiffs herein were not entitled to recover on the policy.

Accordingly the judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

53 Cal.App.2d 455

PEOPLE v. COTA.

Cr. 473.

District Court of Appeal, Fourth District, California.

July 17, 1942.

1. Criminal law 🔑1110(3)

Where defendant on appeal from conviction made a motion to correct transcript to show that a criticized instruction was given at request of the people, and it appeared from trial judge's affidavit that instruction was requested by the people, motion would be granted and instruction would be considered as one given at request of the people.

2. Criminal law 🔑814(20), 1173(2)

It is proper to refuse an instruction as to a lesser offense or degree included in offense charged where evidence warrants a conviction, if at all, only for the higher offense or degree, but error in giving such an instruction under such circumstances is not reversible unless it appears that defendant has been prejudicially affected thereby.

3. Criminal law 🔑1172(7)

Where defendant was charged with assault with a deadly weapon, and evidence was sufficient to support a conviction of the crime as charged but defendant was convicted of simple assault, an instruction that jury could find defendant guilty of simple assault as being an offense included in the offense charged was not reversible error, notwithstanding that defendant denied that he had struck or stabbed prosecuting witness. Pen.Code, § 245.

4. Criminal law 🔑1144(14)

Where defendant was charged with assault with a deadly weapon, and evidence was sufficient to support a conviction of the crime as charged, and jury convicted defendant of simple assault after being instructed that jury could find defendant guilty of simple assault as being an offense included in the offense charged, it could not be assumed that jury would have acquitted defendant in absence of such instruction. Pen.Code, § 245.

Appeal from Superior Court, Imperial County; Roy D. McPherrin, Judge.

Amado Cota was convicted of simple assault, and he appeals.

Affirmed.

Reginald L. Knox, Jr., of El Centro, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of assault with a deadly weapon under section 245 of the Penal Code, it being alleged that on a certain date he committed such an assault by stabbing and cutting the person of one Jesus Sua. A jury found him guilty of simple assault and he has appealed from the judgment and from an order denying his motion for a new trial.

[1] It is admitted that Sua was badly injured through a knife wound inflicted by someone. The appellant throughout has contended that he is not the person who inflicted the wound and that he was not present when the act was done. It is conceded, as it must be, that the evidence is sufficient to have supported a conviction of the crime as charged. It is earnestly contended, however, that there is no evidence of any felonious act other than the stabbing of Sua with a knife; that if the appellant committed that act he was guilty of an assault with a deadly weapon and not of the lesser crime; that the court erred in giving an instruction in which the jury was told that it might find the appellant guilty of simple assault as being an offense included in the offense charged; that this instruction was prejudicial to him; and that since he was either guilty of the offense as charged, or not guilty, he is entitled to a reversal. In this connection the appellant has moved to correct the transcript in order to show that this criticised instruction was given at the request of the People and not of the appellant. It appears from an affidavit of the trial judge that this instruction was requested by the People and that no instructions were requested by the appellant. For present purposes, we will grant the motion and consider the instruction as one given at the request of the People.

[2] It is well established in this state that it is proper to refuse an instruction as to a lesser offense or degree included in the offense charged where the evidence warrants a conviction, if at all, only for the higher offense or degree. People v. Rogers, 163 Cal. 476, 126 P. 143; People v. Galloway, 104 Cal.App. 422, 286 P. 476; People v. DiDonato, 90 Cal.App. 366, 265 P. 978. It has also been held in this state that it is error to give such an instruction under such circumstances, but it has frequently been held that such error is not reversible unless it appears that the defendant has been prejudicially affected thereby. In People v. Tugwell, 32 Cal. App. 520, 163 P. 508, 511, where this matter was discussed and the authorities considered, the court said: "Counsel for appellant say the jury might have disagreed, but we cannot indulge in such presumption. On the contrary, since the jury found that defendant unlawfully killed Maude Kennedy, the presumption is that, had the instruction complained of not been given, the jury would have found him guilty of murder. Therefore, conceding the effect of the erroneous instruction was to cause the jury to bring in a verdict for a lesser offense, nevertheless defendant is in no position to complain, since he is not prejudiced by reason thereof." In People v. Washburn, 54 Cal.App. 124, 201 P. 335, 336, the appellant, who was charged with an assault with a deadly weapon, was convicted of simple assault in accordance with an instruction authorizing such a verdict. In considering a contention similar to that here made the court there said: "There can be no presumption that any of the jurors had any reasonable doubt of the guilt of the defendant, or that if said instruction had not been given, a verdict of not guilty or a disagreement would have resulted. We cannot impute any misconduct or want of integrity to any of the jurors, and we must hold that, while believing the defendant guilty of the greater offense, they found some circumstance of mitigation that inclined them to exercise

this clemency. At any rate, it cannot be said that the error was prejudicial or resulted in a miscarriage of justice." To the same effect, see People v. Alderson, 105 Cal.App. 202, 287 P. 362, where the giving of a similar instruction resulted in a verdict of simple assault although the evidence indicated guilt of a higher offense.

[3] The appellant argues that such cases are to be distinguished from the instant case in that in all of the cases cited the defendant admitted the commission of the act in question but pleaded self defense or other justification, whereas here this appellant at all times denied that he had struck or stabbed the prosecuting witness. It is, therefore, argued that in such a case as this where the appellant is guilty, if at all, of one crime only, it was error to instruct the jury that it may convict him of a lesser and included offense and that such error is prejudicial in that the appellant's chance for an acquittal was lessened. In People v. Alderson, supra, and in some of the other cases cited in the briefs, but to which we have not referred, it does not appear whether or not the defendant admitted the act in question while claiming justification. In People v. Tugwell, supra, it does appear that the defendant strenuously denied that he was the person who had taken the life of Mrs. Kennedy. In our opinion, the distinction thus relied on is not sufficient to take this case out of the rules which have been rather consistently followed in this state.

[4] The entire question here was whether the appellant was the person who had inflicted the knife wound in question. If the jury had had any reasonable doubt that he was that person it was its duty to acquit him and it was so instructed. Having found him guilty at all they necessarily found that he was the person who had inflicted the wound and, having so found, it cannot be assumed that in the absence of this instruction they would have acquitted the defendant in flagrant disregard of the facts found, of their duty and of the court's instructions. It is more reasonable to believe that the giving of this instruction afforded the jury an opportunity, which it improved, to deal more leniently with the appellant than was otherwise warranted by the evidence which they accepted as true, than to believe that it found that the appellant was not the person who inflicted the wound but disregarded that finding and found him guilty anyway. So far as disclosed by, or may be inferred from, the record, the appellant was benefited rather than prejudiced by this instruction which, although it should not have been given, was too favorable to him.

It may be further observed, although not controlling here, that an affirmance of this judgment will be much more beneficial to the appellant than would be a reversal. He was sentenced to six months in the county jail with credit for time already served. It would seem to appear that his sentence will be completed before any judgment of this court can become final and any necessity for a new trial would now probably injure him to a far greater extent than any error of which he complains.

The judgment and order are affirmed.

MARKS, J., concurred.

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53 Cal.App.2d 546

HOWARD v. BENNETT et al.

Civ. 13566.

District Court of Appeal, Second District, Division 2, California.

July 24, 1942.

1. Courts 🔑472(4)

The statute providing for declaratory relief action was not designed to deprive the superior court sitting in probate of its exclusive jurisdiction to construe provisions of a will and determine the rights of parties thereunder. Code Civ.Proc. § 1060.

2. Courts 🔑472(4)

Generally the superior court sitting in probate has exclusive jurisdiction to determine the persons having an interest, and share that each has, in the estate of a decedent. Probate Code, §§ 100, 1020, 1021.

3. Courts 🔑472(4)

Where superior court sitting in probate could give full relief, it had exclusive jurisdiction to construe terms of will in estate which it was administering so as to deprive superior court in general of jurisdiction to entertain declaratory relief action for purpose of construing the will. Code Civ.Proc. § 1060; Probate Code, §§ 100, 1020, 1021.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Declaratory relief action by William Duff Howard against Albert Austin Bennett and others. From an adverse judgment, defendants appeal.

Reversed, with directions.

Walter G. Danielson, of Los Angeles, for appellants.

Harvey L. Silbert, of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in a declaratory relief action for the purpose of having construed certain provisions of a will, defendants appeal.

These are the undisputed facts:

Lilly B. Howard died testate November 9, 1938. November 16, 1938, her will was duly admitted to probate in the Superior Court of Los Angeles County sitting in probate. June 13, 1939, plaintiff filed in the superior court the present action, seeking to have the court declare plaintiff's rights under the terms of decedent's will, should he defend and prosecute actions concerning property which some of the beneficiaries of decedent claimed to belong to decedent's estate.[1]

By appropriate proceeding defendants questioned the jurisdiction of the court to entertain the present proceeding.

This is the sole question necessary for us to determine:

Where a superior court sitting in probate can give full relief, does it have exclusive jurisdiction to construe the terms of a will in an estate which it is administering so as to deprive the superior court in general of jurisdiction to entertain a declaratory relief action for the purpose of construing the terms of said will?

[1] This question must be answered in the affirmative. Section 1060 of the Code of Civil Procedure, which provides for a declaratory relief action, was not designed to deprive the superior court sitting in probate of its exclusive jurisdiction to construe the provisions of a will and determine the rights of the parties thereunder. (See Pennington v. Green, 152 Kan. 739, 107 P.2d 766, 768; In re List's Estate, 283 Pa. 255, 129 A. 64; In re Lochrie's Estate, 340 Pa. 145, 16 A.2d 133, 138; Stewart v. Herten, 125 Neb. 210, 249 N.W. 552, 554.)

[2] It is the general rule in California that the superior court sitting in probate has exclusive jurisdiction to determine the persons and share that each has in the estate of a decedent (§§ 100, 1020, 1021, Prob.Code; Luscomb v. Fintzelberg, 162 Cal. 433, 123 P. 247; Trout v. Ogilvie, 41 Cal.App. 167, 174, 182 P. 333; Meilink v. Gianelli, 100 Cal.App. 615, 616, 280 P. 561.

McCaughna v. Bilhorn, 10 Cal.App.2d 674, 52 P.2d 1025, is not here in point, for in the cited case the superior court sitting in probate could not, as in the instant case, settle the entire controversy between the parties. The plaintiff had filed his claim with the estate, which had been rejected. He was, therefore, relegated to an action on the civil side of the superior court to establish his claim and in so doing he properly sought to have the court determine the rights as to which he was in doubt under the provisions of the will.

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[1] The paragraph in the will which was in question read as follows:

"Ninth: In case any legatee or devisee or beneficiary mentioned or referred to in this my Will, for whom or for whose benefit I have made any provision therein, shall endeavor in anywise to contest in any court, or before any tribunal, this will or the validity thereof, or its due and proper execution, or the provisions applicable to him or her, or any other provision of this my will, or shall commence any suit or action, or submit to any court or other tribunal, or be a party to any pleading or proceeding, which suit, action pleading or other proceeding assails or draws in question the validity or operation of any of the provisions of said will, or shall in any way question my acts in making this will, or any of its provisions, then and in that event such legatee, devisee or beneficiary shall thereupon forfeit and shall thenceforth cease to have any right, title or interest in or to any portion of my estate, or any property devised or bequeathed hereunder, or any income therefrom; and any and all provisions in this will in favor of or for the benefit of such person are hereby absolutely revoked and eliminated and any and all rights or interests which such person would otherwise have had hereunder shall as wholly fail as if such person had predeceased me; and I further direct that any expense incurred by my executors in defending any contest in or about, or in respect to this will, or the provisions thereof, shall be paid from my estate."

[3] In the case now before us the superior court sitting in probate was in a position to settle and determine all of the rights of the parties and it was not necessary for plaintiff to resort to the civil side of the superior court.

For the foregoing reasons the general rule above stated applies to the facts of the present case and the superior court sitting generally was without jurisdiction to entertain the present action.

For the foregoing reasons the judgment is reversed with directions to the trial court to dismiss the action.

MOORE, P. J., concurred.

53 Cal.App.2d 439

DAVIS v. STEWART.

Civ. 11980.

District Court of Appeal, First District, Division 2, California.

July 17, 1942.

Hearing Denied Sept. 14, 1942.

1. Mortgages 🔑33(5)

That written instruments evidencing transaction which plaintiff contended was a security transaction and which defendant contended was a sale of land to defendant contained option to sell land back to plaintiff was not conclusive of a mortgage transaction, but was a circumstance to be considered in favor of plaintiff.

2. Appeal and error 🔑1097(1)

Record established that evidence on second trial of action to have deed absolute in form declared to be a mortgage was different from the evidence on the first trial, and decision rendered on appeal following the first trial was not the "law of the case" on subsequent appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

3. Mortgages 🔑38(1)

Evidence sustained judgment for plaintiff on ground that deed and other written instruments, including option to repurchase, executed by the plaintiff and defendant were intended as a mortgage and not as an absolute sale.

4. Mortgages 🔑608½

Where plaintiff, who had executed written instruments including deed absolute on its face and had been granted five-year option to repurchase, brought action within the five-year period to have instruments declared a mortgage, and defendant contended that instruments established existence of sale, trial court properly received evidence and made findings showing amount of disbursements made by defendant on plaintiff's behalf, and amount of interest that had accrued, and made findings of amounts received by defendant as rents, issues and profits and of amount of purchase price due under terms of the agreement, and entry of judgment for plaintiff was proper, even if transaction was a sale as contended by defendant.

5. Appeal and error 🔑171(1)

Although plaintiff contended that agreement executed by parties was a mortgage and defendant contended that it was a deed absolute, reviewing court was not limited by those contentions and had duty to grant plaintiff any relief consistent with the pleadings and the issues. Code Civ.Proc. § 580.

6. Judgment 🔑252(1)

A party is entitled to any relief which may be appropriate under the scope of his pleadings and within the facts alleged and proved, irrespective of the theory on which they may be alleged. Code Civ.Proc. § 580.

Appeal from Superior Court, Marin County; Donald Geary, Judge Assigned.

Action by Alice Maud Davis against A. L. Stewart to have a deed absolute in form declared to be a mortgage. From an adverse judgment, defendant appeals.

Affirmed.

Hearing denied; CARTER, J., not participating.

Leander L. James and Lionel Browne, both of San Francisco, for appellant.

Martinelli & Gardiner, of San Rafael, and Herbert Chamberlin, of San Francisco, for respondent.

STURTEVANT, Justice.

This is the second appeal by the defendant Stewart in the above-entitled action.

The first appeal terminated in the decision entitled Davis v. Stewart, 31 Cal.App.2d 574, 88 P.2d 734. On the second trial many items of evidence were introduced. The issues made by the complaint, the answer, and the replication thereto were tried and copious findings were made thereon. No finding is now attacked but the defendant relies on the doctrine of "the law of the case."

The property is located a short distance south of the city of San Rafael in Marin county. It is across from and slightly north and west of the "Y" formed by the intersection of Highway 101 and the San Quentin-San Rafael Highway. Specifically it is referred to and identified in the transcript as parcels numbers 1, 2 and 3. Parcel No. 1 was acquired by J. E. Davis from the estate of Frederick Schuemann by deed dated October 25, 1929. No improvements were then on the property. Improvements have since been added, including buildings housing a service station with living quarters, an auto court with ten cabins and living quarters for the operator, a store, another service station, a cafe, and in the rear a frame shack and some long sheds. Parcel No. 2 was acquired by the same grantee from the same grantor by deed dated October 25, 1929. No improvements have been placed on it. Parcel No. 3 was acquired by J. E. Davis from William Siebe and wife by deed dated November 2, 1931. On that parcel two buildings have been constructed at a cost of $2,500 each.

The defendant A. L. Stewart sold and delivered to J. E. Davis a quantity of dirt used for filling. The first sale was for $1,688 evidenced by a promissory note dated October 1, 1931, payable April 1, 1932, at 6 per cent. The second sale was in the sum of $1,062. The two sales amounted to $2,750. J. E. Davis and Alice M. Davis executed to Stewart a note for $2,750 payable $50 monthly including 6 per cent interest. To secure said note they executed a trust deed covering parcel No. 3 only. The trust deed provided for and secured additional indebtedness if incurred. Later Stewart delivered additional filling in the sum of $4,038. The total deliveries then amounted to $6,788 and were secured by said trust deed. A computation shows that said obligation, according to the terms of the note, would not have been paid until twenty years had expired. Notwithstanding the terms of said contract Stewart filed a materialman's lien on July 18, 1932, for $6,788 on parcels 1 and 3. Prior to that date parcels 1 and 2 had been conveyed to plaintiff, Alice M. Davis, and prior to July 18, 1932, plaintiff had executed to J. E. Davis a general power of attorney. At said time a number of encumbrances were of record. A debt against parcel 1 in the sum of $3,250 in favor of Bank of America was secured by a deed of trust dated May 4, 1931. An obligation in favor of A. Bonaiti in the sum of $1,250 was secured by a deed of trust against parcel No. 1. Against parcel No. 3 an obligation in favor of William Siebe to secure the payment of $1,000 was secured by a trust deed, dated October 31, 1931. Against the same property stood the trust deed above mentioned in favor of the defendant Stewart in the sum of $6,788. There also stood against said lot a judgment secured by an attachment in favor of William R. Cole for the sum of $1,300.

When the defendant filed said lien J. E. Davis protested claiming that the promissory note and trust deed would defeat the materialman's lien. The defendant's attorney advised him to the same effect. Thereupon the defendant proposed that the actual facts and actual agreements regarding the dirt be concealed and that the lien be foreclosed and in that manner all encumbrances would be undercut and eliminated. Davis rejected the proposal. However he was willing that the lien be foreclosed, that time for payment for the dirt be accelerated, that the parcels be sold to Stewart at the foreclosure sale, if Stewart would pay the claims of other creditors and if the property could be redeemed upon payment of the aggregate indebtedness to Stewart. This was agreeable to Stewart. He had his attorneys prepare a written statement of such agreement. That tentative agreement was produced at the trial. It purported to cover parcel 3 only. The document was signed by this plaintiff and by this defendant. Almost immediately both Mr. and Mrs. Davis were served with summons in an action to foreclose the mechanic's lien. On September 10, 1932, Davis addressed a letter to Stewart claiming that the agreement just mentioned did not state the oral understanding between the parties. Stewart replied admitting the fact and asking for a suggestion. The tentative agreement was therefore abandoned and a new agreement was written consolidating and refinancing all the debts owed by the Davises.

Before taking up the new instrument it is helpful to note that at the time it was written the Davises had invested $19,000; that they had rejected offers respectively of $17,000 and $18,000; that they considered the value of their property $30,000; that the income therefrom was around $400 per month.

It is likewise interesting to note that at the same time there was owing to defendant Stewart $6,788 evidenced by notes payable $50 per month, 6 per cent interest, and extending over a period of twenty years; that said debt was secured by a trust deed covering parcel 3 only.

It may also be noted that at the same time the defendant Stewart had such credit at the banks that he could borrow up to $20,000 on his unsecured note, however the Davises had attempted to borrow from the banks and could not do so. Under these circumstances Stewart represented to the Davises that all of their property must be made available to him and by him used as security in order to obtain money from the bank for refinancing their debts.

The consolidating and refinancing of the debts was worked out by a plan under which Stewart became the sole creditor of the Davises in the sum of $13,479.29, payable within five years from September 27, 1932, with interest at 7 per cent per annum, and secured by the three parcels of realty owned by the Davises, together with the rents, issues, and profits therefrom, and the possession thereof. Pursuant to this plan the Davises executed a deed of the property to Stewart. He thereupon borrowed from his banker the sum of $6,542.46 at 6 per cent secured by a deed of trust on the property. This sum was used to pay the general creditors and clear the title. The property also became security for the payment to Stewart of his dirt claim of $6,788, with interest. The plan necessarily required the dismissal of the foreclosure action instituted by Stewart, and the wiping out of the junior deed of trust held by him covering parcel No. 3. The notes given by the Davises to evidence the dirt claim of $6,788 were retained by Stewart.

The items making up the sum of $13,479.29, earlier mentioned, are these: General creditors, $6,542.46; Stewart dirt claim, $6,788; interest on the dirt claim, $148.83. In computing the sum of $148.83 as interest on the said $6,788 from June 2, 1932, Stewart exacted interest at the rate of 7 per cent per annum, instead of 6 per cent per annum as provided in the said notes given by the Davises.

All expenses of the plan thus worked out were paid by the Davises. They stripped themselves of the $455 which they had on hand in cash. They paid the fees and expenses of Stewart's attorney. They paid for the title insurance policy issued to Stewart, and they paid for the title insurance policy issued to the bank. They paid for recording the deed to Stewart, and they paid for recording the deed of trust from Stewart to the bank. They paid all taxes, and they turned over to Stewart the fire insurance policies covering the buildings on the property.

That the plan thus worked out was mutually beneficial is not susceptible to doubt. It operated to the benefit of Stewart by accelerating the time of payment for the dirt, by increasing the rate of interest, and by improving the security for payment. The time of payment for the dirt was reduced from twenty years to five years or less; the rate of interest was increased from 6 per cent to 7 per cent; and three parcels of realty together with the possession thereof and the rents, issues, and profits therefrom, were substituted as security in place of a junior deed of trust on one parcel of realty without buildings. And the plan operated to the benefit of the Davises, for it set up, during a time of depression, a moratorium of five years for the payment of their debts except insofar as their property could respond to the payment thereof.

The plaintiff personally and her husband both testified that the contract was intended solely as a security to protect the defendant's claim of $6,788 for filling delivered, and $6,542.46, the amount of other claims paid or to be paid by defendant for the Davises. The defendant on the other hand claimed it was an absolute sale. However the record shows a sale was never discussed and the value of the property was never discussed by the respective parties. The contract was expressed in three several instruments set forth in the complaint—about thirty-six folios. One of the papers is a deed. If a sale was intended 90 per cent of the other written material was wholly idle stuff. After the delivery of the contracts Davis remained on the premises under the terms of the contract to account to the defendant. The defendant entered the transaction on his books and kept accounts with the properties as a single item. Although he collected a large amount in rents he never accounted therefor in paying state or federal income taxes. After the documents were delivered Davis built, at his own expense, on the properties, with the full knowledge of the defendant, two buildings at a cost of $2,500 each; that is in the total sum of $5,000. But defendant made no objection, neither did he attempt to direct the location, architecture, or manner or nature of the construction. In doing that building Davis incurred debts in the sum of $825. That sum was paid by defendant and was by him added to the price paid, $13,479.29, and was to bear interest at 7 per cent and be payable September 27, 1937, all as provided in the agreement set forth in the plaintiff's complaint.

The defendant claims that his deed dated September 27, 1932, was a deed absolute and not a mortgage; and that this court so held when deciding the first appeal, Davis v. Stewart, supra. He further contends said decision has become the law of the case. Sheets v. Southern Pacific Co., 1 Cal.2d 408, 411, 35 P.2d 121. In that connection he claims the evidence on the second trial was the same as on the first trial.

[1, 2] A comparison of passages contained in the decision on the first appeal and the evidence in the record does not support appellant's contention. Referring to pages of said decision and the evidence in the record before us the following propositions appear. (1) As stated on page 576 of 31 Cal.App.2d, 88 P.2d 734, fraud was not proved. But the evidence is that plaintiff did not claim fraud but she did claim that the written instruments did not correctly express the agreement made by the parties. (2) As shown on page 577 of 31 Cal.App.2d, 88 P.2d 734, the former decision held that all of the competent evidence on the first appeal indicated the contract was an absolute transfer. But the evidence in the record before us is that a sale was never discussed by the parties and that the written instruments were intended as security to pay debts incurred and moneys paid out for the plaintiff's account, and that the words negativing a mortgage were inserted to enable the appellant to use the deed to be made in his favor to secure a loan at his bank. It also shows that on September 6, a written instrument was prepared covering defendant's claim in the sum of $6,788 for dirt delivered. It did not cover the other debts but was otherwise similar in form. That instrument was immediately abandoned by the parties and the written instruments under attack were made and executed. (3) Again on the same page it is stated that the only competent evidence of the intention of the parties at the time of the transaction is in harmony with that expressed in the written instruments. The evidence in the present record is to the contrary. It shows that Mr. Davis negotiated with defendant and acted for himself and as attorney in fact for Mrs. Davis. It also shows that from the beginning he and the defendant negotiated for a mortgage and not for a sale absolute. (4) On page 578 of 31 Cal.App.2d, 88 P.2d 734, it is stated that the owners did not, either by said instruments or otherwise, undertake to repay the defendant the amount of his lien for $6,788 or the amount of the other existing debts which defendant paid for them. The evidence before us is directly to the effect that to pay all of said items the contracts under attack were executed. (5) Again on the same page it was stated if the owner had treated the transaction as a mortgage and had sought to foreclose it the answer would have been that there had been a retraxit as to the lien claim of $6,788 by the voluntary dismissal with prejudice and that there was no promise to repay said sum. But the evidence shows that the defendant entered a retraxit only of his materialman's lien and not of the debt theretofore secured by said lien. Said debt remained, evidenced by a promissory note signed by the Davises and said notes defendant still holds. (6) Again on the same page it is stated that there was no obligation on the part of the plaintiff to pay interest unless the option was exercised and if the defendant sought to foreclose he could not have collected interest. That fact is in favor of the defendant's contention but the written instruments contain an option to sell back to the plaintiff. While not conclusive that fact was a circumstance to be considered in favor of the plaintiff in determining whether the agreement was a mortgage or a deed absolute. Henley v. Hotaling, 41 Cal. 22, 27. Therefore we think it is clear that the evidence before the court on the second trial was quite different from the evidence before the court on the first trial. It follows that the decision rendered on the first appeal is not the law of the case. Royal Ins. Co. v. Caledonian Ins. Co., 182 Cal. 219, 223, 187 P. 748.

[3, 4] Moreover it is perfectly clear that the contract made by the parties by the instruments pleaded in plaintiff's complaint either was or was not a mortgage. If, as shown above, it was a mortgage, the judgment as rendered in favor of the plaintiff must be affirmed. If it was not a mortgage but was a deed absolute, the distinction is not helpful to the defendant. The agreement was made September 27, 1932. By the terms of said agreement the Davises were given an option at any time within five years to repurchase from the defendant. That time extended to September 27, 1937. This action was commenced September 23, 1936. Considering the involved facts hereinabove recited and the contentions of the respective parties no reason appears why the bringing of said action was not both proper and necessary. The trial court received evidence and made findings showing the exact amount of disbursements made by the defendant and the amount of each item of interest that accrued in his favor. It also made findings as to the several items the defendant had received as rents, issues, and profits from said properties. Further it made exact findings as to the amount of the purchase price to be owing by the Davises and due the defendant under the terms of said agreement. The latter sum was so fixed and determined to be $5,907. The defendant does not contend that it is an erroneous sum. We have found no error in the computation. It was made in strict compliance with the provisions in the contract creating the option in favor of the plaintiff. The practice followed by the trial court was in exact compliance with the rules governing the exercise by an optionee of his rights. Reed v. Parker, 33 Wash. 107, 74 P. 61; Hoyt v. Union Nat. Bank, 115 Kan. 167, 222 P. 127; Clancy v. Tremblay, 155 Wash. 558, 285 P. 453; Parmenter v. Kellis, Tex.Civ.App., 153 S.W.2d 965, 968.

[5, 6] Although the plaintiff has contended that the agreement made by the parties was a mortgage and the defendant has contended it was a deed absolute, such facts do not limit this court from determining the rights of the parties. The court has the power, and it is its duty, when the plaintiff's complaint has been answered to grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. Code Civ.Proc. § 580. In Estrin v. Superior Court, 14 Cal.2d 670, at page 678, 96 P.2d 340, at page 344, the court said: "A party is entitled to 'any and all relief which may be appropriate under the scope of his pleadings and within the facts alleged and proved, irrespective of the theory upon which they may be alleged. (Citing cases.)'" We think the trial court followed that rule in framing its findings and ordering the relief it ordered in the instant case.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

53 Cal.App.2d 370

BALZECA v. LORENTZEN.

Civ. 11948.

District Court of Appeal, First District, Division 1, California.

July 13, 1942.

Rehearing Denied Aug. 12, 1942.

Hearing Denied Sept. 10, 1942.

1. Appeal and error 🔑1033(5)

In action by apartment house manager against owner for injuries sustained by fall from ladder while manager was replacing an electric light bulb, refusal of owner's proposed instruction on unavoidable accident was not error where instruction given was more favorable to owner than she was entitled to have given.

2. Workmen's compensation 🔑2110

Under the Labor Code it is not a defense to an action that employee was guilty of contributory negligence or assumed risk of hazard complained of. St.1937, p. 271, §§ 3706, 3708.

3. Trial 🔑219

Ordinarily, an instruction upon unavoidable accident should contain a definition of the term.

4. Appeal and error 🔑1170(7)

In action by apartment house manager against owner for injuries, irrespective of correctness of admission of evidence concerning statements made by attorney, reportedly representing owner, to representatives of Industrial Accident Commission that while owner did not carry compensation insurance she admitted liability and would pay com-

pensation and furnish hospital and medical care, the owner was not prejudiced by the admission of the evidence where other evidence sustained judgment. Const. art. 6, § 4½.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Personal injury action by Leola Huff Balzeca against Carolyn Lorentzen. Judgment for plaintiff and defendant appeals.

Affirmed.

George K. Ford and Simpson Finnell, Jr., both of San Francisco, for appellant.

Edmund Gerald Brown and Harold C. Brown, both of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendant from an amended judgment and order of the court, following a jury verdict, awarding plaintiff the sum of $1,500 damages for personal injuries, and attorney's fees of $500. Labor Code, § 3706, St.1937, p. 271.

Respondent in performing her duties as apartment house manager for appellant was injured by a fall from a ladder while she was replacing an electric light bulb. She claims that the ladder furnished by appellant collapsed as the result of the unsafe condition in which it was maintained. Immediately after the accident, and while respondent was still lying upon the floor, appellant ascended the same ladder and completed the work of replacing the globe.

An attorney living in the apartment house called upon the Industrial Accident Commission shortly after the accident and, representing himself to be the attorney for appellant, stated that while the latter did not carry compensation insurance, she admitted liability and that she would pay respondent compensation and furnish hospital and medical care. The commission so advised the respondent by letter, sending a copy thereof to the attorney. Incidentally both the attorney and the appellant informed the commission that the matter of compensation insurance had been overlooked, and they immediately applied for its issuance. Appellant contended at the trial that she had discharged respondent six days prior to the accident; nevertheless the latter was still living in one of the apartments which was furnished her as part compensation for her services as manager, and apparently was still performing duties in connection with the house.

Appellant urges that there was prejudicial error in the refusal of the trial court to give certain specified instructions on the question of unavoidable accident; also that the record fails to show any authority on the part of the attorney (who did not represent her in the present action) to make any admissions to the commission, and that it was prejudicial error to permit officials of that body to testify to such statements, made neither at a hearing nor a trial.

[1-3] While two of appellant's proposed instructions on the question of unavoidable accident were refused, the court, at her request, did instruct the jury in part as follows: "* * * if you find that the evidence herein shows by a preponderance thereof that defendant did use reasonable care to supply plaintiff with the ladder in question, or that plaintiff sustained the injuries by reason of her own negligence or through an unavoidable accident, then you will find a verdict for the defendant." This instruction was more favorable to appellant than she was entitled to have given. In her opening brief, she states her position as follows: "Defendant at the trial contended that it could well be inferred that the fall of plaintiff was due to an unavoidable accident. That is, considering the hazardous position that she placed herself standing on top of the ladder, requiring a steadying of her position with her hand against the wall, and with the other hand reaching upward and her head tilted toward where the bulb was to be placed." Under the provisions of Labor Code, § 3706, it is not a defense to an action "that the employee was guilty of contributory negligence, or assumed the risk of the hazard complained of." Labor Code, § 3708, St. 1937, p. 271. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 117 P.2d 850. Ordinarily, an instruction upon the so-called doctrine of unavoidable accident should contain a definition of the term, but in that regard our attention is called only to the following instruction, number IX, requested by appellant: "* * * if you find that plaintiff's injury resulted from an unavoidable accident, for which no one was to blame, then this completely exonerates the defendant." The language is merely tautological and is no more enlightening than the matter contained in the instruction given.

Appellant charges prejudicial error in permitting certain witnesses to recount statements claimed to have been made by the attorney who investigated the circumstances of the accident and, as stated, called upon the Industrial Accident Commission in appellant's behalf with relation thereto. There is testimony in the record that appellant requested the attorney to "take care of it for me." The point stressed on appeal is whether the statements constituted admissions beyond the scope of the attorney's employment, and whether their admission in evidence was prejudicially erroneous. Without deciding the scope of the employment, or the attorney's authority to make the alleged statements, which were not made as a part of and during a legal proceeding (Zurich G. A. & L. Ins. Co., Ltd., v. Kinsler, 12 Cal.2d 98, 81 P.2d 913), the vital question, whether authorized to make the statements or not, is, was the error, if any, prejudicial.

Whatever statements were made—and there is a conflict in the evidence thereon—grew out of the following circumstances: At the time of the accident appellant was subject to a penalty by reason of the fact that she did not carry compensation insurance. The attorney, her tenant, was primarily interested in helping his client avoid the penalty. He interviewed several representatives of the commission and persuaded them that her failure to carry such insurance was unintentional. In addition, on behalf of his client, he informed them, as evidenced by a letter to respondent from the office of the commission, of which a copy was furnished the attorney, "that all your hospital and medical care and compensation due you personally will be taken care of by Mrs. Lorentzen and that she in fact has already paid a certain amount on account of the hospital bill * * * that within a few days there will be a payment of compensation to you for lost time." This understanding was performed in part by appellant, who paid for hospitalization, etc. The record disclosed the following testimony given by a representative of the commission: "A. He first referred to a conversation over the telephone that I had participated in with him, and then stated that he was acting as attorney for Mrs. Lorentzen, and that—while I cannot reproduce his exact words, he stated to the effect that she was not insured at the time of the injury to Mrs. Balzeca, but they were admitting liability, and the compensation and medical treatment was to be paid and furnished according to the provisions of the law. Mr. Brown [attorney for respondent]: Q. Did she say that Mrs. Balzeca was working for her at that time—did he say that? A. To the best of my recollection he did."

Appellant in her brief makes the following statement: "The witnesses * * * made it clear that at no time was the liability for negligence mentioned or discussed with either the attorney or the defendant, but that at all times the subject matter under discussion was whether or not a criminal liability would lie for failure to insure."

That there is a difference in admitting criminal liability under compensation insurance, and liability for negligence, needs no discussion, since compensation in a case of this character is due without regard to whether the employee has been negligent. The court instructed the jury as follows: "The liability, if any, of the defendant is entirely different from her liability under the Labor Code under which the plaintiff can recover through the Industrial Accident Commission compensation fixed by the Labor Code entirely irrespective of and independent of any question of negligence of her employer."

Relative to testimony that the attorney admitted respondent was working for appellant at the time of the accident, there is a direct conflict. Regardless, however, of the statement claimed to have been made by him in this regard, there is ample evidence in the record to substantiate respondent's contention that she was at the time still in the employ of appellant.

[4] Irrespective of the correctness or incorrectness of the admission of the evidence concerning statements made by the attorney to representatives of the Industrial Accident Commission, we fail to find that appellant was prejudiced thereby.

Appellant does not contend that the evidence is insufficient to sustain the judgment. The record shows that the trial of the real issues did not result in a miscarriage of justice. Const. of Calif. art. VI, § 4½.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

PEOPLE v. HUSTON.

Cr. 3583.

District Court of Appeal, Second District, Division 2, California.
July 16, 1942.

Hearing Granted by Supreme Court
Aug. 13, 1942.

Rehearing Denied July 29, 1942.

1. Criminal law 🔑1159(4)

Inconsistencies and discrepancies in prosecuting witness' testimony are matters for trial judge's sole consideration, and his findings, supported by substantial evidence, will not be disturbed on appeal because of such inconsistencies or discrepancies.

2. Stipulations 🔑14(7)

By parties' stipulation for submission of case to trial judge on transcript of testimony at previous trial, except that held inadmissible by appellate court, which ordered new trial on reversal of prior judgment of conviction, defendant "waived" objection to any other evidence in transcript than that so excepted.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Criminal law 🔑1036(1)

Generally, a party "waives" objection to introduction of evidence, unless interposed in trial court, and may not make objection thereto for first time on appeal.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Louis Arby Huston was convicted of committing lewd and lascivious acts, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant was convicted after trial before the court without a jury of violating section 288 of the Penal Code. This appeal is from the judgment and order denying his motion for a new trial.

The evidence being viewed most favorably to the People (respondent), the essential facts are:

In the spring of 1940 defendant on two separate occasions committed an act prohibited by section 288 of the Penal Code, to wit, he kissed the private parts of the prosecuting witness, a female of almost twelve years of age.

[1] Defendant urges for reversal of the judgment two propositions, which will be stated and answered hereunder seriatim.

First: The evidence is insufficient to sustain the judgment.

This proposition is untenable. We have examined the record and are of the opinion there was substantial evidence considered in connection with such inferences as the judge may have reasonably drawn therefrom to sustain the facts hereinabove mentioned and each and every other material fact upon which the judgment of guilty was predicated. For example, the prosecuting witness testified that on two separate occasions defendant committed acts interdicted by section 288 of the Penal Code. Inconsistencies and discrepancies in the testimony of the prosecuting witness are matters for the sole consideration of the trial judge and, where, as in the instant case, there is substantial evidence to support the trial judge's findings, this court will not disturb them because of inconsistencies or discrepancies in the testimony of the prosecuting witness. (See People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, for a full statement of the applicable rule.)

[2, 3] *Second: The trial court committed prejudicial error in receiving certain evidence.*

This proposition is likewise untenable. After the first trial of the present case, this court reversed a judgment by which defendant was convicted and ordered a new trial. (People v. Huston, 45 Cal.App. 2d 596, 114 P.2d 607.) Upon the second trial defendant, his counsel, and the district attorney, waived a jury trial and the case, by stipulation of both parties, was submitted to the trial judge upon the transcript of the testimony of the first trial, excepting therefrom the testimony which this court had held to be inadmissible. By this stipulation defendant waived any objection to any other evidence which was contained in the transcript, it being the general rule that a party waives an objection to the introduction of evidence unless such objection is interposed in the trial court. An objection to the introduction of evidence may not be made for the first time on appeal. (10 Cal.Jur. (1923) 824, § 111; Hurd v. Walker, 9 Cal.App.2d 525, 527, 50 P.2d 1074.)

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

53 Cal.App.2d 387

LA MAR v. CITY COUNCIL OF CITY OF SOUTH SAN FRANCISCO et al.

Civ. 12202.

District Court of Appeal, First District, Division 2, California.

July 14, 1942

Hearing Denied Sept. 10, 1942.

1. Municipal corporations 🔑111(2)

An ordinance providing for adoption of a personnel system by city and stating that ordinance should apply to all offices, positions, and employments in service of city, except those specifically exempted therefrom, was not invalid on ground that it did not comply with requirement of statute authorizing adoption of ordinance that ordinance should designate the departments, appointive officers or employees of city who were to be placed under the merit system. Gen.Laws Supp.1939, Act 1401, § 2; Civ.Code, § 3536.

2. Mandamus 🔑76, 81

Where city council had adopted ordinance providing for adoption of a personnel system for city, but had failed to make appointments and adopt rules called for by ordinance, the petitioner, as an elector and taxpayer, was entitled to writ of mandate directing council to make appointments and adopt rules under the ordinance. Gen.Laws Supp.1939, Act 1401, § 2.

◆

Original mandamus proceeding by Benjamin F. La Mar against the City Council of the City of South San Francisco and others to compel the council to make certain appointments and to adopt certain rules.

Writ issued.

Gregory, Hunt & Melvin, Bradford M. Melvin, and William C. Danielson, all of San Francisco, for petitioner.

Kirkbride & Wilson, of San Mateo, for respondents.

STURTEVANT, Justice.

This is an original application to this court for a writ of mandate. The petitioner is an elector and taxpayer in the city of South San Francisco, county of San Mateo. The respondents are the duly elected and acting members of the city council of the city of South San Francisco. On December 1, 1941, said council adopted ordinance 216 creating a personnel system. Said ordinance took effect January 14, 1942. Among other things said ordinance provided as follows:

"Section 1. *Adoption of Personnel System.* Pursuant to the authority granted to the legislative body of any city within the State of California under the provisions of Chapter 48, Statutes of 1935, and in order to establish an equitable and uniform procedure for dealing with personnel matters through a department of personnel, and to place municipal employment on a merit basis so that the best qualified persons available shall be brought into the service of the city, the following personnel system is hereby adopted.

"Section 2. *Department of Personnel.* There is hereby created a department of personnel which shall consist of a board of review and a personnel clerk. The board of review shall consist of three members to be appointed by the city council.

"The first board to be appointed shall, at its first meeting, so classify its members by lot that one shall serve for a term which shall expire February 15, 1942, one shall serve for a term which shall expire February 15, 1944, and one shall serve for a term which shall expire February 15, 1946. At the expiration of each of the terms so provided for, a successor shall be appointed by the city council for a term of six years.

"Vacancies on the board of review, from whatever cause, shall be filled by appointment by the city council for the unexpired term. Each member of the board shall serve until his successor is appointed and qualified. A four-fifths vote of all the

members of the city council shall be required to appoint a member to said board or to fill any vacancy thereon or to remove any member of said board from office prior to the expiration of his term of office.
* * *

"Section 4. *Personnel Clerk.* The city council shall appoint a personnel clerk whose duty it shall be to act in the capacity of clerk for the personnel system. The duties of the office of personnel clerk may be combined with those of any other office in the event the work involved does not warrant, in the discretion of the city council, the creation of a special position.
* * *

"Section 5. *Competitive Service.* The provisions of this ordinance shall apply to all offices, positions and employments in the service of the city, including all persons employed in the public library of said city, except:

"(a) Elective Offices. Provided however, that, in the event the people of the city shall, at a general municipal election or special election held for that purpose, elect to change the status of any one or more elective officers of the city to that of appointive officers, then at the expiration of the term of office of any such officer, the person holding the office at the time of the expiration of said term, providing that he shall have served in such position for a period of at least six months continuously, immediately prior to the expiration of said term of office, shall assume regular status in the competitive service without preliminary examination or working tests and shall thereafter be subject in all respects to the provisions of this ordinance.

"(b) Positions on appointive boards, commissions and committees.

"(c) All police officers whose compensation is not paid by said city.

"(d) The poundmaster and any deputy poundmaster. Offices, positions and employments not exempted above shall constitute the competitive service of the city."

After the adoption of said ordinance the respondents failed and refused to appoint the "Board of Review" and the "Personnel Clerk" and to adopt rules pursuant to the provisions of section 6 of said ordinance. Having alleged the foregoing facts, the petitioner prays for a writ commanding the respondents to make said appointments and to adopt said rules.

[1] The petitioner contends that his application for a writ of mandamus is the proper remedy, and that he, as an elector and taxpayer, is entitled to make the application. Neither of said propositions is controverted by the respondents. The petitioner further contends that the abovementioned facts warrant the issuance of a writ. Platnauer v. Board of Supervisors, 65 Cal.App. 666, 225 P. 12; City of San Diego v. Capps, 32 Cal.App. 461, 163 P. 235. The respondents do not question the soundness of those decisions but contend they are inapplicable to the facts of the instant case. The above-mentioned ordinance was adopted under the authority of section 2, Statutes of 1935, page 380, as amended Statutes of 1939, page 2040, Deering's General Laws Supp. 1939, Act 1401. That section is as follows: "§ 2. In said ordinance creating such system said legislative body *shall designate* the departments, appointive officers or employees of the city which shall be placed under such merit system or civil service system; such legislative body *may* from time to time, by ordinance, add additional departments, appointive officers or employees of the city to the *list originally designated* in the ordinance creating such system. Said legislative body *shall not* have the authority to withdraw any departments, appointive officers or employees from the operation of such system, either by an outright repeal of the civil service ordinance or otherwise, unless and until the withdrawal thereof shall have been submitted to the qualified electors of said city at a special or regular municipal election held in said city and shall have been approved by not less than a two-thirds vote of the electors voting on such proposition." (Italics ours.) Having cited said section the respondents proceed to compare the provisions of section 5 of the ordinance with the calls of the statute and they contend that the ordinance is invalid because it does not purport to "* * * designate the departments, appointive officers or employees * * *." In that connection they further contend that the ordinance does not contain a "list" of said departments, etc. Continuing they assert that as the ordinance did not contain the recitals prescribed by section 2 of said statute the ordinance is void. Myers v. Stringham, 195 Cal. 672, 675, 676, 235 P. 448. However by the provisions of section 5, supra, the ordinance applies, with certain designated exceptions, to "*all* offices, positions and employments in the service of the city," and by that

broad recital *all* are designated. "The greater contains the less." Civ.Code, sec. 3536. If between the provisions of section 2 of the statute and the provisions of section 5 of the ordinance there were a conflict, to that extent the provisions of the ordinance might be claimed invalid. Marculescu v. City Planning Comm., 7 Cal.App. 2d 371, 46 P.2d 308. Respondents do not make any showing to the effect that the provisions of the ordinance do not comply with the provisions of the statute and we see no material variance.

[2] It follows that the ordinance was valid in all respects. It also follows that the writ of mandate should issue as prayed for. It is so ordered.

NOURSE, P. J., and SPENCE, J., concurred.

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53 Cal.App.2d 701

GRAHAM et al. v. SMITHER.

Civ. 6726.

District Court of Appeal, Third District, California.

July 30, 1942.

1. Mines and minerals 🔑58

Evidence warranted cancellation of a lease containing an option to purchase leased land and quieting title thereto in lessors on ground that lease and option was procured by false pretenses by lessee respecting his intention to prospect for minerals on land.

2. Contracts 🔑94(1)
Landlord and tenant 🔑28(1)

The making of promises regarding material facts, which induces one to execute a lease or contract or to alter his position to his detriment, constitutes "actual fraud" which will justify the rescission of such lease or contract. Civ.Code, § 1572, subd. 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Fraud".

3. Contracts 🔑94(1)
Landlord and tenant 🔑28(1)

It is not necessary that each of the false statements which induced the execution of a contract or lease shall be supported by the evidence to warrant rescission of such contract or lease, it being sufficient if one or more of such statements are supported by the evidence. Civ.Code, § 1572, subd. 4.

4. Evidence 🔑434(6)

In lessor's suit to cancel lease which contained an option to purchase leased land, on ground of fraud by lessee, oral evidence of surrounding circumstances under which lease and option was procured was admissible.

5. Trial 🔑105(5)

Where oral evidence of surrounding circumstances under which lease and option was procured was received without objection, the right to challenge such evidence was "waived".

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Appeal and error 🔑204(1)

It is too late to object to evidence for the first time on appeal.

Appeal from Superior Court, Shasta County; Charles A. Paulsen, Judge.

Suit by Benton A. Graham, as administrator of the estate of Victor Graham, deceased, and others, against Thomas M. Smither, to cancel a lease with an option to purchase land and to quiet title to the land. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Thomas M. Smither in pro. per.

Carr & Kennedy, of Redding, for respondents.

THOMPSON, Justice.

The defendant has appealed from a judgment which was rendered against him in a suit cancelling a lease and option to purchase land on the ground of failure of consideration and that it was procured by means of fraud.

Zeph D. Graham and his brother Victor owned equal undivided interests in sixty-seven acres of unimproved land within the area of the Central Valleys Project in Shasta County. Victor died in 1933, possessed of that interest in the land in question. He left surviving him several heirs. An administrator of his estate was not appointed until March 13, 1939.

Zeph D. Graham was 67 years of age. He lived at Redding, where he was engaged in teaching music. He had formerly engaged in some placer mining, including a little unsuccessful prospecting on the land in question. The defendant claimed to be a mining engineer who was employed in the land department of the Pacific Gas and Electric Company at San Francisco. About the time the first contract on the Shasta Dam Project was awarded, this appellant made numerous trips to Shasta County and interested himself in procuring from owners of land within that area at least five or six similar leases for nominal rental with accompanying options to purchase the lands. Another one of these leases, to which reference is made by the appellant in this record, was cancelled by the trial court on the ground of fraud and failure of consideration. On appeal that judgment was affirmed. Palm v. Smither, 52 Cal.App.2d 500, 126 P.2d 428. It seems apparent that the appellant procured the lease in the present case, as he evidently did in the Palm case, to tie up the title with an accompanying option to purchase the land, with the purpose of speculating on the probability of selling it for a greatly increased price to the United States Bureau of Reclamation for use in the dam project, and that he fraudulently represented that he was president of a mining company, and that he intended to prospect the land in good faith for gold or other valuable minerals.

The owners of the land were not formerly acquainted with the appellant. On August 27, 1938, Mr. Smither went to Redding and interviewed Zeph Graham, representing himself to be a mining man and president of the East Belt Mining Company. He said, "I would like to get permission to prospect for gold and minerals [on your land]. * * * We will go in and put down holes all over the place, prospect holes all over the place." He produced a proposed lease and option which he had previously prepared. He first tried to obtain the lease for 2½ cents per acre per year with the privilege of renewing the lease each year for a period of ten years. He offered to insert an option to purchase it during the term of the lease for the sum of $340. The evident inference, derived from the terms of the lease and from the oral conversation, was that the mining corporation would promptly prospect the premises and if it discovered gold or other valuable minerals in paying quantity, the option to purchase the land would be at once exercised. When the appellant subsequently saw Benton Graham, the brother of Zeph, to secure his signature to the lease, he told him, "I am going to start operations to prospect * * * right soon."

Zeph refused to agree to the offered rental or to the purchase price. He said they orally agreed to an annual rental of 25 cents per acre per year, and to a purchase price of $1,000. The appellant deceived him by pretending to write in the lease the agreed amount of rental of 25 cents per acre. Instead of that sum he inserted in the lease the sum of 2½ cents per acre. Zeph signed the lease with that understanding without reading it, and with the agreement that the appellant would procure the signatures of all of the other heirs of Victor Graham, deceased, who, he was then told, was dead. The agreed rental was an insignificant sum. A check for $2 in payment of rent was all that the appellant ever sent to the lessors. Zeph testified that the only consideration for signing the lease was his expectation that the prospecting would be promptly prosecuted so that if minerals were discovered in paying quantity the option to purchase the land for the sum of $1,000 would be exercised at once.

The appellant did subsequently secure the signatures of three other heirs of Victor Graham, deceased. The signatures of the three remaining heirs were never obtained. The lease was promptly recorded so as to create a cloud on the title to the land. There is a conflict of evidence regarding the activity in prosecuting the prospecting enterprise, but Zeph testified that no prospecting was ever performed by the appellant during the first year of the lease, or at all. The lessee did testify that he went over the land in May, 1939, and took some specimens of soil, but that they didn't look good to him, and he never had them assayed. He admitted that he neither sank shafts nor dug holes in the process of prospecting.

At the expiration of the first year of the lease the appellant attempted to renew the agreement on the same terms contained in the written document, which was promptly refused. In the meantime, Zeph had a bona fide offer of $3,200 for the land from the United States Bureau of Reclamation for use in the Shasta Dam Project. Notice of rescission of the lease and option was served on the appellant in September, 1939, on the grounds of fraud and failure of consideration, specifying the deceit and failure previously mentioned. This suit for cancellation of the lease and to quiet title to the land was then commenced. The court adopted findings favorable to the plaintiffs in every material respect. It was determined that the defendant was guilty of fraud from the inception in procuring the lease, and that he had no intention of prospecting the land for valuable minerals. A decree of court was accordingly rendered, cancelling the lease for fraud and failure of consideration, and quieting title thereto in the plaintiffs.

The findings and judgment are adequately supported by the evidence. All of the necessary elements of fraud, sufficient to warrant the cancellation of the lease and option, are shown by the record. With full knowledge of the fact that the land is situated within the Central Valleys Water Project, and that it would be greatly enhanced in value on that account, the appellant failed to disclose that fact to the lessors; he deliberately deceived them by representing that he was a mining man and president of the East Belt Mining Company, which was then a defunct corporation whose charter had been forfeited for failure to pay corporation taxes; he fraudulently represented to the lessees that he or the mining company would promptly sink shafts, dig holes "all over the property" and conduct prospecting investigation for gold and other valuable minerals at once, and that if the minerals were discovered in paying quantity the option to purchase the land for the sum of $1,000 would be exercised. That was the sole object of the lessors in making the lease. Mr. Zeph Graham so testified. The record satisfactorily shows that the appellant never intended to prospect for minerals. Evidently his only purpose was to tie up the title and hold it for speculation, believing the Shasta Dam Project would result in greatly increasing its value. The appellant failed to prospect the land in good faith. According to his own testimony, his taking of specimens on one occasion in May, 1939, just before the term of the lease was about to expire, was a mere sham and pretense. He never even had those specimens assayed. He fraudulently inserted in the lease, which he had previously prepared for the occasion, the rental sum of 2½ cents per acre instead of 25 cents per acre, as the parties agreed, and he failed to secure the signatures of all of the heirs of Victor Graham, deceased, as he promised to do. There was no real effort on the part of the lessee to perform the most important provision of the lease, that of prospecting for minerals, at any time within the term of that contract. The lease merely extended for one year with the privilege of renewal. Even though the time for performance was not specifically stated in the lease, it was understood that operations would be commenced promptly, or at least within a reasonable time. It is unreasonable to assume the lessee was not required to commence prospecting during the entire term of the instrument, or that he was entitled to a renewal of the contract in spite of the fact that he made no real effort to perform the work which was the inducing cause of the execution of the lease by the owners of the property.

[1] For the foregoing reasons, we are satisfied the evidence supports the findings and judgment, and that the court was warranted in quieting title to the property in plaintiffs.

[2] The making of promises regarding material facts, which induces one to execute a lease or contract, or to alter his position to his detriment, constitutes actual fraud which will justify the rescission of the document. § 1572, subd. 4, Civ.Code; 12 Cal.Jur. 738, § 22; Palm v. Smither, 52 Cal.App.2d 500, 126 P.2d 428; Wilson v. Rigali & Veselich, 138 Cal.App. 760, 33 P.2d 455; Cox v. Klatte, 29 Cal.App.2d 150, 84 P.2d 290.

[3] It is not necessary that each of the false statements shall be supported by the evidence. It is sufficient to warrant a rescission of the instrument if a single material statement is fraudulently made, provided that statement were relied upon and became an inducing reason for the execution of the instrument. Stewart v. Crowley, 213 Cal. 694, 3 P.2d 562; Wilson v. Rigali & Veselich, supra.

[4-6] The court did not err in receiving oral evidence of the circumstances surrounding the making of the lease and option in question. That testimony was competent in support of the allegation of fraud relied upon by the plaintiffs as a ground for

cancelling the instrument. Darrow v. Houlihan, 205 Cal. 771, 272 P. 1049; Mooney v. Cyriacks, 185 Cal. 70, 81, 195 P. 922; Jones on Evidence, Civil Cases, 3rd Ed., p. 660, § 435. Moreover, the appellant waived his right to challenge the oral evidence by failing to object to it at the trial. It is too late to object to evidence for the first time on appeal. Howard v. Adams, 16 Cal.2d 253, 257, 105 P. 2d 971, 130 A.L.R. 1003; Palm v. Smither, supra.

The judgment is affirmed.

ADAMS, P. J., concurred.

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53 Cal.App.2d 430

JOHNSON et al. v. ATKINS et al.

Civ. 12065.

District Court of Appeal, First District, Division 2, California.

July 15, 1942.

As Modified on Denial of Rehearing Aug. 14, 1942.

1. Contracts 🔑220

Where, from nature of contract and surrounding circumstances, parties from beginning must have known it could not be fulfilled unless, when time thereof arrived, some particular condition continued to exist, under doctrine of "frustration", in absence of warranty that such condition of things shall exist, contract is to be construed as subject to implied condition that parties shall be excused in case, before breach, performance becomes impossible or purpose frustrated from such condition ceasing to exist without default of either.

See Words and Phrases, Permanent Edition, for all other definitions of "Frustration".

2. Contracts 🔑309(1)

Where contract is terminated through "frustration" of the object thereof, the arbitration clause of contract is likewise thereby suspended as to all matters and disputes which have not already arisen, unless couched in such terms as will except it out of the results that follow from frustration generally.

3. Contracts 🔑309(1)

Where the assumed possibility of a desired object or effect to be attained by either party to contract forms the basis on which both parties enter into it, and such object or effect is, or surely will be, frustrated, under doctrine of "frustration", a promisor who is without fault in causing the frustration and who is harmed thereby is discharged from the duty of performing his promise, unless a contrary intention appears.

4. Contracts 🔑309(2)

Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things to which contract relates, under doctrine of "frustration", the subsequent perishing of person or thing, or cessation of existence of the condition will excuse the performance, a condition to such effect being implied even though promise may have been unqualified.

5. Sales 🔑172

Where it was understood by parties to contract for the sale of copra for shipment to named ports in Colombia that purpose of adventure was the shipment of copra for resale to Colombian buyer and that such shipment could not be made without a permit from Colombian government, under doctrine of "frustration", cancellation or denial of such permit without fault of the buyer terminated the contract, including the arbitration clause thereof.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Proceedings by J. B. Sprague Johnson and others against David Atkins and others to prevent submission to arbitration of questions of rights and obligations of the parties under a contract for the sale of copra to petitioners for shipment to Colombia, and to contest the award of the arbitrators. From a judgment or order confirming the award of arbitrators, petitioners appeal.

Judgment reversed.

Brobeck, Phleger & Harrison, of San Francisco, for appellants.

William A. Boekel and John D. Gallaher, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

This is an appeal from a judgment, or order, confirming an award of arbitrators made after the trial court had denied appellants' opposition to the petition for arbitration.

The controversy arises out of a c. i. f. contract for the sale of 500 tons of copra to the appellants for shipment to Puerto Colombia, or Barranquilla, Colombia, from San Francisco or Oakland. Two hundred tons were shipped and paid for when the buyer learned that no more copra could be shipped to that country, because permission for entry was either cancelled or denied by the Colombia authorities. The buyer paid to the seller incidental expenses incurred in handling the remaining 300 tons, and requested the seller to make other disposition of the remainder for their account. The seller refused and sent the controversy to arbitrators appointed under the rules of the San Francisco foreign commerce association, which rules were made a part of the contract. The arbitrators ruled that it was the duty of the buyer to secure the permit and made their award in favor of the seller. The buyer first protested the submission to arbitration and then contested the award in suitable proceedings before the superior court.

On this appeal the appellants present three grounds for a reversal of the judgment, or order. (1) That the rules of the association do not cover a c. i. f. contract —that is a contract calling for prepayments of costs, insurance, and freight— but that they are limited to contracts covering sales made "Ex Dock, Ex Warehouse, f. o. b. Carrier, Port of Entry." (2) That, assuming the contract to be subject to arbitration, the arbitration clause fell when the object of the contract was frustrated. (3) That the award is void because it failed to comply with the rule requiring the arbitrators to fully set forth the facts of the case.

Because of the views herein expressed it is unnecessary to consider either the first or the third point raised. If, through frustration, the contract was at an end arbitration was not proper under any interpretation of the rules, and it would then become immaterial whether the award was in proper form.

[1] "We may assume without deciding that the contract was one that called for arbitration under the rules of the association, because we prefer to rest the judgment upon the firmer foundation that the trial court should have tried the issue whether the contract was terminated by frustration of the commercial venture contemplated by the parties in the execution of the contract, and hence the arbitrators had no jurisdiction to make the award." The doctrine of frustration is well stated in Straus v. Kazemekas, 100 Conn. 581, 124 A. 234, 238, where the court says: "Where from the nature of the contract and the surrounding circumstances the parties from the beginning must have known that it could not be fulfilled unless when the time for fulfillment arrived, some particular thing or condition of things continued to exist so that they must be deemed, when entering into the contract, to have contemplated such continuing existence as the foundation of what was to be done; in the absence of any express or implied warranty that such thing or condition of things shall exist the contract is to be construed as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible or the purpose of the contract frustrated from such thing or condition ceasing to exist without default of either of the parties. 12 A.L.R. 1275."

[2] The doctrine has been given wider scope and application in the cases following the World War of 1914 where contracts for the sale of specific materials, and for the shipment on named vessels, or to specific ports, were made impossible of performance by war restrictions, embargoes, or seizure of the vessel. Numerous cases on the subject are to be found in the English reports; the earlier cases refusing to apply the doctrine, and the later uniformly accepting it as a settled rule of law, which not only declares a termination of the obligation, but a suspension of the arbitration clauses of the contract. The latest case called to our attention is Hirji Mulji et al. v. Cheong Yue etc. Co., English Law Reports, [1926] App.Cas. page 497. That case involved a dispute between the contracting parties whether the frustration of the object of a charter party by reason of the requisition of the chartered vessel in war time put an end to the jurisdiction of the arbitrator. The holding was that, since the contract came to an end by the frustration of the commercial venture, the jurisdiction of the arbitrator

terminated with the contract and he therefore had no power to award damages for failure of performance. The case arose in the British court in Hongkong which approved an award of the arbitrator allowing damages for the breach, and rejecting the defense of frustration. The award was affirmed by the Supreme Court of Hongkong, two justices dissenting. On appeal to the privy council this judgment was reversed, all justices concurring. Defining the doctrine upon which the court rested its opinion it was said (p. 510): "Frustration, on the other hand, is explained in theory as a condition or term of the contract, implied by the law ab initio, in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable, having regard to the mutual interests concerned and of the main objects of the contract: see per Lord Watson in Dahl v. Nelson, Donkin & Co., 6 App.Cas. 38. It is irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances. It is really a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands." Many of the earlier cases to the contrary, upon which the judgment no doubt was based, are considered and their rule rejected in this later opinion. It is further said (p. 505):

> "All these arguments, it will be seen, resolve themselves, on examination, into the fundamental inquiry, whether in law and fact frustration had been brought about before any dispute arose with regard to frustration or its cause or its consequences. The arbitration clause is but part of the contract and, unless it is couched in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too. This must be so, if the law is, that the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen.
>
> "Throughout the line of cases, now a long one, in which it has been held that certain events frustrate the commercial adventure contemplated by the parties when they made the contract, there runs an almost continuous series of expressions to the effect that such a frustration brings the contract to an end forthwith, without more and automatically. They are too numerous to be cited exhaustively, but there are few expressions to the contrary and none in recent cases."

It was then said that a great many charter parties had been dealt with during the last few years on contracts held to have been frustrated by reason of requisitions during the war period; that Bank Line v. Arthur Capel & Co., [1919] App.Cas. 435, settled the rule that the contract was terminated by these events. It was further said that (p. 509), "whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention or their opinions, or even knowledge, as to the event, which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure."

[3, 4] The same principle is followed in our own cases. In Restatement of the Law of Contracts, section 288, it is said: "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears." California cases in support of the text are Hackfeld & Co. v. Castle, 186 Cal. 53, 198 P. 1041, and La Cumbre G. & C. Club v. Santa Barbara Hotel Co., 205 Cal. 422, 271 P. 476. In the Hackfeld case the contract called for the shipment of honey "from Honolulu via Tehuantepec to Hamburg." The Tehuantepec route was discontinued before the time for shipment because of unsettled political conditions in Mexico, and the war of 1914 had caused an embargo on shipments to Hamburg. The buyer refused to accept delivery of the portion of the goods not shipped and the seller sued for the loss. In affirming a judgment for defendant the Supreme Court held that the provisions for the manner of shipment were essential to the performance of the contract and that the contract must therefore be deemed subject to the implied condition that the parties be excused in case, before breach, performance became impossible by reason of the prescribed route ceasing to exist. In the La Cumbre case the golf club had a contract with the

hotel company giving privileges of membership to guests of the hotel in consideration of specified monthly payments. The hotel burned down and the company refused to make the payments to the golf club. In an action by the latter the Supreme Court followed the rule of the Hackfeld case and cited with approval the statement in 13 C.J. 642 (see 17 C.J.S., Contracts, § 464, p. 956): "Where from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of the person or thing, condition or state of things to which it relates, the subsequent perishing of the person or thing, or cessation of existence of the condition, will excuse the performance, a condition to such effect being implied, in spite of the fact that the promise may have been unqualified."

[5] Following the same rule, but addressed particularly to appellants' contention that the frustration of the purpose of the contract left nothing to arbitrate under it, are Hanes v. Coffee, 212 Cal. 777, 300 P. 963; Stetson v. Orland Oil Syndicate, 42 Cal.App.2d 139, 108 P.2d 463; and Friedlander v. Stanley Productions, 24 Cal.App.2d 677, 76 P.2d 145. The application of these cases and of the Hirji Mulji case, supra, is apparent. The rules of the foreign commerce association, which were expressly made a part of the contract, provide: "Rule 513. Arbitration—Any dispute arising under contract shall immediately be submitted to arbitration before a committee of the Foreign Commerce Association of the San Francisco Chamber of Commerce under its Rules." In the Hirji Mulji case, supra, the court said: "The arbitration clause is but part of the contract and, unless it is couched in such terms as will except it out of the results, which follow from frustration, generally, it will come to an end too. This must be so, if the law is, that the legal effect of frustration is the immediate termination of the contract as to all matters and disputes which have not already arisen." It will be seen that here the arbitration clause contained no such exceptions. Here the arbitrators based their award upon the finding that "After full consideration of all points, the arbitrators were unanimously of the opinion that Seller had filled his part of the contract and was estopped from making shipment by Buyer's inability to secure the necessary permit from the Colombia authorities. It was clearly the duty of Buyer to furnish such permit. * * *" As a special defense to the petition the appellants herein pleaded that from the inception of the transaction all parties knew that the copra could not be shipped into Colombia without a permit issued under the authority of that government, that the obligation to secure such a permit rested upon the buyer, but that the contract obligated the seller to deliver the necessary shipping documents for transportation of the copra to one of two designated ports in Colombia, and all parties understood that it would be impossible to procure such documents without the permit. Other facts were pleaded in support of the issue that the commercial adventure was from its inception understood to be a purchase here for resale to a Colombian buyer and that a permit, or license, for shipment to a Colombian port was essential to the purposes of the adventure; that this purpose was thus frustrated by conditions beyond the control of the buyer. Evidence was tendered, and an offer was made to prove this special defense, and the trial court sustained objections to the offer and ordered the evidence stricken. This was error. The evidence was directed to the very meat of the controversy. If the facts alleged are true the contract was terminated and no arbitration was permissible.

The judgment is reversed.

STURTEVANT, and SPENCE, JJ., concurred.

53 Cal.App.2d 559

KLINE v. WEINTRAUB et al.

Civ. 13672.

District Court of Appeal, Second District, Division 2, California.

July 24, 1942.

Rehearing Denied Aug. 13, 1942.

1. Appeal and error ⚷907(2)

When the point that evidence is insufficient to support trial court's findings is urged on defendant's appeal, and no part of the evidence is printed or referred to, an appellate court will assume that facts cited by plaintiff supporting the findings were proven by competent evidence at trial.

2. Attorney and client ⚷149

Where principal purpose of agreement between attorney and client was that attorney should establish client's claim against an estate, and attorney carried out agreement, which assigned to him a one-fourth interest in the claim, by obtaining a final judgment against estate, and agreement did not require attorney to represent client until judgment was paid in full before being entitled to consideration for agreement, attorney's executrix was not precluded from recovering a one-fourth interest in judgment on ground that attorney had not prior to his death performed services constituting the consideration for agreement.

3. Attorney and client ⚷153

Where attorney and client made an agreement for attorney's services in establishing client's claim against an estate and assigning a one-fourth interest in the claim to attorney for his services, and attorney obtained a final judgment for client, attorney's claim to an interest in judgment was not subject to a credit for sums received by attorney for representing client in unrelated proceedings for separate maintenance.

4. Attorney and client ⚷153

Where agreement between client and attorney calling for latter's services in establishing client's claim against an estate and assigning a one-fourth interest in claim to attorney for his services provided that attorney accepted assignment in full payment for services, and attorney obtained a final judgment for client, attorney's claim to an interest in judgment was subject to a credit representing sums allowed for attorney's fees in proceedings against estate.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Ethel Kline, as executrix, etc., against Sidonie Weintraub and others to recover a one-fourth interest in a judgment, wherein Sidonie Weintraub filed a cross-complaint. From a judgment for plaintiff, defendant Sidonie Weintraub appeals.

Judgment modified and affirmed.

Moidel, Moidel & Moidel and Isadore Moidel, all of Los Angeles, for appellant.

Martin Forrest and Harry Hirsh, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action for a one-fourth interest in a judgment entered in favor of defendant Sidonie Weintraub against the estate of her deceased husband Harry Weintraub, defendant Sidonie Weintraub appeals.

The conceded facts are:

On or about May 15, 1932, plaintiff's testator, E. A. Kline, an attorney at law and husband of plaintiff Ethel Kline, entered into an agreement with defendant Sidonie Weintraub reading as follows:

"Agreement

"This Agreement, made this ——— day of May, 1932 by and between Sidonie Weintraub of the City of Los Angeles, State of California, party of the first part, and E. A. Kline of the same place, party of the second part,

"Witnesseth:

"Whereas, the party of the first part is desirous of protecting her rights as against the Estate of Solomon L. Weintraub, her husband now deceased, particularly under an agreement for the payment to her of the sum of $20,000.00 on his death, which agreement was duly executed by party of the first part and her said deceased husband, and which agreement was violated by her said husband in making a will directly contrary to the provisions of said agreement, and

"Whereas, she is desirous of obtaining the services of said E. A. Kline, as her attorney in presenting that matter and taking care of her interest within his discretion as an attorney and if necessary bring action for the recovery under said contract.

"Now therefore, This Agreement Witnesseth:

"The party of the first part hereby retains the party of the second part as and for her attorney to carry out the objections and purposes as above set forth and in consideration of services already rendered and to be rendered by said party of the second part she hereby agrees to pay him for said services and hereby, as security therefor, absolutely assigns, sets over and transfers unto him one-fourth (¼) of all her right, title and interest in and to said agreement and all moneys which may be derived therefrom and all moneys which may be paid on such agreement either by suit, compromise or settlement, and also all costs and necessary disbursements which may be incurred in the event of any action which may be filed on or under said agreement.

"The party of the second part hereby accepts such retainer and assignment to be in full of his services rendered in reference to said agreement.

"It is hereby agreed between the parties hereto that the party of the second part may, if he desires to do so, retain any other attorney to act with or for him in said matter, but if he shall do so he shall pay said attorney or attorneys so retained or employed by him out of the share hereby assigned to him as aforesaid by the party of the first part.

"In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

"Sidonie Weintraub,
"Party of the First Part.

"E. A. Kline,
"Party of the Second Part."

July 18, 1932, Mr. Kline, as attorney for Mrs. Weintraub, filed an action against the estate of her deceased husband for the purpose of establishing as a claim against his estate the agreement with her husband referred to in the contract between Mrs. Weintraub and Attorney Kline. Mrs. Weintraub prevailed in this action and obtained a judgment against her deceased husband's estate for $20,000, and also for the sum of $600, which had been awarded to her for attorney's fees in a separate maintenance action which she had instituted against her husband on September 3, 1931, and in which action Attorney Kline represented her.

To and including June 19, 1937, the executor of Mr. Weintraub's estate paid Mrs. Weintraub $12,750 on account of the judgment against the estate, of which sum one-fourth was paid to Attorney Kline. May 12, 1937, Attorney Kline, on behalf of Mrs. Weintraub, filed an action which resulted in a declaratory relief judgment clarifying the judgment previously rendered in Mrs. Weintraub's favor against the estate of her deceased husband. Thereafter Attorney Kline died and the executor of Mr. Weintraub's estate ceased to make any further payments to Mrs. Weintraub. She employed Attorney Harry F. Sewell to enforce the payments due her. Thereafter through various proceedings an agreement was reached whereby the executor resumed payments on the unpaid balance of the judgment against Mr. Weintraub's estate.

Defendant Sidonie Weintraub urges for reversal of the judgment three propositions, which will be stated and answered hereunder seriatim.

First: The evidence is insufficient to sustain the material findings of the trial court.

[1] This proposition is untenable. Appealing defendant has not supported this proposition by the printing of references to evidence of any character tending to show that the findings of the court are not supported by substantial evidence. The law is established in this jurisdiction that when the point is urged on appeal that the evidence is insufficient to support findings of the trial court and no part of the evidence is printed or referred to, an appellate court will assume that facts cited by plaintiff (respondent), as in the instant case, supporting the findings were proven by competent evidence at the trial. (Johnston v. Johnston, 48 Cal.App.2d 23, 25, 119 P.2d 158; Skidmore v. County of Tuolumne, 35 Cal.App.2d 525, 529, 96 P.2d 178.)

Second: Attorney Kline had not prior to his death performed the services which constituted the consideration for Mrs. Weintraub's agreement with him.

[2] This proposition is likewise untenable. A fair interpretation of the agreement between Attorney Kline and Mrs. Weintraub discloses that the principal purpose of the agreement was that Attorney Kline should establish Mrs. Weintraub's claim against the estate of her deceased

husband. This he did by obtaining a judgment against the estate, which became final.

It is to be noted that the agreement says, "Whereas, she is desirous of obtaining the services of said E. A. Kline as her attorney in presenting that matter and taking care of her interest within his discretion as an attorney and if necessary bring action for the recovery under said contract." It is obvious that this provision in the agreement referred to the establishment of Mrs. Weintraub's claim against the estate of her deceased husband. Attorney Kline established this claim, as we have heretofore pointed out by obtaining a judgment on behalf of Mrs. Weintraub against the estate of her deceased husband. There is nothing in the agreement which required him to represent her until the judgment was finally paid in full before he should be entitled to the consideration for the agreement, which was an assignment of a one-fourth interest in the claim which she had against her husband's estate and all moneys derived therefrom.

Third: Defendant, Mrs. Weintraub, was entitled to two separate credits against plaintiff's claim, because Attorney Kline had received (a) $617.50 as attorney's fees in a separate maintenance action which he had instituted on behalf of Mrs. Weintraub on September 3, 1931, and (b) $600 from the executor of Mr. Weintraub's estate in the litigation which resulted in the establishment of Mrs. Weintraub's claim against her husband's estate.

[3] (a) The $617.50 received by Attorney Kline for representing Mrs. Weintraub in her separate maintenance suit was for services performed in that suit and was not in any way related to the services which he agreed to perform under the contract which is the basis of the present suit, and therefore the trial court properly refused to allow this as a credit against plaintiff's claim.

[4] (b) The agreement between Attorney Kline and Mrs. Weintraub provided, "The party of the second part hereby accepts such retainer and assignment to be in full of his services rendered in reference to said agreement." Clearly, therefore, Attorney Kline was not entitled to receive and retain the $600 allowed for attorney's fees in the action which he filed against the estate of Mr. Weintraub, and the appealing defendant should have been allowed an additional credit of $600.

For the foregoing reasons the judgment is modified by striking therefrom paragraph 2, which reads as follows:

"2. That out of the sum of $2,350.00 that has so far been paid to defendant and cross-complainant, Sidonie Weintraub, since the death of E. A. Kline, deceased, by the said defendant Weintraub estate, the plaintiffs herein were and now are entitled to the sum of $587.50, being one-fourth thereof", and by striking from paragraph 4 the figures $16.75 and inserting in lieu thereof $4.25. Otherwise the judgment is affirmed.

MOORE, P. J., concurred.

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53 Cal.App.2d 498

KELL et al. v. JANSEN et al.

Civ. 6766.

District Court of Appeal, Third District, California.

July 21, 1942.

1. Appeal and error ⚷1012(1)

The weight of evidence was for trial court, sitting without a jury.

2. Mines and minerals ⚷125

Evidence established that gold dredging tailings were negligently deposited in natural channels of creek, so as to authorize recovery for destruction of landowners' diversion works, ditch and bridge resulting from such negligence combined with unprecedented flood.

3. Negligence ⚷61(1)

Although no one is responsible for that which is merely the act of God or an inevitable accident, when human agency is combined therewith and neglect occurs in employment of such agency, a liability for damage results from such neglect.

4. Mines and minerals ⚷125

Evidence established that negligence in depositing gold dredging tailings in natural

channels of creek combined with unprecedented flood to destroy landowners' diversion works, ditch and bridge, so as to authorize recovery for such destruction.

5. Mines and minerals ⚷125

In action for destruction of landowners' water diversion works, ditch and bridge caused by negligent depositing of gold dredging tailings in natural channels of creek, combined with unprecedented flood, cost of repairing damage and restoring plaintiffs' premises to their original condition was proper measure of damages if it amounted to less than value of premises prior to injury, and otherwise value of premises was proper measure.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action for negligence by Louise Osborn Kell and others against W. K. Jansen and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Geis & Hogle, of Willows, for appellants.

Spann, Carr, Cibula & Frazier, for respondents.

ADAMS, Presiding Justice.

Plaintiffs were the owners of certain land in Shasta county across which a natural stream known as the east fork of Clear creek ran in a southwesterly direction to its confluence with Clear creek which ran along the west side of the property. The only access to the house occupied by the Kells upon the premises was by a road leading from a county road and crossing the east fork over a bridge which Mr. Kell had constructed. Plaintiffs also owned a water right appurtenant to their property, and water for the irrigation of some fifteen or twenty acres of their land was diverted from the said east fork at a point above the upper or northerly line of their property by means of a headgate, dam and ditch.

Defendants were engaged in gold dredging, and in the summer of 1939 they purchased some five acres of the Kells' land lying on the north side of the east fork, for the purpose of dredging same, after which it was reconveyed to plaintiffs. Operations were begun about August 15th, and continued for eight days, during which time the channel of said east fork was dredged from a point near its confluence with Clear creek, to a point beyond the boundary of plaintiffs' land, and extending beyond the Kell diversion dam. In the course of these operations the original channel of the stream was changed, the old channel being filled up with tailings. Also the Kell dam and headgate and a part of their ditch were destroyed. The bridge was moved from its original position, the channel which it had formerly spanned was widened by the dredging operations, and the bridge was then set back across the new channel. When the fall and winter rains came the channel of the stream was unable to carry the waters with the result that the bridge was washed out and plaintiffs' ditch was further damaged.

Charging that the damages sustained by plaintiffs because of their loss of the bridge and diversion works were due to the negligence of defendants in the manner in which their dredging operations were carried on, and their negligent deposit of tailings on the banks and in the natural channel of the stream, plaintiffs began this action. Trial was had by the court sitting without a jury, and at its termination findings of fact and conclusions of law were filed, followed by judgment awarding plaintiffs $1,287 for damages to the bridge, $471 for the loss of their dam and headgate, $35 for a fill, and $234 for the destruction of 234 feet of their diversion ditch.

Defendants have appealed contending that the evidence is insufficient to show negligence on their part, that the damages suffered by plaintiffs were due, rather, to an act of God, to-wit: an excessive flood that occurred about the first of March, 1940, and that damages were improperly assessed.

The trial court found that in the course of the dredging operations tailings were negligently deposited behind the dredger used therein in the natural channels of Clear creek and the east fork thereof, and that the dredging operations and the negligent deposit of tailings as aforesaid changed, altered, obstructed and destroyed the natural channels of the streams; that during the course of said dredging operations and as a proximate consequence of the negligent deposit of said tailings in the streams the dam and headgate of plaintiffs were entirely destroyed and rendered useless and as a further proximate consequence at least 234 feet of plaintiffs' ditch were entirely destroyed. As to the bridge it was found that it was removed from its original location and later negligently replaced by defendants, and that thereafter as a proximate consequence of the acts of defendants in altering, changing and obstructing the natural channel of the east fork said bridge was washed away and entirely destroyed, and the banks of the creek greatly widened. As to the claim of defendants that these damages were due to the unprecedented floods that came late in February or early in March, 1940, the court found that prior to said time there had been normal high water which had washed the tailing deposits into the channel and changed the course of the creek in such a manner as proximately to result in the said injuries; that prior to said flood the normal high waters had begun to wash away the tailing piles upon which the bridge was negligently placed and that the washing away of said bridge was proximately contributed to by the high waters flowing down the east fork prior to said flood.

[1] Appellants cannot contend seriously that there is a total absence of evidence to support the court's finding of negligence on their part; they do to some extent argue the weight of it, but such matters are for the trial court. It may be noted, however, that defendant Clark testified that they agreed with the Kells that they would not mine up their ditch or their dam, that after their operations the dam was useless unless they put in a few days to open it up, that they tore out the willows where the headgate was, though the willows would be a protection to the ditch in high water, that their caterpillar probably mashed down the banks of the ditch a little, that they mined both sides of the creek, that tailing piles were left, that they had agreed to leave the road and bridge in as good condition as it was formerly, that the stream at the bridge which was formerly twenty feet wide was sixty feet wide after the dredging, that tailings were left across certain portions of the east fork, that the level of the creek bed was raised and that when the bridge was replaced after they took it out it was set back on tailing piles. Mr. Kell testified that tailings were piled on both sides of the stream fifteen feet higher than the original water flow, that the bridge was replaced across an entirely new channel with no bulkheads, just on top of the tailing piles, that the channel was moved about forty feet from the south side to the north side of the creek, and that the water level was raised about four feet. Mrs. Kell testified that the old channel of the creek was closed with tailings and their ditch spread out over the flat, that the old channel was covered with tailings, that the dredger operated close enough to the ditch to tear some of it down and defendants made no effort to make a substantial ditch but built one of tailings that went down with the first high water, that the banks of the original ditch were solid, and as to the bridge that it was originally a good substantial one, that its original site was buried under tailings and that when it was replaced the sills were not put on bedrock and no bulkheads were built.

[2] There was, therefore, ample evidence to sustain the trial court's findings of negligence.

In Salstrom v. Orleans Bar Gold Mining Co., 153 Cal. 551, 555, 96 P. 292, it was said that no matter how carefully a miner may conduct his mining operations, he has no lawful right to flood or wash away his neighbors' land, or deposit mining debris thereon to its injury, and that if by the deposit of such debris in the stream he causes such a result, he is liable for the resulting damage; and the fact that he uses all care for his neighbors' property, consistent with the successful conduct of his mining operations, is immaterial. (With citations.)

[3] As to the contention of defendants that even though they were negligent the extraordinary floods of 1940 would have washed the bridge out anyway, as many other bridges in the vicinity were destroyed, and therefore the eventual destruction of the Kell bridge and other works must be attributed to that act of God, the rule of law in this state, as enunciated in Chidester v. Consolidated Ditch Co., 59 Cal. 197, is that while no one is responsible for that which is merely the act of God, or inevitable accident, "But when human agency is combined with it, and neglect occurs in the employment of such agency, a liability for damage results from such neglect." Also, see, Smith v. San Joaquin Light & Power Corp., 59 Cal.App. 647, 649, 211 P. 843; Perkins v. Blauth, 163 Cal. 782, 792, 127 P. 50.

In the instant case the trial court found that the injuries to plaintiffs' dam, head gate and ditch were proximately contributed to by the deposit of tailings in the creek prior to the flood conditions which defendants designate as the act of God; that prior to said flood there had been normal high water which had washed the tailing deposits into the channel and changed the course of the creek in such manner as proximately to result in said injuries; and as to the loss of the bridge, that prior to said flood conditions the normal high waters had begun to wash away the tailing piles upon which the bridge was negligently placed and the washing away of the bridge was proximately contributed to by the prior high water.

[4] These findings are sustained by the evidence. Mr. Kell and Mr. Maupin both testified that several days prior to the big flood the water was washing the tailing piles on which the bridge had been placed; and defendant Clark admitted that prior to the flood he had been warned that the water was washing around the bridge and that he had certain repairs made in an effort to shear the water away from washing out the approaches. He also admitted that prior to the flood the creek bed had filled up with tailings to a certain extent and that there had been an overflow into a swale, and that he sent men to put in a sack dam; also that he ran the bulldozer down the channel and pushed the tailings out on the sides of the creek; and the testimony shows that the normal high waters washed tailings down and covered up the dam, covered the headgate and filled the ditch. There was ample evidence, therefore, that the negligence of defendants in their operations combined with the unprecedented flood to complete the destruction of plaintiffs' diversion works, ditch and bridge.

Appellants further contend that damages were improperly assessed; that the measure thereof should have been the diminution in the fair market value of plaintiffs' property, but that the court measured the damages by the cost of replacement.

[5] The rule laid down in Green v. General Pet. Corp., 205 Cal. 328, 336, 270 P. 952, 60 A.L.R. 475, is that if the cost of repairing the injury and restoring the premises to their original condition amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value then the value of the property is the proper measure. Citing Salstrom v. Orleans Bar Gold Mining Co., supra.

Also, see 36 Am.Jur., section 229, page 443, section 230, page 444, and Erceg v. Fairbanks Exploration Co., 9 Cir., 95 F.2d 850, 852. In 18 R.C.L., section 144, page 1249, it is said that where injuries are remediable the cost of repairs or restoration may properly be the measure of damages. The testimony for plaintiffs was that the value of their property before the injuries complained of was $3,700 to $4,000: the cost of restoration was found to be $2,027, therefore the latter was the proper measure of damages.

As to the amount of the damages it appears to have been within the evidence presented and we cannot say that it is excessive.

The judgment is affirmed.

THOMPSON, J., concurred.

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20 Cal.2d 612

In re BROAD'S ESTATE.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. BROAD et al.

L. A. 17945.

Supreme Court of California.

July 29, 1942.

1. Executors and administrators 🔑314(12)

Where trial court and parties treated executor's proceedings for interpretation of will as proceedings to determine persons to whom distribution should be made, a judgment determining testator's heirs and the validity of bequests was appealable. Probate Code, § 1240.

2. Appeal and error 🔑843(2)

On appeal from judgment in proceedings for interpretation of a will, Supreme Court was not required to determine question raised by amicus curiae whether judgment would be conclusive on persons not appearing or not represented in the proceedings, especially in absence of an objection by appellants.

3. Wills 🔑860

Where will executed three days before testator's death made specific and residuary bequest to charities and testator's friends and bequeathed to the friends all money remaining in estate after payment of testator's indebtedness and cost of administering estate, and bequests to charities were invalid, the friends could not share in such bequests but were entitled to receive only the portion of cash on hand at date of testator's death which remained after payment of indebtedness and cost of administering estate, exclusive of expenses of maintaining estate during period of administration. Probate Code, §§ 41, 42.

4. Wills 🔑858(2)

Under amendment to statute respecting bequests to charitable institutions, the material change in wording of statute manifests that legislature intended a change in respects in which previous language was amended, and to protect designated heirs against hasty and improvident gifts to charity, and that the testamentary disposition should be unaffected where testator does not leave any of the designated heirs. Probate Code, § 41.

5. Wills 🔑858(2)

Under statute providing that property bequeathed to charitable institutions contrary to statutory restrictions "shall go to the spouse" and certain other designated heirs of testator, meaning must be given to quoted language, and it is intended that in event of a bequest contrary to restrictions such heirs shall take. Probate Code, § 41.

6. Wills 🔑858(2)

Where will executed three days before testator's death made specific and residuary bequests to charitable institutions, and testator left no surviving spouse, brother, sister, descendant or ancestor, and did not mention surviving nephews and nieces in will, the bequests to charities were invalid and property so bequeathed was distributable to nephews and nieces in accordance with laws of succession. Probate Code, §§ 41, 42, 126.

TRAYNOR and EDMONDS, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Proceedings in the matter of the estate of William J. Broad, deceased, wherein Security-First National Bank of Los Angeles, a national banking corporation, as executor, etc., filed a petition for interpretation of deceased's will, and William Broad and R. F. Pierce and others, contestants, filed an answer to the petition. From an adverse judgment, R. F. Pierce and others appeal, opposed by the Security-First National Bank of Los Angeles, as executor, etc., and William Broad.

Affirmed.

For prior opinion, see 117 P.2d 697.

Duckworth, Mussell & King, of San Bernardino, for appellants.

Fred A. Wilson, of San Bernardino, and Walter J. Hartzell, of Redlands, for respondents.

Garret W. McEnerny, of San Francisco, amicus curiae, for respondents.

SHENK, Justice.

This is an appeal from a judgment on a petition of the executor for the interpretation of the will of the decedent.

The controversy involves the construction and application of section 41 of the Probate Code as amended in 1937 (Stats. 1937, p. 1435). That section provides: "No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least thirty days before the death of the testator. If so executed at least thirty days before death, such devices [sic] and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected."

William J. Broad executed his last will and testament on April 8, 1939. He died three days later. By his will he forgave to his friends, Arthur and Florence Brock, their indebtedness to him, with the exception of the sum of $6,000. The $6,000 owed by the Brocks he bequeathed in equal shares to Grace Methodist Church, Redlands, California, and David and Margaret's Home, La Verne, California. He forgave his friends, R. F. and Alberta Pierce, the indebtedness owed by them and in addition bequeathed to them "all money remaining in my estate after payment of my indebtedness and the cost and expenses of administering my estate."

The only other provision of the will which requires mention is the bequest of "all of the rest, residue and remainder" of the estate in equal shares to twelve named legatees, including the Pierces, Grace Methodist Church of Redlands, David and Margaret's Home of La Verne, and Volunteers of America.

The decedent left no spouse, brother, sister, descendant or ancestor surviving him but did leave several nieces and nephews, none of whom was named in the will with the possible exception of Martha Broad Berry who was designated therein as a cousin. The appraised value of the estate was $28,331.49. After the expiration of six months from the first publication of notice to creditors the Security-First National Bank of Los Angeles, named in the will as executor, filed a first account current, together with a petition for partial distribution and a petition for interpretation of the will. R. F. and Alberta Pierce filed an answer to the petition for interpretation and objections to the account and petition for distribution. William Broad, a nephew of the decedent, also filed an answer.

By their answer the Pierces sought to have the court interpret the will so as to authorize distribution to them of all moneys remaining at the time of final distribution, including all assets which could be converted into cash, after payment of specific bequests and costs of administration.

The answer of William Broad set forth a claim of sole heirship as a nephew of the testator; that as sole heir he would be entitled to have distributed to him the bequests and devises to the three charitable institutions, and that the Pierces would be entitled only to the portion of the money on hand at the date of death which remained after payment of indebtedness and the cost of administering the estate. After a hearing on the petition and answers the court found that the decedent left as his heirs at law three nephews and five nieces, descendants of a deceased brother and a deceased sister; that Grace Methodist Church of Redlands, David and Margaret's Home of La Verne, and Volunteers of America were charitable institutions within the meaning of section 41 of the Probate Code and were not exempt from its provisions. § 42, Prob. Code. The court determined that by reason of the death of the decedent within thirty days after executing his will and the survival of the nieces and nephews, the specific and residuary bequests to the three named charitable institutions were invalid, and that the property thereby bequeathed should be distributed to the nieces and nephews in accordance with the laws of succession. The court further concluded that the Pierces were entitled under the specific bequest to receive only the portion of cash on hand at the date of the death of the testator which remained after the payment of indebtedness and the cost of administering the estate, exclusive of the expenses of maintaining the estate during the period of administration. Judgment was entered that the named nieces and nephews would be entitled to take in designated proportions the property bequeathed to the charitable institutions, namely, the $6,000 owed by the Brocks and three-twelfths of the residue.

The Pierces have appealed from the judgment. It is their contention that the charitable bequests should devolve to them under the specific bequest of moneys on hand; or that the $6,000 bequest should fall into the residue and become distributable to all the residuary legatees including themselves, with the exception of the charitable legatees, and that the portion of the residue otherwise distributable to the charitable institutions should be distributed to the surviving heirs at law.

[1-3] Preliminary to a discussion of the merits we note that the judgment was properly appealable as one determining the persons to whom distribution should be made. § 1240, Prob. Code. The court and the parties treated the proceeding as one for that purpose. The question raised by amicus curiae whether the judgment appealed from would be conclusive on persons not appearing or not represented in the proceedings, or whether such persons would be precluded on final distribution from asserting rights to a distributive share not in accordance with the court's adjudication, is not a question which need be determined on this appeal especially in the absence of an objection by the appellants, and no such objection was made by them. There is no merit in the appellants' contention that the court erred in its conclusion that the legacy of money was limited as ordered in the judgment. The language of the legacy provision, read and considered with the other provisions for specific and residuary bequests, fully supports the court's construction of the specific legacy.

The principal question for determination is the correctness of the court's interpretation and application of section 41 of the Probate Code. That section was founded on former section 1313 of the Civil Code. As originally enacted section 1313 declared void any bequest or devise for charity contained in a will executed within thirty days of the testator's death, or any disposition to charity of more than one-third of the estate by a testator leaving heirs at law. By express provision the property involved in any such void bequest went "to the residuary legatee or devisee, next of kin, or heirs, according to law." In Estate of Russell, 150 Cal. 604, 89 P. 345, it was held that under that section and section 1332 of the Civil Code (now § 126, Prob. Code), the property mentioned in such a void legacy passed to the residuary devisee and not to the heirs unless a contrary intention appeared in the will.

In Estate of Dwyer's Estate, 159 Cal. 680, 689, 115 P. 242, it was stated that the legislative restriction on bequests to charity was not intended as a mortmain statute or as declaratory of any public policy relative to charitable dispositions by will, but that its purpose was to protect the heirs at law against hasty and improvident gifts by the testator of his entire estate to charity and to the exclusion of those who in the judgment of the Legislature had a better claim to his bounty.

In 1933 the matter of the Estate of Garthwaite, 131 Cal.App. 321, 21 P.2d 465, was decided. There the testatrix left no heirs. She executed a will within thirty days preceding her death whereby she left her entire estate in trust for charitable uses. The sole question was whether that disposition was void under section 1313 of the Civil Code (reenacted in 1931 as section 41 of the Probate Code). It was contended that since the testatrix left no heirs the bequests should be deemed valid. It was held, however, that the testamentary disposition was void under the plain language of the statute. In 1937 the Legislature amended section 41 to read as first above quoted. Subsequently the matter of the Estate of Mautner, 38 Cal.App.2d 521, 101 P.2d 520, was decided. The facts were similar to those involved in the Garthwaite case. In accordance with the amended statute an order distributing property to a charitable organization was affirmed.

It is the contention of the appellants and of amicus curiae that the purpose of the 1937 amendment was only to obviate the result declared in the Garthwaite estate and to produce the result declared in the Mautner estate, namely, that when there is surviving no spouse, brother, sister, nephew, niece, descendant, or ancestor, the restrictions of section 41 do not apply and the property should go in accordance with the will, but that when such heirs do survive, property bequeathed in excess of the restrictions passes into the residue by virtue of section 126 of the Probate Code and the decision in Estate of Russell, supra. In other words a construction is urged which would be in accordance with the language as it read prior to the amendment of 1937, that all dispositions contrary to the restrictions "shall be void, and go to the residuary legatee or devisee * * * or heirs, according to law." The amended section does not invalidate the bequest or devise to charitable uses. It provides that "all property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected."

[4-6] Such a material change in the wording of the section plainly indicates that the Legislature intended a change in the respects in which the previous language was amended. People v. Weitzel, 201 Cal. 116, 118, 255 P. 792, 52 A.L.R. 811; Loew's, Inc., v. Byram, 11 Cal.2d 746, 750, 82 P.2d 1. Undoubtedly the Legislature intended the change to accord with the result in the Mautner case, to the effect that the testamentary disposition should be unaffected where the testator did not leave any of the designated heirs. Also in accord with the obvious design to protect those heirs against "hasty and improvident gifts to charity" (Estate of Dwyer, supra [159 Cal. 680, 115 P. 245]), the Legislature provided that property bequeathed or devised contrary to the restrictions "shall go to the spouse," etc. Meaning must be given to the language thus employed. It was plainly intended that in that event such heirs should take. How they should take is then stated: "if and to the extent that they would have taken said property *as aforesaid*", that is "if" they "would otherwise have taken" said property "under the will, or the laws of succession," and "to the extent" that they "would otherwise have taken" said property "under the will, or the laws of succession." With this intention and purpose in mind we find no difficulty in concluding that the court was correct in determining that the surviving heirs should take under the laws of succession.

The judgment is affirmed.

GIBSON, C. J., CURTIS and CARTER, JJ., concurred.

TRAYNOR, Justice (dissenting).

I dissent. The majority opinion assumes that the bequests to the charitable institutions were invalid and that the problem resolves itself into determining whether the heirs or the residuary legatees should receive the property. There can be no question, however, as to whom such property shall go until it is first determined whether the gift to the charities is invalid. Section 41 of the Probate Code as amended in 1937 provides as follows: "No estate, real or personal, may be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, by a testator who leaves a spouse, brother, sister, nephew, niece, descendant or ancestor surviving him, who, under the will, or the laws of succession, would otherwise have taken the property so bequeathed or devised, unless the will was duly executed at least thirty days before the death of the testator. If so executed at least thirty days before death, such devices [*sic*] and legacies shall be valid, but they may not collectively exceed one-third of the testator's estate as against his spouse, brother, sister, nephew, niece, descendant or ancestor, who would otherwise, as aforesaid, have taken the excess over one-third, and if they do, a pro rata deduction from such devises and legacies shall be made so as to reduce the aggregate thereof to one-third of the estate. All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected."

A bequest to charity is invalid under this section only if, in addition to the death of the testator within thirty days after the execution of the will, the testator leaves surviving him designated heirs, *"who under the will, or the laws of succession, would otherwise have taken the property so bequeathed."* The death of the testator within the thirty-day period and the survival of the designated heirs are not alone sufficient to invalidate the bequest. There remains the question whether the named heirs would "otherwise" have taken the property under the will, or the laws of succession "but for such devises or legacies." In other words, if the charitable bequests had not been made, to whom would the property go under the will, or, if the will does not cover this contingency, to whom would the property go under the laws of succession? If the property would go to spouse, brother, sister, nephew, niece, descendant or ancestor the bequest to charity is invalid. If it would not go to any of these but to more remote kin or strangers to the blood it is valid. The property cannot go to the designated heirs, and the charitable bequest is therefore valid if (a) the testator does not leave surviving him a nephew, niece or nearer heir (Estate of Mautner, 38 Cal.App.2d 521, 101 P.2d 520; see Estate of Garthwaite, 131 Cal.App. 321, 21 P.2d 465 for the opposite rule before the 1937 amendment to section 41), or (b) if he has so framed his will that his nephews, nieces, or nearer heirs would not take what would otherwise be a defeated gift to charity.

Under section 41 as it read before the 1937 amendment, a void charitable devise passed to the residuary devisee and not to the heirs, in the absence of a contrary provision in the will. Estate of Russell, 150 Cal. 604, 89 P. 345. The 1937 amendment to section 41 makes it plain that charitable bequests and devises are no longer to be sacrificed to the enrichment of residuary bequests or devises given to strangers to the blood or to heirs more remote than nephew and niece. That purpose is clearly set forth in section 41 as follows: "All property bequeathed or devised contrary to the provisions of this section shall go to the spouse, brother, sister, nephew, niece, descendant or ancestor of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies; otherwise the testator's estate shall go in accordance with his will and such devises and legacies shall be unaffected." The same result is accomplished by that portion of section 42 reading as follows: "Bequests and devises * * * made by a testator leaving no spouse, brother, sister, nephew, niece, descendant or ancestor surviving by whom the property so bequeathed or devised would have been taken if said property had not been so bequeathed or devised, are excepted from the restrictions of this article." If none of the designated heirs can take the property, the restrictions on charitable bequests do not apply and the property goes in accordance with the testator's will. The very reasons therefore that exclude the heirs make a charitable bequest valid as against residuary legatees.

In the present case the decedent left nieces and nephews surviving him. The validity of the charitable bequests therefore depends upon whether the property would go to such heirs but for those bequests. If the residuary bequest to the charities had not been made there would be an intestacy as to one-fourth of the residue and the nieces and nephews would inherit that property under the laws of succession. That bequest therefore is invalid, and as property bequeathed contrary to the provisions of section 41, it must go to the nieces and nephews. If the specific bequest had not been made the $6,000 would be included in the residue under Probate Code, section 126, for it is not otherwise bequeathed by the testator's will. The will contains a residuary clause, which does not include the nieces and nephews and they are not otherwise provided for in the will. It is clear therefore that the nieces and nephews cannot take such property under the will. Had there been no residuary clause they would have taken under the laws of succession and the specific bequest would therefore have been invalid. Since there is a residuary clause, however, they can take under the laws of succession only to the extent that the residuary bequests are not effective. The residuary clause left one-fourth of the residue to three charitable organizations, two of which were legatees of the $6,000 bequest. The residuary share of the charitable organization was therefore augmented by one-fourth of the $6,000 that would have gone to the other residuary legatees had the bequest to such organizations not been made. That one-fourth cannot go to the other residuary legatees because it was not bequeathed to them. It cannot go to the charitable organizations because there are heirs who would have taken under the laws of succession had it not been bequeathed to the charity. One-fourth of the $6,000 should therefore go to the nieces and nephews under the express terms of section 41 that "All property bequeathed or devised contrary to the provisions of this section shall go to the * * * nephew, niece * * * of the testator, if and to the extent that they would have taken said property as aforesaid but for such devises or legacies."

The remaining three-fourths of the $6,000 bequest is a valid gift to charity by reason of the following express terms of section 41: "* * * otherwise the testator's estate shall go in accordance with his will and such * * * legacies shall be unaffected" and section 42: "Bequests * * * made by a testator leaving no * * * nephew, niece * * * surviving by whom the property so bequeathed * * * would have been taken if said property had not been so bequeathed * * * are excepted from the restrictions of this article."

It is immaterial that the charities may benefit by a reversal of the judgment although they are not appellants in this proceeding. If the part of a judgment appealed from is so dependent upon the remainder that it affects the whole, the appeal is from the entire judgment, and the appellate court must do as justice requires. Estate of Murphey, 7 Cal.2d 712, 62 P.2d 374; Whalen v. Smith, 163 Cal. 360, 125 P. 904, Ann.Cas.1913E, 1319. The present appeal cannot be limited to the determination in favor of the heirs, for that determination is dependent upon the holding that the gifts to charity are void. Furthermore, proceedings to determine to whom distribution shall be made are in rem and no judgment in personam is given in favor of one party against another. Edlund v. Superior Court, 209 Cal. 690, 289 P. 841. See, also, O'Day v. Superior Court, 18 Cal. 2d 540, 116 P.2d 621; Lilienkamp v. Superior Court, 14 Cal.2d 293, 93 P.2d 1008. The object of the proceedings is to ascertain the persons entitled to share in the estate, and in the words of the Edlund case, "It will not be questioned that justice and sound policy require that the estates of decedents be distributed to persons rightfully entitled thereto * * *." [209 Cal. 690, 289 P. 843.]

The judgment should be reversed.

EDMONDS, J., concurred.

20 Cal.2d 665

DOUILLARD et al. v. WOODD.

L. A. 18275.

Supreme Court of California.

Aug. 3, 1942.

As Modified Sept. 2, 1942.

1. Wills 🔑**740(3)**

In action on alleged oral contract to divide defendant's legacy with plaintiffs, evidence *held* sufficient to support trial court's finding that defendant made such agreement.

2. Wills 🔑**740(3)**

Promises of testatrix' heirs not to contest her will constituted "valuable consideration" for contract by another heir to divide her legacy under will with promisors.

See Words and Phrases, Permanent Edition, for all other definitions of "Valuable Consideration".

3. Contracts 🔑**187(1)**
Wills 🔑**740(3)**

Exchange of mutual promises between one receiving both special and residuary legacies under will and every other residuary legatee was unnecessary to validate contract for division of special legacy among all legatees in consideration of such other residuary legatees' promise not to contest will, as any one of residuary legatees, not a party to agreement, might enforce it as third party beneficiary.

4. Appeal and error 🔑**1011(1)**

In action on alleged oral contract to divide defendant's legacy under will with plaintiffs, defendant's positive testimony that she made no such contract merely presented for determination by trier of facts an irreconcilable conflict with plaintiffs' and other witnesses' testimony as to such contract.

5. Appeal and error 🔑**989**

An appellate court's power respecting any question as to sufficiency of evidence begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support trial court's fact finding.

6. Novation ⟜1

Specific and residuary legatees' memorandum of agreement, specifically limited to division of property distributable under will to residuary legatees and not inconsisten on its face with specific legatee's prior oral contract to divide special legacy with residuary legatees, did not constitute "novation" of such contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Novation".

7. Wills ⟜741

Receipts for signers' distributive shares of residue of testator's estate under will applied only to their rights under terms of will, and hence did not constitute "waiver" of their right to enforce agreement by executrix as specific legatee to divide specific legacy with residuary legatees, though receipts recited that certain property was accepted in full settlement, payment and release of all claims against estate as legatee or otherwise and against executrix, in absence of evidence that any legatee signing receipt intended to waive his rights against specific legatee in her individual capacity.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

8. Trial ⟜56

A trial judge is not bound to allow cumulative testimony on same point.

9. Trial ⟜56

Exclusion of defendant's testimony as to particulars concerning facts to which she had testified generally *held* not error.

10. Novation ⟜1

The essential requirements of "novation" are recognition of pre-existing contract and intention to substitute new agreement for old one. Civ.Code, §§ 1530–1532.

11. Trial ⟜45(3)

A mere general offer of proof, without producing witness or stating evidence whereby fact in issue is to be proved, or without putting question to witness, if present, in such form as to give opportunity for objection, is not correct trial procedure and affords no ground for appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Emile A. Douillard and others against Melanie D. Woodd on an alleged oral contract to divide a legacy with plaintiffs. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Prior opinion, 120 P.2d 73.

Daniel A. Knapp and Fred W. Heath, both of Los Angeles, for appellant.

Thomas Higgins, Jr., and J. M. Clements, both of Los Angeles, for respondents.

EDMONDS, Justice.

Following the administration of the estate of Emily S. Donahue, the respondents, who were legatees under her will, sued the appellant, the principal beneficiary of it, upon an asserted oral contract by which Mrs. Woodd agreed to divide her legacy with them. The appeal is from a judgment rendered in accordance with the respondents' complaint.

All of the parties are heirs of Mrs. Donahue, who bequeathed $10,000 to her daughter, Mrs. Woodd, "in appreciation of her devotion and service to me in many ways for many years." After directing that each grandchild and great-grandchild be paid $50 from her estate, Mrs. Donahue devised the residue of her estate to Mrs. Woodd and the respondents in stated shares. The probate court decreed distribution accordingly.

According to the complaint, Mrs. Woodd orally agreed with the respondents that if they would not contest the will she would divide her legacy of $10,000 between herself and them in the same proportions designated by Mrs. Donahue for the division of the residue of her estate. By way of answer, Mrs. Woodd denied that she made that agreement. She also pleaded three affirmative defenses: (1) That before distribution of the estate, all of the legatees entered into a written novation of all prior agreements, and that under such novation, they are not entitled to the relief sought in their complaint; (2) that the alleged contract violated Section 1973(1) of the Code of Civil Procedure, requiring an agreement to be in writing where, by its terms, it is not to be performed within a year from the making thereof; and (3) that the legatees, by the terms of the written receipts of their distributive shares of the estate, waived any right to enforce the asserted agreement.

The trial court found that Mrs. Woodd made the contract alleged by the respondents in consideration of their forbearing to contest the will of Mrs. Donahue, and that these legatees had performed their part of the agreement by permitting the estate to be administered, without contest, in accordance with the terms of the will. Upon the issues raised by the affirmative defenses of Mrs. Woodd, the court found that there was no novation or waiver of any rights under the oral contract and that the contract does not violate the statute of frauds. Judgment was entered accordingly.

The appellant contends that the evidence is insufficient to support the findings concerning the making of the oral contract and that there was no later novation or a waiver of rights under it; also that the court committed prejudicial error in sustaining objections to certain evidence offered by her. The respondents insist that the evidence is sufficient to support the trial court's findings on all of the issues. And according to these heirs, the questions to which the trial court sustained objection were directed to discussions relative to the division of the residue of the estate and had no bearing upon either the issue of whether an agreement had been made by the parties or whether a novation had replaced the original agreement to divide the special legacy.

When the case was before the District Court of Appeal, a controversy arose concerning the transcript. The appellant charged that much of the testimony stated in the bill of exceptions settled by the trial judge is incorrect. The District Court of Appeal appointed a referee to examine the record, and upon his report, it settled a supplemental bill of exceptions, which corrected the bill settled and allowed by the trial judge to make it conform to the reporter's transcript, and added certain testimony and rulings which had been omitted.

Considering only the testimony as corrected by the supplemental bill of exceptions, there is substantial evidence to support the judgment. Four of the respondents and the wives of two of them testified positively that Mrs. Woodd agreed to divide the $10,000, as charged in the complaint, provided they did not contest the will. Two other witnesses testified to separate conversations with the appellant, on which occasions Mrs. Woodd told them that she intended to divide her legacy among the other heirs as soon as she received it.

[1-5] Although the terms of the contract are not too clearly established by this evidence, the testimony in its entirety supports the finding of the trial court that Mrs. Woodd agreed to divide her $10,000 legacy with the respondents. The promise on their part not to contest the will constituted a valuable consideration for this contract. Bacon v. Kessel, 31 Cal.App.2d 245, 87 P.2d 857. It was not necessary that mutual promises be exchanged between the appellant and every legatee; any one of the respondents, not a party to the agreement, as a third party beneficiary, might enforce the agreement made for his benefit. Garratt v. Baker, 5 Cal.2d 745, 56 P.2d 225; Woodhead Lumber Co. v. E. G. Niemann Investments, 99 Cal.App. 456, 278 P. 913; Bryan v. Banks, 98 Cal. App. 748, 277 P. 1075. And although Mrs. Woodd testified positively that she made no such contract, this only presented to the trier of fact an irreconcilable conflict which it was his duty to determine. Under such circumstances the power of an appellate court, so far as any question as to the sufficiency of the evidence is concerned, begins and ends with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. Raggio v. Mallory, 10 Cal.2d 723, 76 P. 2d 660; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; In re Winzeler's Estate, 42 Cal.App.2d 246, 108 P.2d 720; In re Filippi's Estate, 9 Cal.App. 2d 407, 49 P.2d 892.

[6, 7] The appellant contends, however, that even though such an agreement may have been entered into by her, yet the "Memorandum of Agreement" signed at a later time by all of the legatees constituted a novation of the contract. But the memorandum is specifically limited by its terms to a division of the property "to be distributed to us as residuary legatees" and on its face this writing is in no way inconsistent with the separate agreement on the part of Mrs. Woodd to divide her special legacy among them. For the same reason, the receipts signed by the respondents for their distributive shares of the residue of the estate may be held to apply only to their rights under the terms of the will,

even though these documents recite that certain property is accepted "in full settlement, payment and release of all claims against said estate as legatee or otherwise, and against the executrix." There is no evidence to show that, in signing such a receipt, any legatee intended to waive his rights against the appellant in her individual capacity.

[8-10] The only remaining objections of the appellant relate to the exclusion of certain evidence offered by her at the trial. These questions were directed to the appellant by her counsel and related to the negotiations leading up to the signing of the contract for the distribution of the residue among the legatees. Under this contract, Mrs. Woodd agreed to accept a large building, whose appraised value exceeded her residuary share, and to pay the difference between the value of her residuary share and the value of the building into the estate to equalize her share.

Referring to the negotiations preliminary to this agreement Mrs. Woodd testified: "All through the meeting it was that I should take the big building, because I had the $10,000.00 to buy it * * * they wanted me to use my $10,000.00 for it." The appellant now complains that the court erroneously sustained objections to subsequent questions specifically asking whether each legatee had then told her that she could make up the difference for the large building out of her $10,000. The witness clearly included all of the legatees in her testimony and the court stated, in sustaining the objections to continued questioning along this line, that "there is sufficient for the record on that now." A trial judge is not bound to allow cumulative testimony upon the same point and as the record shows that he understood Mrs. Woodd as having testified generally to the same facts concerning which answers were sought particularly, the appellant has no cause for complaint. Nor is there any merit to the contention that the facts related by her established a novation. Essential requirements for a novation are a recognition of the pre-existing contract and an intention to substitute the new agreement for the old one. Civ.Code, §§ 1530–1532.

[11] Before the taking of evidence was concluded, counsel for the appellant offered to show by the testimony of the appellant and "by other witnesses" that the respondents affirmatively took positions which were entirely inconsistent with and directly negatived the asserted agreement to divide the appellant's legacy. But the appellant did not state the names of these witnesses nor the facts to which any one of them would testify. A mere general offer of proof without producing the witness or stating the evidence whereby the fact in issue is to be proved, or, if the witness be present, without putting a question to him in such form as to give opportunity for objection, is not correct trial procedure and it affords no ground for appeal. Rose v. Doe, 4 Cal. App. 680, 89 P. 135; Biddick v. Kobler, 110 Cal. 191, 42 P. 578; Dohrman v. J. B. Roof, Inc., 108 Cal.App. 456, 291 P. 879; Liberty Bank v. Ernst, 93 Cal.App. 560, 269 P. 959.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 646

HARRISON v. ADAMS et al.

L. A. 17675, 17706.

Supreme Court of California.

Aug. 3, 1942.

1. Appeal and error 🔑907(3)

Where appeal was on the judgment roll alone, finding that assignment of interest in judgment to assignor's wife was made for valuable consideration was presumed to have been supported by substantial evidence.

2. Set-off and counterclaim 🔑8(1)

A court of equity will compel a set-off when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered.

3. Set-off and counterclaim 🔑8(2)

The insolvency of one of two parties having mutual demands, affords sufficient ground for invoking equitable principle of set-off.

4. Judgment 🔑883(9)

A judgment debtor who has by assignment or otherwise become owner of judgment against the judgment creditor may go into the court in which the judgment against him was rendered and have his judgment offset against the creditor's judgment.

5. Judgment 🔑883(13)

The fact that a claim of a plaintiff has not been reduced to judgment is no obstacle to its allowance as a set-off against a judgment against the plaintiff and such a set-off may be compelled even against an assignee of the judgment who took without notice and for value.

6. Judgment 🔑883(13)

A judgment debtor may set-off claims against the creditor which were acquired after assignment of the judgment to a third person but prior to notice to the debtor of the assignment. Code Civ.Proc. § 368.

7. Judgment 🔑883(9, 13)

In order for an assignee of a claim or judgment to use it as a set-off against a judgment against him, the assignee must be the beneficial owner of the claim or judgment. Code Civ.Proc. § 368.

8. Judgment 🔑883(9)

In order for an assignee of a judgment to use it as a set-off against a judgment against him, "mutuality" is essential, that is, the judgments must be between the same parties in the same right. Code Civ.Proc. § 368.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality".

9. Judgment 🔑883(9)

In determining whether demand of assignee of a judgment against assignee's creditor, and the creditor's judgment against assignee are "mutual" so that they may be set off against each other, equity will look to the real parties in interest. Code Civ.Proc. § 368.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutual".

10. Judgment 🔑883(9)

There may be a set-off of judgment where the real and beneficial owner of one of them is the debtor on the other, although an assignee for collection is the nominal owner of the first judgment.

11. Assignment 🔑121

An assignment for collection vests legal title in the assignee which is sufficient to enable him to maintain an action in his own name, but the assignor retains the equitable interest in the thing assigned.

12. Assignment 🔑89

A "fiduciary relationship" exists between an assignee under an assignment for collection, and the assignor, and the assignee is a "trustee" or "agent" of the assignor.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent", "Fiduciary Relationship" and "Trustee".

13. Set-off and counterclaim 🔑52(1)

If an assignee for collection should attempt to set-off the assigned chose in action against his individual obligation he would be violating law forbidding a trustee from using trust property for his private or individual purposes. Civ.Code, § 2229.

14. Judgment 🔑883(13)

Allowing a judgment debtor to set-off against judgment creditor's claim, a claim assigned to the judgment debtor for collection would violate rule requiring mutuality of parties in order to authorize set-off.

15. Judgment 🔑883(13)

Where insolvent judgment creditor assigned his interest in judgment to his wife for valuable consideration, and thereafter payee of a note executed by the judgment creditor assigned the note to the judgment debtor for collection only, under contract providing that payee should receive ⅔ and the debtor ⅓ of the amount collected, the debtor who had no notice of the assignment of the judgment to the creditor's wife, was not entitled to use the note as set-off against the judgment. Code Civ.Proc. § 368.

In Bank.

Appeals from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by R. E. Harrison against Henry J. Adams and others to set off an amount due on note against judgment obtained by named defendant against the plaintiff. From a portion of the judgment and from the whole of the same judgment, plaintiff appealed and the appeals were consolidated. Upon the death of the plaintiff, Charlotte R. Harrison as executrix of his estate was substituted as plaintiff.

Affirmed.

For prior opinion, see 118 P.2d 43.

Luce, Forward, Lee & Kunzel, of San Diego, for appellant.

Dempster McKee, of San Diego, for respondents.

EDMONDS, Justice.

The judgment from which the plaintiff has appealed must be reversed if a chose in action, which has been assigned for collection, may be used by the assignee as a set-off against the judgment creditor of the assignee. The record in L. A. 17675 shows a notice of appeal from a portion of the judgment. Under a second notice of appeal from the whole of the same judgment, a transcript was filed under L. A. 17706. The two appeals have been consolidated, and following the death of R. E. Harrison, the appellant, the executrix of his estate was substituted for him.

In a previous action, Henry J. Adams obtained a judgment against the plaintiff for $11,000. Harrison appealed, making a cash deposit with the county clerk to stay execution. Adams assigned the judgment to F. N. Meyers for the purpose of distributing its proceeds in accordance with a contract for attorneys' fees. Harrison was served with notice of this assignment.

Subsequently, Adams assigned his interest in the judgment to Verda Adams, his wife, giving notice to Meyers of the assignment. However, Harrison had no notice of the second assignment until after the present action was commenced.

Following these assignments, one Russell assigned to Harrison, for the purpose of collection, Adams' promissory note for $3,800 which was then due and payable. Later, the judgment against Harrison was affirmed. Harrison then commenced the present action, naming Adams and Meyers as defendants, to set off the amount due upon the note against the judgment obtained by Adams. At the time of filing it, Harrison secured an order restraining the clerk of the superior court from paying to Adams or Meyers any part of the money deposited by him in lieu of a bond on appeal. Subsequently, by stipulation, all of the deposit was paid to Meyers except $4,600, which is held pending the final determination of this action, and Verda Adams was substituted for Meyers as a party defendant.

These facts are undisputed. In connection with them, the trial court found that the assignment from Adams to his wife was for a valuable consideration and that Adams was insolvent both before and after the assignment. Judgment was rendered for Harrison against Adams for the amount of principal and interest on the note, approximately $4,600, with costs, and for Verda Adams against Harrison for her costs, directing the clerk to pay to her the amount of the deposit held by him.

Unquestionably the judgment against Henry J. Adams is proper, but, in view of Adams' insolvency, the question vital to the success of Harrison in realizing upon it is whether he can reach the interest of Verda Adams in the money held by the county clerk, or conversely, whether Verda Adams took her title subject to the rights of Harrison, and Russell, his assignor, upon the note.

[1] At the time of the assignments made by Adams, California had not enacted the Uniform Fraudulent Conveyance Act, Stats. 1939, p. 1667, Civ.Code §§ 3439–3439.12. But many years before, this court held that a transfer of property without consideration by a person insolvent, or in contemplation of insolvency, is void as to creditors regardless of the intent of the debtor. Atkinson v. Western Development Syndicate, 170 Cal. 503, 150 P. 360. However, Harrison cannot successfully challenge the assignment made to Verda Adams because his appeal is upon the judgment roll alone, and the finding that it was made for a valuable consideration must be presumed to have the support of substantial evidence to that effect.

[2-5] Concerning the rights of the appellant to the money on deposit as against the assignee of the judgment for a valuable consideration, it is well settled that a court of equity will compel a set-off when mutual demands are held under such circumstances that one of them should be applied against the other and only the balance recovered. The insolvency of the party against whom the relief is sought affords sufficient ground for invoking this equitable principle. Machado v. Borges, 170 Cal. 501, 150 P. 351; Coonan v. Loewenthal, 147 Cal. 218, 81 P. 527, 109 Am.St.Rep. 128; Hobbs v. Duff, 23 Cal. 596; Russell v. Conway, 11 Cal. 93; California Cotton Credit Corp. v. Superior Court, 127 Cal.App. 472, 15 P.2d 1108; City Investment Co. v. Pringle, 73 Cal.App. 782, 239 P. 302; Arp v. Blake, 63 Cal.App. 362, 218 P. 773. And a judgment debtor who has, by assignment or otherwise, become the owner of a judgment or claim against his judgment creditor, may go into the court in which the judgment against him was rendered and have his judgment offset against the first judgment. Machado v. Borges, supra; Coonan v. Loewenthal, supra; Haskins v. Jordan, 123 Cal. 157, 55 P.

786; McBride v. Fallon, 65 Cal. 301, 4 P. 17; Hobbs v. Duff, supra; Porter v. Liscom, 22 Cal. 430, 83 Am.Dec. 76; Russell v. Conway, supra; Arp v. Blake, supra; and see annotation in 121 A.L.R. 478–542. The fact that the demand of the plaintiff has not been reduced to judgment is no obstacle to its allowance as a set-off against a judgment. Machado v. Borges, supra. Such a set-off may be compelled even against an assignee of the judgment who took without notice and for value. Machado v. Borges, supra; Coonan v. Loewenthal, supra; Haskins v. Jordan, supra; McBride v. Fallon, supra; Porter v. Liscom, supra; Cohen v. Bonnell, 14 Cal.App.2d 38, 57 P.2d 1326; Bank of America v. Pacific Ready-Cut Homes, Inc., 122 Cal.App. 554, 10 P.2d 478; Arp v. Blake, supra.

[6] And it has been held that under section 368 of the Code of Civil Procedure the debtor may set off claims against the creditor which were acquired after the assignment of the judgment to a third person but prior to notice to the debtor of the assignment. Arp v. Blake, supra; and see McKenney v. Ellsworth, 165 Cal. 326, 132 P. 75; St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 P. 876; McCabe v. Grey, 20 Cal. 509. "Whatever may be the rule as to notice in other states, however much or little the courts may have permitted themselves to be influenced by equitable considerations in favor of the assignee, the fact remains that in this state there is no room for the exercise of discretion upon the question. The rule is one rigidly fixed by statute * * *." Haskins v. Jordan, supra, [123 Cal. 157, 55 P. 788].

[7-10] But the assignee must be the beneficial owner of the claim or judgment in order to use it as a set-off against a judgment against him. Jones v. Chalfant, 55 Cal. 505; see cases collected in note, 121 A.L.R. 478, 523. And mutuality is essential, that is, the judgments must be between the same parties in the same right. Machado v. Borges, supra; Kaye v. Metz, 186 Cal. 42, 198 P. 1047; Petersen v. Lyders, 139 Cal. App. 303, 33 P.2d 1030; California Cotton Credit Corp. v. Superior Court, supra; Hobbs v. Duff, supra; Flynn v. Seale, 2 Cal. App. 665, 84 P. 263; and see cases collected in note, 121 A.L.R. 478, 514. In determining whether demands are mutual, equity will look to the real parties in interest. Thus there may be a set-off of judgments where the real and beneficial owner of one of them is the debtor upon the other, although an assignee for collection is the nominal owner of the first judgment. Heine Piano Co. v. Bloomer, 183 Cal. 398, 191 P. 900.

[11-14] An assignment for collection vests legal title in the assignee which is sufficient to enable him to maintain an action in his own name, but the assignor retains the equitable interest in the thing assigned. National Reserve Co. v. Metropolitan Trust Co., 17 Cal.2d 827, 112 P.2d 598; Morrison v. Veach, 190 Cal. 507, 213 P. 945; Bechtel v. Baglieto, 13 Cal.App.2d 495, 57 P.2d 192; Elam v. Arzaga, 122 Cal.App. 742, 10 P.2d 805; Koepple v. Morrison, 84 Cal.App. 137, 257 P. 590. Such an assignee has been referred to as the trustee or agent of the assignor (Weiner v. Luscombe, 19 Cal.App.2d 668, 66 P.2d 151; Elam v. Arzaga, supra; Toby v. Oregon Pac. R. Co., 98 Cal. 490, 33 P. 550), and a fiduciary relationship exists between them. Elam v. Arzaga, supra. If the assignee for collection should attempt to set off the assigned chose in action against his individual obligation, he would be violating the elementary rule of the law of trusts which forbids the trustee from using trust property for his private or individual purposes. Civ.Code, § 2229; Purdy v. Johnson, 174 Cal. 521, 163 P. 893; Bermingham v. Wilcox, 120 Cal. 467, 52 P. 822; and see Levy v. Drew, 4 Cal.2d 456, 50 P.2d 435, 101 A.L.R. 1144. Also, a trustee, or one bearing a similar fiduciary relationship, may not set off a claim due the trust estate against his own personal obligation. Hobbs v. Duff, supra; Estate of Hildebrandt, 92 Cal. 433, 28 P. 486; Flynn v. Seale, supra; see annotation in 121 A.L.R. 478, 517. And to allow a judgment debtor to set off a claim assigned to him for collection would be violative of the rule requiring the mutuality of parties; it would, in effect, permit the collection of a debt due to a third party, in this case, Russell, against whom no corresponding right of set-off exists on the part of the judgment creditor.

[15] The respondent urges, however, that where an equitable action for a set-off is being maintained because of the insolvency of the creditor, equity will allow a set-off, even though the demands be not mutual. But what equity exists in behalf of the judgment debtor when he seeks to collect, not his own claim, but a claim to which another is beneficially entitled? In the present action, Harrison must account to Russell for two-thirds of any amount he receives upon the note of Adams. Harrison does not own a

separable interest in it and his beneficial interest is contingent upon collection. If the money held by the county clerk in connection with the case of Adams v. Harrison was owned by Adams, it might be subjected to the judgment rendered against Adams in the present action. But at the time the action was commenced, the money in custodio legis belonged to Verda Adams, and was therefore not subject to the judgment obtained by Harrison for the benefit of Adams.

The appellant contends that since the court in Del Monte Ranch Dairy v. Bernardo, 174 Cal. 757, 164 P. 628, held that an assignor for collection could not use the claim as a set-off after the assignment, the assignee must have that right or none exists. But that conclusion could only apply where the assignee claims the right to set off his assignor's demand against a debt owed by his assignor. In such a case to allow an assignee to set off, for the benefit of his assignor, the assignor's equitable right against the assignor's creditor would be consistent with the rule that, in determining whether claims are mutual for the purpose of set-off, equity will look to the real parties in interest. Hobbs v. Duff, supra; Heine Piano Co. v. Bloomer, supra. But the principles stated in the Del Monte Ranch case have no application to the present action, where there is no claim that Russell, the assignor for collection, has any right of set-off against Adams.

The appellant cites Hammell v. Superior Court, 217 Cal. 5, 17 P.2d 101, as determinative of the right of an assignee for collection to apply the assigned chose as a set-off against his personal obligation. In that case counsel advanced the argument that, inasmuch as the amounts sued for in the complaint were made up of several claims assigned to the plaintiff for collection, the superior court did not have jurisdiction because there were, in fact, separate plaintiffs. In rejecting the contention, the court held that, for the purposes of jurisdiction, since the plaintiff had the capacity to sue in his own name and the aggregate amount demanded fell within the jurisdiction of the court, no further inquiry would be made into the character of the plaintiff's ownership. That decision is of course inapplicable to the present action where the character of the ownership of the claim upon which set-off is sought determines the rights of the parties.

Finally, says the appellant, it makes no difference to the judgment creditor whether the assignee is one for collection or holds both the legal and the equitable title; his only concern is that he should receive a full release from the debt. Such a holding would ignore the fundamental basis of equitable set-off, which is the right to balance mutual demands between the parties to the action, by allowing a stranger to collect his claim through a nominal party. Moreover, in the present case, this stranger is asserting rights against a bona fide purchaser for value.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 574

PUCCETTI v. GIROLA et al.

S. F. 16711.

Supreme Court of California.
July 16, 1942.

As Modified on Denial of Rehearing
Aug. 10, 1942.

1. Deeds 🔑31

Codal provision that any person in whom the title of real estate is vested who shall afterwards from any cause have his or her name changed must in any conveyance of such real estate set forth the name in which he or she derived title thereto, abrogates the common-law rule that whatever the name in which the true owner conveyed the property the conveyances as between grantor and grantee transferred the title, and precludes any conveyance that would appear in the record as a wild deed from giving rise to multiple chains of title. Civ.Code, § 1096.

2. Deeds 🔑31

The codal provision that any person in whom title of real estate is vested who shall afterwards from any cause have his or her name changed must in any conveyance of such real estate set forth the name in which he or she derived title thereto is "mandatory". Civ.Code, § 1096.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

3. Corporations 🔑443

Where corporation changed its name after taking title to land, but in deeding the land did not set forth the name under which land had been acquired as required by statute, the deed did not pass title, but title remained in the corporation in absence of reformation of the deeds or an adjudication of the identity of grantor. Code Civ.Proc. § 751a; Civ.Code, § 1096.

4. Execution 🔑53

Where corporation changed name after acquiring title to land and in making a voluntary conveyance of the land failed to state the name under which title to the land had been acquired as required by statute, the land was subject to levy of execution on judgment against corporation and passed to judgment creditor by virtue of sheriff's sale and deed. Civ.Code, § 1096.

5. Fraudulent conveyances 🔑300(1)

In action by judgment creditor who had purchased land at execution sale to quiet title against grantee of judgment debtor because deeds to grantee did not state name under which land had been acquired and because deed was in fraud of creditors, finding that deeds to grantee were not entirely voluntary was without support in the evidence. Civ.Code, § 1096.

6. Fraudulent conveyances 🔑87(1)

Where accounts assigned had been marked closed several months before the purported assignment, they were presumably valueless and their cancellation would not constitute "consideration" for deeds as against creditor of grantor.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

7. Corporations 🔑1

The consequences that ordinarily follow the observance of the separate identity of a corporation and the persons who compose it are disregarded when it is necessary to protect the rights of third persons or to prevent injustice.

8. Corporations 🔑542(1)

Assignment of accounts against family corporation by officers and directors to their mother who canceled indebtedness in consideration of conveyances by corporation against which a creditor subsequently obtained judgment constituted merely a "colorable consideration" and did not constitute "value" so as to render conveyances invulnerable to attack by judgment creditor.

See Words and Phrases, Permanent Edition, for all other definitions of "Colorable Consideration" and "Value".

9. Mortgages 🔑154(4)

Where mortgagor had no valid legal interest in property, mortgagee acquired no security for its mortgage, where a search of the record would have revealed no predecessor in interest of record to mortgagor's grantor.

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Alberto Puccetti, for whom Gemma Puccetti, as administratrix, etc., was substituted against Madeline Girola and others to quiet title to certain land. From a judgment for the defendant Madeline Girola, who had filed a cross-complaint, the plaintiff appeals.

Judgment reversed.

Prior opinion, 119 P.2d 200.

Jesse G. Benson, of Oakland, for appellant.

John J. Beck, of Los Angeles, Altman & Ellis, John C. Altman, and Willard L. Ellis, all of San Francisco, and Donahue, Richards & Hamlin and A. R. Rowell, all of Oakland, for respondents.

TRAYNOR, Justice.

On April 21, 1931, Alberto Puccetti commenced an action against Girola Bros., a corporation, Henry Girola, its president and sole stockholder, and others for fraudulently inducing him to purchase stock in a subsidiary corporation. Before that suit was filed, Girola Bros. had changed its name to Madalay, Inc., and while the action was pending, it conveyed by quitclaim deeds certain real property to defendant Madeline Girola, a director of Girola Bros. and the mother of Henry Girola. The deeds, recorded by Madeline Girola, set forth Madalay, Inc., as grantor, but failed to set forth the name in which Madalay Inc., derived title to the realty as required by section 1096 of the Civil Code. On November 1, 1933, Puccetti obtained a judgment, and on July 9, 1937, recorded an abstract thereof and a writ of execution levying upon all the right, title, and interest of the judgment debtors in the property. On August 18, 1937, Madeline Girola executed a mortgage on the property to defendant State Finance Company who recorded it on October 8, 1937. On November 8, 1937, Puccetti purchased the land at an execution sale and on that day recorded the sheriff's certificate of sale. On December 9, 1938, he recorded the sheriff's deed conveying the property to him. He then brought this action to quiet title to the land, claiming that the conveyance to Madeline Girola was void because it failed to comply with section 1096 of the Civil Code and because it was in fraud of creditors.

The trial court made findings in favor of defendants and granted the cross-complaint of Madeline Girola, quieting title in her. Puccetti has appealed from the judgment. Following his death during the pendency of the appeal, his administratrix, Gemma Puccetti, was substituted as plaintiff and appellant.

It is admitted that the conveyance from Madalay, Inc., to Madeline Girola failed to comply with section 1096 of the Civil Code, providing "Any person in whom the title of real estate is vested, who shall afterwards, from any cause, have his or her name changed, must, in any conveyance of said real estate so held, set forth the name in which he or she derived title to said real estate." Appellant contends that the requirements of this section are mandatory and that a deed in violation thereof does not pass legal title. Respondents argue that the section must be construed to have the same effect as the recording statutes embodied in sections 1213–1218 of the Civil Code, so that a conveyance in disregard thereof can be attacked only by a subsequent purchaser or encumbrancer for value without notice of the change of name by the original owner.

[1, 2] Section 1096 was originally enacted in 1874 following a suggestion of the court in Fallon v. Kehoe, 38 Cal. 44, 99 Am.Dec. 347. In that case, land had been conveyed to Jeremiah Fallon in his nickname, Darby O'Fallon. He conveyed the land in his true name before the enactment of the recording act, and following its enactment he made another conveyance in the name under which he had derived title. In a suit between the successive grantees, the court held that the first grantee was entitled to prevail under the common-law rule that whatever the name in which the true owner conveyed the property, the conveyances as between grantor and grantee transferred the title. Recordation of the first deed was held to be constructive notice to subsequent purchasers even though a search of the record would not have disclosed the earlier deed, which was out of the grantor's chain of title.

Section 1096 seeks to prevent any opportunity for fraud in comparable situations by requiring a grantor who conveys land by a name other than that in which he derived title to recite the change of name in the conveyance. It thus abrogates the common-law rule relied upon in the Fallon case by precluding any conveyance that would appear in the record as a "wild deed" from giving rise to multiple chains of title. Its language is mandatory and nowhere suggests that compliance is excused when a subsequent purchaser has notice of the change in name. It was placed in the chapter entitled "Transfer of Real Property" and grouped with other sections under the heading "Mode of Transfer." Section 1095 in the same chapter provides in similar language that "When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact," and it has been held that failure to follow the mandate of that section renders a deed void. Morrison v. Bowman, 29 Cal. 337; Mitchell v. Benjamin Franklin Bond. & Indemnity Corp., 13 Cal.App.2d 447, 57 P. 2d 185.

[3-8] The deeds from Madalay, Inc., to Madeline Girola were therefore inoperative to pass legal title, and title remained in the grantor corporation, in the absence of a reformation of the deeds to comply with Civil Code section 1096 or of an adjudication of the identity of the grantor under section 751a of the Code of Civil Procedure. The property was thus subject to Puccetti's levy of execution and passed to him by virtue of the sheriff's sale and deed. Code Civ.Proc. § 700; Freelon v. Adrian, 161 Cal. 13, 18, 118 P. 220. Had Madeline Girola paid value for the conveyance, she would have an equity in the land that would take priority over the rights of a subsequent purchaser at an execution sale with notice of her interest. Whitney v. Sherman, 178 Cal. 435, 173 P. 931; Riley v. Martinelli, 97 Cal. 575, 32 P. 579, 21 L.R.A. 33, 33 Am.St.Rep. 209. See, also, cases cited in 11 Cal.Jur. p. 123. The trial court's finding, however, that the deeds to Madeline Girola were not entirely voluntary is without support in the evidence, which presents no conflict.

Both Madeline Girola, the grantee, and Josephine Girola, secretary of the grantor corporation, testified that no money was paid and no property transferred by the grantee in consideration of the conveyance. The claimed consideration was alleged to have arisen from the following transaction: Henry, Joseph, and Josephine Girola, who were all members of the Girola family and directors of Girola Bros., received salaries from a subsidiary corporation, which they deposited in the bank accounts of Girola Bros. A large part of this money they drew out in cash, and another part of the money was expended by the corporation for the household expenses of members of the family. The books of the corporation showed that it owed them, at one time, a total of $54,523.46. All these accounts, however, were marked as closed on January 1, 1932. On April 28, 1932, the parties met in the office of their lawyer, where Henry, Joseph, and Josephine Girola executed gratuitous assignments to their mother, Madeline Girola, of the amounts that the books showed the corporation owed them. Madeline Girola immediately executed a cancellation in favor of Madalay, Inc., of the amounts so assigned and received a conveyance of the property. Since the accounts assigned to Madeline Girola were marked closed several months before the purported assignments they were presumably valueless, and their cancellation would not constitute consideration for the deeds. Moreover, even if these accounts had been subsisting the consideration would have been furnished in substance and effect by the grantor. The consequences that ordinarily follow the observance of the separate identity of a corporation and the persons who compose it are disregarded when it is necessary to protect the rights of third persons or to prevent injustice. D. N. & E. Walter & Co. v. Zuckerman, 214 Cal. 418, 6 P.2d 251, 79 A.L.R. 329; Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 227 P. 723; Minifie v. Rowley, 187 Cal. 481, 202 P. 673. See, also, cases cited in 6A Cal.Jur. 80. The presence of a colorable consideration does not alter the nature of the transaction or the fact that Madeline Girola failed to give value for the deeds.

[9] The parties stipulated that a lien asserted by the defendant Bank of America National Trust and Savings Association and arising from a deed of trust executed by Girola Bros. before the transactions involved herein is a good and subsisting lien and that it will remain so regardless of the outcome of this action. Defendant State Finance Company also asserts a lien by virtue of a mortgage executed by Madeline Girola after the alleged conveyance to her by Madalay, Inc. Since Madeline Girola acquired no interest in the property, however, the finance company acquired no security for its mortgage. Trout v. Taylor, 220 Cal. 652, 32 P. 2d 968; Promis v. Duke, 208 Cal. 420, 281 P. 613; Gould v. Wise, 97 Cal. 532, 32 P. 576, 33 P. 323. The finance company dealt with Madeline Girola at its own risk except for the protection offered by the record, and a search would have revealed no predecessor in interest of record to Madeline Girola's grantor, an omission that would put a prudent person on inquiry.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

20 Cal.2d 585

SPECK et al. v. SARVER et al.

S. F. 16529.

Supreme Court of California.

July 23, 1942.

Rehearing Denied Aug. 20, 1942.

1. Negligence 🔑138(2)

An instruction as to existence of presumption that person takes ordinary care for his own concerns should not be given where plaintiff's evidence discloses conduct of injured party immediately prior to or at time in question. Code Civ.Proc. § 1963, subd. 4.

2. Appeal and error 🔑1064(1)
Trial 🔑296(7)

In action for injuries sustained in automobile collision, wherein plaintiffs testified as to their conduct immediately prior to collision, and wherein evidence supported finding that plaintiffs were not contributorily negligent, instruction that, in absence of contrary evidence, the law presumed that plaintiffs did everything that reasonably prudent persons would have done under the circumstances for protection of their safety, was erroneous, but not prejudicial, especially in view of other instructions. Code Civ. Proc. § 1963, subd. 4.

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, San Mateo County; Aylett R. Cotton, Judge.

Action by Alice Speck and others against Philip R. Sarver and another for injuries sustained in an automobile collision. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Prior opinion, 106 P.2d 49.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

Francis N. Foley, of San Mateo, for appellants.

Norman S. Menifee, of San Francisco, for respondents.

CURTIS, Justice.

Defendants appeal from a judgment in favor of plaintiffs for damages for injuries arising out of an automobile collision.

The two automobiles involved approached from opposite directions on a narrow, winding highway and met in a headon collision on a curve in the road. There was no white line marking the middle of the highway. A bank extended upward on the east or defendants' side of the road, and there was a steep slope extending downward on the west or plaintiffs' side of the road. The plaintiffs testified that the defendants' automobile was on the wrong side of the road and traveling at an excessive rate of speed immediately preceding the collision, while plaintiffs' automobile was on the proper side of the road and traveling at a slow rate of speed. Plaintiff Matthew Speck, the driver of the car, testified that just prior to the impact he swerved slightly toward the center of the road to avoid going over the bank. The defendant driver also turned in and the automobiles came to rest approximately in the center of the road. Philip Sarver, the driver of the defendants' car, testified that at all times he was driving on the proper side of the road at a moderate speed, while just before the collision plaintiff Speck was driving on the wrong side of the road. After the jury returned a verdict in favor of plaintiffs, a motion for a new trial was made by the defendants and denied by the trial court.

Upon this appeal it is urged that the evidence is insufficient to support the implied finding of the jury that the plaintiffs were free from negligence. In other words, it is contended that plaintiffs were guilty of contributory negligence as a matter of law. It is also urged that the court erred in giving a certain instruction to the jury, and that there was prejudicial misconduct on the part of plaintiffs' attorney preventing defendants from having a fair trial.

There is no necessity for a detailed discussion of appellants' first contention. From the brief recital of the facts herein and from the other evidence disclosed by the record, it is apparent that the jury was justified in making its implied finding that the plaintiffs were free from contributory negligence. The evidence is conflicting on this issue and the jury's implied finding thereon is conclusive on appeal. Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044; Flores v. Fitzgerald, 204 Cal. 374, 268 P. 369; Smith v. Rothschild, 3 Cal.App.2d 273, 39 P.2d 464; Wynne v. Wright, 105 Cal.App. 17, 286 P. 1057.

The instruction complained of is as follows: "In the absence of evidence to the contrary, the law presumes that the plaintiffs did everything that reasonably prudent persons would have done under the circumstances for the protection of their safety. The presumption that plaintiffs were not guilty of contributory negligence is, in itself, a species of evidence which continues with the said plaintiffs throughout the trial of this action and unless and until overcome by evidence to the contrary. This presumption in favor of said plaintiffs must prevail until and unless it is overcome by satisfactory evidence to the contrary."

[1, 2] The rebuttable presumption that a person takes ordinary care of his own concerns is declared in section 1963, subd. 4, of the Code of Civil Procedure. An instruction as to the existence of this presumption may properly be given to the jury in certain situations. See Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Ellison v. Lang Transportation Co., 12 Cal.2d 355, 84 P.2d 510; Downing v. Southern Pacific Co., 15 Cal.App.2d 246, 59 P.2d 578.

Such an instruction, however, should not be given where the evidence introduced by the plaintiff discloses the acts and conduct of the injured party immediately prior to or at the time in question. See cases last cited and also Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65; Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709; Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884. In the instant case the plaintiffs testified in regard to the events leading up to the collision. Plaintiff Matthew Speck, the driver, explained all of his actions. Under such circumstances there was no room for the presumption in this case. What was said in Rogers v. Interstate Transit Co., supra, is equally applicable here. It is there stated at page 38 of 212 Cal. at page 885 of 297 P.: "At the trial of this action, plaintiff not only testified as to the circumstances of the collision between the car he was driving and the autostage of the defendant, but he produced witnesses who gave evidence, both direct and on cross-examination, of his acts and conduct just before and at the time of the collision. Whether the plaintiff took ordinary care of his own concerns while operating his car at that particular occasion was a matter of evidence established by the plaintiff and witnesses called by him in support of his claim that he did. In the face of this evidence, there was no room for any presumption. If the evidence on his part showed that he was negligent, then it cannot be said that the jury, notwithstanding this evidence, might presume that he was not negligent, or that he took ordinary care of his own concerns, which amounts to the same thing. On the other hand, if this evidence showed that plaintiff was not negligent in the operation of his car at the time of its collision with defendant's stage, then that fact was before the jury, not as the result of any presumption, but in response to testimony of witnesses testifying in the case. In either event, the jury, in determining whether the plaintiff was guilty of negligence, would look to, and be governed by, the evidence before the court, and not by any presumption." In view of the foregoing, the giving of the instruction complained of was error.

The question still remains whether the instruction was prejudicial under all the circumstances of this case. We are satisfied that it was not. There was considerable testimony on both sides on the question of contributory negligence, and, as previously stated, there was ample evidence to support the jury's implied finding that the plaintiffs were not negligent. The instruction itself was qualified by the phrase "in the absence of evidence to the contrary." Under it the jury was therefore free to accept the contrary evidence and to return a verdict thereon in favor of the defendants. Contributory negligence was fully and properly defined by the court, and the jury was instructed: "If you find from the evidence that plaintiffs were guilty of contributory negligence as defined in this instruction, however slight such contributory negligence on their part may have been, then you should return your verdict for the defendants, and each of them." The jury was further instructed: "Plaintiffs were at all times called upon to exercise ordinary care for their own safety and, if they failed to do so, and such failure was a proximate cause of injury or damage to them, they cannot recover and your verdict must be against them and in favor of defendants." The jury was also told: "Whether the parties did, or did not, use ordinary care is for you to determine from the facts testified to and, if you conclude from the evidence that plaintiffs did not use ordinary care and that their lack of ordinary care contributed proximately to their injury or damage then your verdict must be against the plaintiffs and in favor of defendants." In consideration of the qualification in the instruction itself and in view of the other instructions quoted above, the defendants did not suffer any prejudice by the giving of the instruction. Under such circumstances the error is not prejudicial and does not warrant a reversal. California Constitution, article VI, § 4½; Ellison v. Lang Transportation Co., supra; Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Rogers v. Interstate Transit Co., supra.

Any asserted misconduct on the part of plaintiffs' counsel in implying that defendants' counsel was withholding photographs of the scene of the accident may not be said to have been prejudicial. The trial judge admonished the jury to disregard the statements. Keena v. United Railroads, 197 Cal. 148, 163, 239 P. 1061; House v. Pacific Greyhound Lines, 35 Cal.App.2d 336, 342, 95 P.2d 465; Gerberich v. Southern California Edison Co., 26 Cal.App.2d 471, 476, 79 P.2d 783. Nor did plaintiff Matthew Speck's statement on the witness stand that defendant Philip Sarver had stated he was insured constitute prejudicial misconduct under the facts of this case. Speck's statement was made incidentally during testimony as to a conversation which occurred between him and Sarver in which Sarver tended to admit fault. The statement was not made in response to any question by counsel attempting to inject the fact of defendants' insurance into the case. The proper rule governing the reference to insurance in the instant case is found in Packard v. Moore, 9 Cal.2d 571, 580, 71 P.2d 922, 927, wherein this court adopts the following statement from Hughs v. Quackenbush, 1 Cal.App.2d 349, 37 P.2d 99: "While courts have condemned repeatedly attempts to bring before the jury the fact that insurance exists, their condemnation extends only to cases where there is an 'avowed purpose and successful attempt' to bring the fact before the jury. It does not extend to cases where the information comes in, incidentally, in attempting to prove other facts, or where the record does not show that the particular answer was sought or anticipated." See, also, Hatfield v. Levy Brothers, 18 Cal.2d 798, 117 P.2d 841.

The judgment is affirmed.

SHENK and CARTER, JJ., concurring.

GIBSON, Chief Justice.

I concur for the reason that the rules as to the nature of rebuttable presumptions upon which the foregoing opinion is based have been fixed by many decisions of this court, and any modification of such rules should be effected by the Legislature, and not by overruling at this time the cases establishing them.

TRAYNOR, Justice.

I dissent.

After properly instructing the jury that the defendants had the burden of proving the plaintiffs guilty of contributory negligence, the court proceeded to instruct them that there was a presumption against the existence of facts it was defendant's burden to prove, and that this presumption could be weighed as evidence of their non-existence. This instruction was prejudicial error, for it enabled the jury to tilt the scales against the defendant by arbitrarily attributing more weight to the presumption than to the evidence against it, no matter how extensive or persuasive. Evidence is marshalled to no avail against a presumption under such an instruction, for it is impossible to prove the non-existence of the fact presumed when the jury is free to regard the presumption as superior to any proof against it. So long as the presumption is regarded as superior it is inviolate, and the most exhaustive proof cannot disturb its invulnerability. The rule that rebuttable presumptions may be weighed as evidence is so arbitrary, and its consequences so mischievous that it becomes imperative to set forth to what lengths it has departed from the function and purposes of such presumptions.

When one of the parties to a lawsuit has the burden of proof upon a particular issue, he must establish the existence of the necessary facts by preponderance of the evidence, persuade the jury that it is more probable that these facts exist than that they do not. Code Civ.Proc. §§ 2061, subd. 5, 1826, 1981; Murphy v. Waterhouse, 113 Cal. 467, 45 P. 866, 54 Am.St. Rep. 365; Ergo v. Merced Falls, etc., Co., 161 Cal. 334, 119 P. 101, 41 L.R.A.,N.S., 79; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25. In a civil suit the burden of proof is the maximum requirement that can be placed upon a party who undertakes to prove the existence of facts. In some instances the courts and legislatures have found it necessary to lend assistance to the party bearing the burden of proof. In certain types of cases they have set up rules, designated as rebuttable presumptions, to the effect that when such a party establishes the existence of certain primary facts, the additional facts necessary to prove his case will be presumed to exist, unless the opposing party offers proof that they do not exist, in which case the jury must determine the existence or non-existence of these facts from the evidence. Rebuttable presumptions do not shift the ultimate burden of proof, but impose upon the party without the burden of proof the burden of going forward with the evidence after his opponent has introduced evidence sufficient to establish the existence of certain primary facts. Wigmore, Evidence, 3d Ed., §§ 2487, 2489, 2491; Thayer, A Preliminary Treatise on Evidence, 314, 315, 317. See Scott v. Wood, 81 Cal. 398, 22 P. 871; San Francisco v. Tillman Estate Co., 205 Cal. 651, 272 P. 585. They are employed for various reasons. See Morgan, Instructing the Jury on Presumptions and Burden of Proof, 47 Harv.L.Rev. 59, 77; American Law Institute, Code of Evidence Tentative Draft No. 2, (1941) p. 211: (1) To require the litigant with greater access to the facts in dispute to make them known. Thus, if a plaintiff bailor, with the burden of proof, establishes that he delivered property in good condition to a defendant bailee and received it back in a damaged condition, a presumption arises that it was damaged because of the bailee's negligence, and the latter must then come forward with proof that his negligence did not cause the injury. Alpine Forwarding Co. v. Pennsylvania R. Co., 2 Cir., 60 F.2d 734; Rustad v. Great Northern R. Co., 122 Minn. 453, 142 N.W. 727. (2) To assist in solving a dilemma when there is little or no evidence available to prove or disprove a particular fact. Thus, if a person has been continuously absent and unheard from for seven years, he will be presumed dead in the absence of evidence to the contrary, so as to enable a court to distribute his estate. Code Civ.Proc. § 1963, subd. 26. (3) To facilitate a finding in accord with the balance of probability. Thus, it is presumed that a person found to have met his death by violence did not commit suicide in the absence of contrary evidence. Code Civ.Proc. § 1963, subd. 1; see Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269; 95 A.L.R. 887. (4) To encourage a finding consonant with judicial judgment as to sound social policy. Thus, it is usually presumed that a marriage has been lawfully contracted in the absence of evidence to the contrary. Code Civ.Proc. § 1963, subd. 30.

Rebuttable presumptions are thus no more than procedural devices for the fair apportionment between the litigants of the burden of going forward with the evidence. If the party against whom a presumption operates fails to come forward with substantial evidence tending to prove the nonexistence of the facts presumed, his opponent with the burden of proof is entitled to an instruction that the facts exist. If he does come forward with such evidence, the jury must decide upon the existence of the facts. Wigmore, supra, §§ 2487, 2489, 2491; Thayer, supra, 314-315, 317; 1 Jones, Evidence, 2d Ed., 54.

In the majority of jurisdictions the presumption disappears from the case when evidence is introduced contrary to the facts presumed, and the issue goes to the jury with the primary burden of proving the facts still upon the party who originally assumed it. See cases cited in 22 C.J. 156, note 34; 31 C.J.S., Evidence, § 119; Wigmore, supra, § 2491; Jones, supra, § 32. Some courts, however, hold that a presumption continues to operate until the party against whom it applies introduces evidence that persuades the jury that the non-existence of the facts presumed is as probable as their existence when considered with evidence as to their existence introduced by the litigant in whose favor the presumption operates. O'Dea v. Amodeo, 118 Conn. 58, 170 A. 486; Beggs v. Metropolitan Life Ins. Co., 219 Iowa 24, 257 N.W. 445, 95 A.L.R. 863; Clark v. Diefendorf, 109 Conn. 507, 147 A. 33; Gillett v. Michigan United Traction Co., 205 Mich. 410, 171 N.W. 536; Klunk v. Hocking Valley Ry. Co., 74 Ohio St. 125, 77 N.E. 752. See Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 Harv.L.Rev. 59; McBaine, Presumptions: Are They Evidence? 26 Cal.L.Rev. 519, 533. If the opposing party introduces no substantial evidence to combat the presumption, the court will instruct the jury that the facts exist as a matter of law. If he introduces such evidence the case goes to the jury with instructions that if it disbelieves the evidence of the opposing party, the presumption stands and the verdict should be in favor of the party with the burden of proof. If, however, the jury believes it as probable that the facts do not exist as that they do, it should find in favor of the party against whom the presumption operates.

This view of the effect of presumptions is the sounder one. Under the majority rule the purpose of a presumption can be defeated by perjured testimony that is not believed by the trier of the facts; the mere introduction of evidence, however unreliable, suffices to dispel the presumption. Under the minority rule the presumption remains until sufficient contrary evidence is introduced that the trier of the facts is willing to believe.

In either case, it is clear that a rebuttable presumption is only a procedural device to aid the party with the burden of proof. It would be meaningless if applied against him because he already has the greater burden of introducing sufficient evidence to prove the existence of the facts by the preponderance of the probabilities. Such presumptions cannot constitute actual evidence, as would the observations of witnesses or physical objects or occurrences. They are merely rules establishing the existence of a fact as a matter of law in the absence of credible evidence to the contrary, and apportioning the burden of going forward with the introduction of such evidence. The overwhelming majority of decisions in other jurisdictions agree that rebuttable presumptions cannot be evidence, however, they may disagree as to when they disappear from the case. See cases cited in 95 A.L.R. 880.

Certain cases in California, however, have held that the court should instruct the jury to weigh presumptions as actual evidence along with the testimony in determining the existence of facts, and that presumptions may be directed against the party with the burden of proof. Smellie v. Southern Pacific Co. et al., 212 Cal. 540, 299 P. 529; see cases cited in 18 Cal.L.Rev. 418; 20 Cal.L.Rev. 189. See 95 A.L.R. 883. It is a mental impossibility to weigh a presumption as evidence. Juries can decide upon the probable existence of a fact only by a consideration of actual probative evidence bearing thereon. A rule of law that the fact will be presumed to exist in the absence of evidence cannot assist them in determining from an examination of evidence whether or not the fact exists. It is impossible to weigh a rule of law on the one hand against physical objects and personal observations on the other to determine which would more probably establish the existence or non-existence of a fact.

The burden of proof may well be impossible for a litigant to sustain if a presumption is applied as evidence against him. He must, under such a rule, establish the existence of certain facts by a preponderance of the probabilities, while a presumption persists that these facts do not exist and the jury is free to weigh this presumption as evidence upon which to find that the facts do not exist despite physical evidence that they do.

Even when a presumption treated as evidence is applied in favor of the party with the burden of proof, the results are incongruous. The other litigant is in effect informed by the court that his opponent has the burden of proving the facts by the preponderance of the probabilities but there is a presumption that the facts thus to be proved are true, and the jury is free to find on the basis of this presumption that the facts do exist despite physical evidence that they do not. The presumption should serve only to force the party without the burden of proof to come forward with evidence contrary to the facts presumed, not somehow to outweigh the very evidence that he introduces to prove his point.

The California cases have treated presumptions as evidence primarily on the ground that certain code sections compel this result. See McBaine, supra, 26 Cal.L. Rev. 519, 557-561. Code of Civil Procedure section 1961 states: "A presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted the jury are bound to find according to the presumption." Section 1963 lists 40 rebuttable presumptions that "may be controverted by other evidence." These sections embody the general rule that a rebuttable presumption establishes the existence of a fact unless credible evidence contrary to the fact presumed is presented. They in no way establish that the presumption itself is evidence. The references to "other evidence" serve to distinguish evidence controverting the presumption from evidence of the primary facts that give rise to the presumption and from evidence that may be introduced in support of the fact presumed.

Section 2061 of the Code of Civil Procedure provides: "The jury, subject to the control of the court, in the cases specified in this code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: * * * 2. That they are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a less number or against a presumption or other evidence satisfying their minds." Certainly there is no statement here that a presumption must be treated as evidence. This section does no more than establish the rule that gives to presumptions greater vitality than they would have if they disappeared upon the introduction of any evidence contrary to the facts presumed. It provides in effect that a rebuttable presumption remains in the case and controls the determination of a jury that disbelieves the evidence contrary to the fact presumed.

Finally, section 1957 provides: "Indirect evidence is of two kinds: 1. Inferences; and 2. Presumptions." This section is a broad classification of indirect evidence and is not concerned with the legal effect of a presumption. At the time of its adoption in 1872, legal writers used the terms presumptions and inferences interchangeably to apply to a logical deduction that could be drawn from a set of facts. 1 Greenleaf, Evidence (Redfield Ed.) 21; 1 Phillipps, Evidence, 3d Ed., 436, 437; 1 Starkie, Evidence, 3d Ed., 404. See Thayer, supra, 546-548; Wigmore, supra, § 2491; McBaine, supra, 26 Cal.L.Rev. 519, 521-527. That this meaning of presumption was intended by the Legislature, when it enacted section 1957 in 1872 is indicated by section 1832, enacted at the same time, which states: "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example: a witness proves an admission of the party to the fact in dispute. This proves a fact, from which the fact in dispute is inferred." This section defines indirect evidence as an inference, but uses the terms "inference" and "presumption" as synonyms. Section 1957 does not therefore establish rebuttable legal presumptions as evidence in view of other sections of the Code of Civil Procedure which specifically set forth the effect of legal rebuttable presumptions. Code Civ. Proc. §§ 1959, 1961, 1963. A construction of these sections to the effect that rebuttable presumptions may be weighed as evidence would in all likelihood render them unconstitutional. Manley v. State of Georgia, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575; Western & Atlantic R. R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884; Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664; New York Life Insur. Co. v. Gamer, 303 U.S. 161, 58 S.Ct. 500, 82 L.Ed. 726, 114 A.L.R. 1218. See, also, People v. Murguia, 6 Cal.2d 190, 57 P.2d 115. See McBaine, supra, 26 Cal.L. Rev. 519, 551, note 66 and authorities there cited.

The rebuttable presumptions enumerated in the codes as well as those established by the courts do not require any set procedural formula to give them effect. If the litigant against whom a presumption operates has the burden of proof, an instruction by the court to the jury that such litigant must establish the facts by a preponderance of the probabilities imposes upon the litigant an even greater burden than that required by the presumption. No mention of the presumption is necessary. If the presumption operates in favor of the party with the burden of proof, the court should instruct the jury that upon the setting up of certain preliminary facts the presumption applies in favor of the party with the burden of proof who is entitled to the verdict unless the other litigant comes forward with credible evidence contrary to the facts presumed. Once such evidence is produced and believed, the jury should weigh it against any evidence introduced in support of the facts presumed and decide in favor of the party against whom the presumption operates if it believes that the non-existence of the facts is as probable as their existence. Nothing need be said about weighing the presumption as evidence. When the evidence against the presumption is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved the court should instruct the jury, as it would regarding inferences, that the non-existence of the fact presumed has been established as a matter of law. Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868; Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059.

There is no agreement in the California cases on the proposition that rebuttable presumptions should be weighed as evidence. The Smellie case, supra, was preceded by a line of decisions holding that presumptions were not evidence. Biddle Boggs v. Merced Mining Co., 14 Cal. 279, 375; Nieto's Heirs v. Carpenter, 21 Cal. 455, 489; Larrabee v. Western Pacific Ry. Co., 173 Cal. 743, 747, 161 P. 750. The courts have consistently held that the presumption of innocence from crime cannot be used as evidence in a criminal proceeding. People v. Moran, 144 Cal. 48, 77 P. 777. The Smellie case held that Code of Civil Procedure section 1963, subd. 4, which presumes "that a person takes ordinary care of his own concerns" should be weighed by the jury as evidence of absence of contributory negligence on the part of plaintiff. Later cases have limited the application of this presumption to situations where there are no eyewitnesses to an accident, holding that "where it is possible to call eyewitnesses to testify positively to the facts and circumstances surrounding the accident, the presumption is not applicable." Downing v. Southern Pacific Co., 15 Cal.App.2d 246, 59 P.2d 578, 583;

Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884. Still other cases have held that this presumption and similar ones in favor of one party are dispelled when the details of the accident are disclosed by the testimony of that party or his witnesses. Mar Shee v. Maryland Assur. Corp., 190 Cal. 1, 210 P. 269; Mundy v. Marshall, 8 Cal.2d 294, 65 P.2d 65; Kelly v. Fretz, 19 Cal.App.2d 356, 65 P.2d 914; Paulsen v. McDuffie, 4 Cal.2d 111, 47 P.2d 709. Certain decisions have indicated that the person whose conduct is in question must be dead before the presumption can operate in this manner. Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590. In effect these cases hold that the presumption drops out of the case because there is evidence bringing into question the fact presumed. There is in them an inarticulated admission that the character of evidence is foreign to presumptions, and that however often it has artificially been grafted on to them it can be shed with equal facility. Confusion is rife, however, because presumptions have not been clearly divested of their artificial character. They appear now as themselves and again in the guise of evidence. The court has sometimes seen through the disguise when the injustices it would have concealed revealed themselves immediately and boldly. As often as not, however, the court has failed to perceive the injustice through the disguise. It is time to have done with the confusion and inconsistency engendered by its vacillation between the acceptance and the repudiation of presumptions as evidence.

It is pure ritualism that a precedent should gather as much respect from a long life of inconsistency as it would from a long life of certainty, and earn the right to survive merely because it has survived so long. One looks to precedent for certainty, the substance of its vitality. If instead it offers only confusion it loses its right to endure indefinitely. The confusion in the California cases as to the function of rebuttable presumptions can be eliminated only by repudiating the erroneous view that such presumptions may be weighed as evidence. Smellie v. Southern Pacific Co., supra, and the cases following it should be overruled.

In the field of evidence and procedure everything is gained and little lost by overruling an irrational precedent. Nothing is taken away, as it might be in the substantive law of property and contracts, upon which one is entitled to rely. Certainly the parties in an automobile accident cannot reasonably contend that they operated their vehicles in reliance on the rule in the Smellie case. That rule was a judge-made rule and should be laid at rest where it originated. It would be most inappropriate to shift the responsibility for its demise to the Legislature, for it involves not questions of policy, but technical questions of procedure that are peculiarly within the province of the courts. If the court can view with equanimity a legislative repudiation of the rule, its own adherence to the rule springs no longer from a conviction of its rightness, but from a willingness to endure its wrongness until others less suited to the task take the initiative in its repudiation.

EDMONDS, J., concurring.

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20 Cal.2d 630

REXSTREW et al. v. CITY OF HUNTINGTON PARK et al.

L. A. 18270.

Supreme Court of California.

July 30, 1942.

Rehearing Denied Aug. 27, 1942.

1. Mandamus 🔑168(4)

Evidence that city had ample funds to pay salaries of policemen and firemen whose positions were ostensibly abolished for economy purposes, that four of six policemen dismissed and one of three firemen dismissed were re-employed within comparatively short time, that young probationary fireman was retained, and that dismissed policeman's duties were performed by school traffic officer not within civil service ordinance, authorized mandamus compelling reinstatement of dismissed policeman and fireman. Gen.Laws 1937, Act 1401, Act 1402, and Act 5233, § 852; St.1939, p. 1987.

2. Officers 🔑69

The power to abolish a position may not be used to effect discharge of employee protected by salutary provisions of civil service regulations unless such power is exercised in good faith.

3. Appeal and error ⚿1010(1)

A trial court's finding of fact, supported by substantial evidence, would not be disturbed on appeal.

4. Statutes ⚿158, 159

Repeals by implication are not favored and are recognized only when there is a conflict between two or more legislative enactments.

5. Municipal corporations ⚿76, 78

Where the Legislature, in 1935, expressly ratified ordinances creating civil service systems, 1937 re-enactment of general statute providing that city council should appoint all city employees who should hold office during pleasure of council did not impliedly repeal such ordinances, especially in view of 1939 statute again expressly ratifying ordinances. Gen.Laws 1937, Act 1401, Act 1402, and Act 5233, § 852; St.1939, p. 1987.

6. Mandamus ⚿177

Where policeman and fireman were improperly dismissed and were ordered reinstated in mandamus proceeding, and, after dismissal, all firemen and policemen had been subjected to salary decrease, such decrease was properly deducted in awarding accrued salary to dismissed policeman and fireman.

7. Mandamus ⚿177

Where policeman and fireman were improperly dismissed and were ordered reinstated in mandamus proceeding, any remuneration received by them from other gainful employment since their dismissal should be deducted from accrued salary awarded them.

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In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clark, Judge.

Mandamus by Stanley E. Rexstrew and another against the City of Huntington Park and others. From an adverse judgment, defendants appeal.

Reversed and remanded with directions.

For prior opinion, see 120 P.2d 136.

Christopher J. Griffin, City Atty., of Huntington Park, for appellants.

John J. Hamilton, Clyde E. Grafton, and Charles X. Arnold, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

In this proceeding in mandamus the trial court entered a judgment reinstating respondents Rexstrew and Cantonwine, respectively, to the positions of fireman and policeman in the city of Huntington Park, California, and directing payment of their salaries from the date of dismissal from service until their reinstatement. The defendant city and its officers have appealed from the judgment.

Huntington Park is a city of the sixth class. Municipal Corporations Act, Stats. 1883, p. 93, as amended, Deering's Gen. Laws, 1937, Act 5233. In 1932 the electors of the city passed an initiative ordinance (No. 767) by which they inaugurated a civil service system for the employees of the fire department. In 1934 a similar initiative ordinance (No. 821a) was enacted for the members of the police department. In 1935 the Legislature conferred express authority on municipalities to enact such legislation for the selection, classification, suspension and discharge of appointive employees. Stats.1935, ch. 48, p. 380, Deering's Gen.Laws, 1937, Act 1401. At the same session the Legislature ratified all existing municipal ordinances creating civil service systems. Stats.1935, ch. 136, p. 485; Stats.1939, ch. 579, p. 1987; Deering's Gen. Laws, 1937 and Supp.1939 Act 1402. This express ratification established the validity of the two initiative ordinances relied on by respondents. City of Sacramento v. Adams, 171 Cal. 458, 464, 153 P. 908; City of Redlands v. Brook, 151 Cal. 474, 478, 91 P. 150.

The record shows that on or about June 10, 1938, the personnel of the fire department was increased by two new members, Snoeberger and Peterson. On August 22, 1938, approximately two months later, the city council passed a resolution (No. 1758) which recited that "for purposes of economy to effect a reduction of expenses in the Police and Fire Departments" the number of members of those departments should be reduced, and nine persons were ordered discharged. The resolution also recited that the employees so named were those who could best be spared from their respective ranks and departments in order to bring about the required reduction in personnel. A few minutes before this resolution was passed, the chief of police and the chief of the fire department were requested, respectively, to name six members of the police department and three employees of the fire department who were least qualified for their positions. The names submitted by them were those set forth in the resolution, among which were included Cantonwine from the police department and Rextrew from the fire department. At the time they were dismissed, Rexstrew had been a member of the fire department for ten years and Cantonwine had been employed in the police department for about six years. Snoeberger was not named among those dismissed from the fire department and has remained in his position since his appointment. Peterson was dismissed pursuant to the resolution but was reemployed in April, 1939. It further appears that several of the six members dismissed from the police department have since been reemployed in that department.

The trial court found that respondents, following their dismissal, made repeated attempts to obtain reinstatement by application to the civil service board, the city council and the heads of their respective departments, and that they brought this action after such endeavors had failed and within five months after their discharge. There was ample evidence to support the finding that they were not guilty of laches.

The trial court also found that respondents were not dismissed for the purpose of effecting necessary economy, that there was no lack of work in either department to warrant their discharge, that there were ample funds in the city treasury with which their salaries could have been paid for the fiscal year 1938–1939, and that they were not discharged in good faith, but for the purpose of enabling appellants to replace them by persons more favored by the governing officers of the city.

The members of the city council contend the resolution was passed in good faith and only for reasons of economy. They claim that shortly before the resolution was passed they received an audit showing a deficit in the city funds for the year closing June 30, 1938, and that in order to make up such deficit they reduced the personnel in the fire and police departments instead of raising the tax rate.

[1] Contrary to appellants' contention that the dismissal of respondents was necessary to effect economy, the evidence and inferences deducible therefrom adequately support the trial court's finding that such discharge was not in fact made necessary because of lack of funds, but was for the purpose of replacing respondents by other persons. The city treasurer testified that at the end of the fiscal year, June 30, 1938, there was in the general fund the sum of $83,064.70, and in the reserve "water" fund the sum of $59,656.66. Appellants admit such sums were on deposit as reserve funds at that time. During the examination of the city treasurer, counsel for appellants stated, "I will stipulate we had plenty of money to pay these salaries." There was evidence that, following the dismissal of Rexstrew, Snoeberger, a younger man who had been employed in the fire department only two months previously, was retained, and that Peterson, the other probationary employee and likewise a younger man, was subsequently reemployed. The evidence also showed that after Cantonwine's dismissal his duties as patrolman were performed by a school traffic officer whose classification was not within the provisions of the police civil service ordinance. Moreover, of the six members dismissed from the police department, four were given reemployment therein and some within two months after their discharge.

[2, 3] The power to abolish a position may not be used to effect the discharge of an employee protected by the salutary provisions of civil service regulations, unless such power is exercised in good faith. Livingstone v. MacGillivray, 1 Cal.2d 546, 553. 36 P.2d 622; Childress v. Peterson, 18 Cal. 2d 636, 117 P.2d 336; Winslow v. Bull, 97 Cal.App. 516, 523, 275 P. 974. Here respondents held their respective positions under tenure acquired through the adoption of the civil service ordinances. Each had attained the status of a permanent employee and neither was charged with misconduct or any dereliction of duty referred to in the ordinances. The trial court's findings that the positions were not abolished in good faith, being supported by substantial evidence, will not be disturbed by this court.

[4, 5] Appellants also claim that section 852 of the Municipal Corporations Act, as reenacted in 1937, Stats.1937, p. 1811, Deering's Gen.Laws, 1937, Act 5233, which provided that the city council should appoint all city employees, who should hold office "during the pleasure of said city council," operated as an implied repeal of any previous limitation placed on the power to dis-

miss by the fire and police department ordinances. Repeals by implication are not favored and are recognized only when there is a conflict between two or more legislative enactments. Railroad Commission v. Riley, 192 Cal. 54, 57, 218 P. 415, and cases there cited. Section 852 of said act has been in effect in substantially the same language since the incorporation of the city. It was not materially different at the time the fire and police ordinances were enacted. The Legislature having expressly ratified the ordinances in 1935, it cannot be held they were intended to be repealed by implication at the next session of the Legislature by the reenactment of a section of a general law. Moreover, it appears that subsequent to the commencement of this action, and at the 1939 session of the Legislature the ordinances were again expressly ratified. St.1939, p. 1987.

[6] The evidence shows that commencing on September 1, 1938, all members of the fire and police departments of the city were subjected to a ten per cent decrease in salary, which is still in effect. The trial court properly deducted that percentage in awarding accrued salary to respondents.

[7] The record fails to disclose, however, whether respondents have received remuneration from other employment since their discharge. If they have been gainfully employed, any remuneration received from such employment should be deducted from the accrued salary due them. Wiles v. State Personnel Board, 19 Cal.2d 344, 121 P.2d 673; State Board of Equalization v. Superior Court, 20 Cal.2d 467, 127 P.2d 4.

The judgment is therefore reversed and the cause is remanded for the purpose of taking evidence on the question whether respondents have received remuneration from other employment since their dismissal, such amount, if any, to be then deducted from the accrued salary awarded under the trial court's judgment. The trial court shall then issue its writ of mandate requiring the reinstatement of respondents, with accrued salary from the date of their discharge, less any sum received by them as salary from employment subsequent to their dismissal. Since respondents remain the prevailing parties, they are entitled to their costs on this appeal.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

BURR et al. v. PACIFIC INDEMNITY CO. et al.

Civ. 11942.

District Court of Appeal, First District,
Division 2, California.
July 21, 1942.

Rehearing Granted Aug. 20, 1942.

1. Appeal and error ⚷931(1)

The appellate court is justified in assuming that trial court's fact findings, not attacked in appellants' briefs, were amply supported by evidence.

2. Appeal and error ⚷931(1)

On appeal from judgment for plaintiff, evidence must be taken most favorably to plaintiff in determining sufficiency thereof to support trial court's fact findings.

3. Highways ⚷113(4)

In action against highway tunnel contractor for labor and materials furnished by plaintiff, evidence *held* sufficient to support trial court's finding of facts showing that parties never entered into binding written contract in that there was no meeting of minds.

4. Highways ⚷113(4)

When highway tunnel contractor refused to pay person furnishing labor and materials any part of money due him under their oral or implied agreement, he was legally justified in ceasing work and suing contractor for value of work and materials already furnished.

5. Highways ⚷113(1)

Where proposed written contract to perform work for and furnish materials to highway tunnel contractor was never legally executed, other party thereto was not bound by provisions of such contract that extra work could be charged for only when contracted for in writing signed by tunnel contractor, that he might retain amount sufficient to meet subcontractors', laborers' or materialmen's claims, and that such other party could not cease work until ten days after default in any payment and after giving five days written notice.

6. Appeal and error ⚷684(4), 688(1)

Where points, made by motion to dismiss action and motion for leave to reopen case so as to set up additional defense by amendment to answer and produce evidence in support thereof, appeared only in clerk's transcript, setting out notice of such motions, and purported affidavits and counter affidavits, such matters cannot be considered by appellate court, in absence of record showing that motions were made or presented to trial court or of what evidence was presented to such court in support of or opposition to granting of motions.

7. Appeal and error ⚷614

Only the trial judge can certify on appeal the evidence presented to him on trial or hearing of motion, and purported affidavits, appearing in clerk's transcript and certified only by clerk, cannot be considered by appellate court.

8. Appeal and error ⚷907(1)

The appellate court must assume any state of facts which will support trial court's action, in absence of proper record affirmatively showing otherwise.

9. Appeal and error ⚷688(1)

Where record on appeal did not show that motion to reopen case, so as to set up additional defense by amendment of answer, was presented to trial court or what evidence was presented in support of or opposition to granting of such motion, presentation of affidavit in support of defendants' motion for new trial on ground of newly discovered evidence of facts stated in previous motion cannot benefit them on appeal.

10. Highways ⚷113(4)

In action against highway tunnel contractor for work done and materials furnished by plaintiff, evidence *held* to justify trial judge's finding that conduit was damaged by plaintiff's subcontractor's negligent operation of tractor and that owner of conduit was not contributorily negligent, so as to require deduction of amount of such damage from amount of plaintiff's judgment as off-set.

11. Set-off and counterclaim ⚷28(1)

In action against highway tunnel contractor for work done and materials furnished by plaintiff, amount of partial payment to plaintiff's subcontractor for hauling dirt *held* properly deducted from amount of plaintiff's judgment as off-set.

12. Costs ⚷252

The provision of Public Works Act for award of reasonable attorney's fee as costs to prevailing party on trial of action thereunder limits such fee to trial and does not warrant allowance of further fee on appeal. Gen.Laws 1937, Act 6423, § 2.

◆

Appeals from Superior Court, Alameda County; James G. Quinn, Judge.

Action by P. L. Burr and another against the Pacific Indemnity Company and others for the value of work, labor, and materials furnished by plaintiff Burr. From a judgment for plaintiff Burr, defendants appeal, and, from so much of the judgment as failed to allow such plaintiff certain additional sums, he appeals.

Affirmed.

Courtney L. Moore and Walter A. Dold, both of San Francisco, for plaintiffs and appellants.

Theodore M. Stuart, of San Francisco, for defendants and appellants.

DOOLING, Justice pro tem.

Two cross-appeals are herein presented on the one typewritten transcript: (1) An appeal by defendants from a judgment in favor of plaintiff, P. L. Burr, and (2) an appeal by plaintiff, Burr, from that part of the judgment only which failed to allow him as part of his recovery two additional items of $481.38 and $2,140.

The action arose out of work done by Burr for defendant DuPuy in the construction of the Broadway low level tunnel for Joint Highway District No. 13, and was for work, labor and materials furnished by said plaintiff. The amount of the judgment for plaintiff is not attacked by defendants, and we are entitled to assume that it is supported by the evidence. Defendants urge two grounds for reversal which are thus stated in their opening brief:

"1. Can a contractor quit an uncompleted job, and recover the reasonable value of work and labor performed when he quits in direct violation of the terms of his written contract?

"2. Can two persons jointly maintain a lawsuit for work and labor performed as contractors on a construction job when only one of them has a contractor's license, when the other has no license, and when the two of them have not a joint or combination license as required by the Contractors' License Law?"

Under point one defendants in their opening brief assume, without argument or discussion, that the work sued for by Burr was done under a written contract and that certain provisions of that contract were violated by Burr when he quit the job with his work unfinished on October 15, 1937. This assumption flies directly in the teeth of findings V and VII made by the trial court in the following language:

"V. That the said plaintiff and the said DuPuy on June 30, 1937, and July 1, 1937, attempted to enter into a written agreement under which the said plaintiff was to furnish said labor, materials and supplies, and there was then prepared a portion of said agreement in typewriting with ink interlineations and four separate letters; all to be signed or initialed by the plaintiff P. L. Burr and the said defendant DuPuy. That the said plaintiff Burr and the said defendant DuPuy verbally agreed that all of the said writings combined would constitute their written agreement, one of which was the 'breakdown' on which the monthly payments were to be computed. Thereupon the said Burr signed or initialed all of said papers and the said DuPuy signed or initialed all thereof except the fourth letter (referred to in the evidence as the 'disputed letter') which said letter the said DuPuy accepted and approved and agreed to sign and mail to said Burr; that thereafter said DuPuy falsely represented that he had signed and mailed the same to said Burr; that the said disputed letter contained material provisions and agreements without which the said attempted written agreement was incomplete and failed to accomplish a complete meetings (sic) of minds or become a binding written contract; that said DuPuy has repudiated the obligations of said disputed letter."

"VII. That although the said attempt to enter into an agreement in writing failed the said plaintiff and the said defendant DuPuy proceeded with said work as though the prices, terms of payment and times of payment set forth in the said various writings were effective and represented to that extent the agreement of the parties; and, in furnishing the said labor, materials and supplies, the said defendant DuPuy well knew that the said plaintiff was proceeding upon the understanding that the agreed prices, terms of payment and times of payment were those set forth in the said various writings; and the said defendant DuPuy recognized his obligation to pay said prices at the times and in the amounts so specified. That the said agreed prices were and are the reasonable value of the said labor, materials and supplies."

[1] These two findings are in no way attacked in defendants' opening brief, and in their closing brief they content themselves with a general statement that both parties recognized from July 1 to October 15 that they were conducting their operations under a contract. In this state of the briefs we would be justified in assuming that finding V and VII above quoted find ample support in the evidence. Robben v. Benson, 43 Cal.App. 204, 213, 214, 185 P. 200; Royal Realty Co. v. Harvey Inv. Co., 95 Cal.App. 352, 360, 272 P. 805; Brovelli v. Bianchi, 136 Cal. 612, 69 P. 416; 2 Cal.Jur. 877.

[2, 3] An examination of the transcript shows that this assumption is correct. Taking the evidence most favorable to plaintiff (in accordance with the time honored rule governing appellate courts) it appears that a typewritten contract to be executed by Burr and DuPuy was prepared by an attorney acting for DuPuy; that this contract was supplemented by three letters signed or initialed by both parties; that Burr submitted to DuPuy a fourth letter (called in finding V the "disputed letter") stating that he would not sign the formal contract unless DuPuy agreed to and signed this fourth letter; that DuPuy promised to sign the letter and thereupon the formal contract was signed by Burr, and DuPuy had his pen in hand prepared to sign the letter when they were interrupted by a third party; that DuPuy then said that he would sign the letter later and mail it to Burr and that Burr before leaving said: "Now that is the condition because I do not want to go on with this contract and will not go on with this contract unless that letter is satisfactory and according to our agreement." The "disputed letter" was never signed by DuPuy although several times afterwards he promised Burr that he would sign it. Meanwhile Burr entered upon the performance of the work, and progress payments were made to him until October 15 when DuPuy refused to pay him anything further and Burr thereupon quit the job.

The evidence above recited having to do with the "disputed letter" is corroborated by certain witnesses, who represented the bonding company which furnished Burr's bond on the representation of DuPuy that he had signed or would sign the "disputed letter." Their testimony further shows that when it finally became apparent that DuPuy had not signed and would not sign the "disputed letter" the bonding company refused to be bound by its bond and returned the check for the premium to DuPuy.

That under the facts found by the trial court in finding V no binding written contract was ever entered into is such a simple truism of the law of contracts as to require no citation of authority. In the language which is familiar to every first year law student there was no meeting of the minds.

[4] When DuPuy on October 15 refused to pay Burr any part of the money then due him under their oral or implied agreement Burr was legally justified in ceasing work and suing for the value of the work and materials already furnished. Porter v. Arrowhead Reservoir Co., 100 Cal. 500, 35 P. 146; San Francisco Bridge Co. v. Dumbarton Land & Improvement Co., 119 Cal. 272, 51 P. 335; Laiblin v. San Joaquin Agricultural Corp., 60 Cal. App. 516, 213 P. 529; Big Boy Drilling Corp., Ltd. v. Etheridge, 44 Cal.App.2d 114, 119, 111 P.2d 953.

[5] Defendants do not question this rule of law but argue that it is inapplicable to this case: (1) Because under the written contract extra work (of which there was admittedly considerable) could only be charged for where contracted for in writing signed by DuPuy; (2) because under the written contract DuPuy was entitled to retain an amount sufficient to meet any claims against the work by subcontractors, laborers or materialmen; and (3) because under the written contract Burr was not entitled to cease work until 10 days after default in any payment and then only after giving 5 days' written notice. These points all assume and depend on the existence of the written contract. The finding of the trial court that the proposed written contract was never entered into destroys their major premise. Burr was not bound by any of these provisions of the proposed but legally unexecuted contract and the arguments predicated thereon are left without factual foundation.

The second point relied upon by defendants depends upon the following facts: F. A. Dailey was Burr's foreman on the job. On the witness stand he testified that he had a written contract with Burr. Upon defendants' demand this writing was produced but was not introduced into evidence on the trial of action. At a later stage of the trial it was stipulated that Dailey should be added as a party plaintiff and Alta Electric and Mechanical Company, Inc., should be added as a party defendant, without any amendment to the pleadings. This was done by formal written order of the court. The judgment as entered, however, runs only in favor of Burr, and defendants point to no evidence in the reporter's transcript which would support a judgment in favor of Dailey.

[6, 7] After judgment had been ordered by the court defendants for the first time raised the point that Dailey was a party to the contract between Burr and DuPuy and that Dailey had no contractor's license and Dailey and Burr had no joint license. This point was apparently made by motion to dismiss the action on that ground and also by motion for leave to reopen the case so as to set up that defense by amendment to the answer and to produce evidence in support thereof. These matters appear in the clerk's transcript only and in the following fashion: There are set out therein a "notice of motion to dismiss proceedings" and a "notice of motion to reopen case" and what purports to be affidavits and counter-affidavits. Attached to a purported affidavit of Courtney L. Moore is a purported copy of the agreement between Dailey and Burr which is alleged to be the agreement under which Dailey was acting on the job in question.

On the record so presented we cannot consider the matters attempted to be presented on this appeal. The record in the first place nowhere shows that either motion was ever made or presented to the court. But assuming that they were made and that a general order which appears in the reporter's transcript under date of March 22, 1941, reading: "The court further orders that all motions be and the same are hereby denied" was a denial of these motions, there is still no record before us from which we can tell what evidence was or may have been presented to the trial court in support of or in opposition to the granting of either motion. No rule is better settled than the one that only the trial judge can certify on appeal the evidence which was presented to him upon either a trial or the hearing of a motion. Purported affidavits appearing in the clerk's transcript and certified only by the clerk cannot be considered by an appellate court. Strumberger v. Hall, 5 Cal.2d 22, 52 P.2d 917; Jeffords v. Young, 197 Cal. 224, 239 P. 1054; Egan v. Bishop, 8 Cal.App.2d 119, 47 P.2d 500; 2 Cal.Jur. 526.

[8] In the absence of a proper record affirmatively showing otherwise we must assume any state of facts which will support the action of the trial court. Ward v. Ward, 15 Cal.2d 234, 237, 100 P.2d 773. Thus we are entitled to assume on the record before us either that the motions were never presented to the trial court, or that if presented the evidence then produced before the trial court justified their denial.

[9] The same matter was again presented on motion for new trial as appears from the reporter's transcript certified by the judge who tried the case. The motion for new trial was supported by an affidavit reciting among other matters that the fact that Dailey did not have a contractor's license was first discovered on February 26, 1941. The record shows that the findings and judgment were not signed and filed until March 22, 1941. Since we are entitled to assume on the record here presented either that no motion to reopen the case was presented to the court, or that if presented the evidence then before the court was sufficient to justify its denial, the presentation of this affidavit in support of their motion for new trial cannot benefit defendants on this appeal. If no motion to reopen was made during the period between February 26 and March 22, 1941, defendants could not rely upon the ground of newly discovered evidence in support of their motion for new trial. Rockwell v. Italian-Swiss Colony, 10 Cal.App. 633, 637, 103 P. 162. If the motion was made and denied, the assumption that its denial was based on sufficient evidence would preclude the defendants from questioning the action of the trial court in denying their motion for new trial on this ground.

[10] The plaintiff's appeal presents the question of the sufficiency of the evidence to justify two deductions by way of offsets from the amount of his judgment.

The first is an item of $481.38. Sheerin, a witness for defendants, testified that DuPuy was required by the District Engineer to pay this amount for damage to certain conduit pipes and cable which were damaged by a tractor running over them. He further testified that Farish, a subcontractor under plaintiff, had tractors on the job at the time. Dailey while denying knowledge of the cause of this damage testified that a tractor would have to run over this conduit to get in and out of the tunnel. It is claimed that this item is excessive on its face, that there was no proof that it was for the reasonable value of the repairs, no proof that the damage was caused by plaintiff's negligence and that the owner of the material damaged was guilty of contributory negligence.

In the trial of the case, extending over a period of many days and involving testimony concerning many dozens of items, the evidence at times, as in this instance, was undoubtedly sketchy. On the cross-examination of defendants' witness no inquiry was made as to the reasonableness of this particular item; the witness testified that DuPuy paid the amount and its reasonableness was apparently not questioned at the time. We think that the trial judge was justified in drawing an inference from the testimony that the conduit was damaged by the negligent operation of one of the tractors operated by Burr's subcontractor (there was no evidence of any other tractors operating on the job at that particular time) and that contributory negligence of the owner of the conduit was not proved.

[11] The $2,140 item represents an amount paid to Farish, Burr's subcontractor, for hauling dirt. Sheerin, defendants' witness, testified that this represented 2,140 yards of dirt at $1.00 per yard hauled from the trenches in the tunnel. Dailey testified for plaintiff that none of this dirt was hauled out of the tunnel. This conflict was resolved by the trial court in favor of defendants. Plaintiff makes the further claim that in any event the full amount paid Farish by DuPuy, including this $2,140, was already once deducted from plaintiff's claim in arriving at the judgment and that in deducting it a second time the court was duplicating the off-set. The unit prices under which Burr was working provided $1 per foot for digging this trench, which would include hauling the material away if necessary. The full charge was made by plaintiff for this work and included in the

judgment. It is thus clear that the $2,140 was a partial payment on account of this $1 per foot of excavation and hence properly deducted.

[12] Plaintiff quotes section 2 of the Public Works Act: (Deering's Gen.Laws, Act 6423) "Upon the trial of any such action, the court shall award to the prevailing party a reasonable attorney's fee, to be taxed as costs, and to be included in the judgment therein rendered."

An attorney's fee was included in the judgment. Plaintiff asks for an additional attorney's fee on appeal. The language of the section, "upon the trial," clearly limits the attorney's fee to the trial, and we find no warrant therein for the allowance of a further fee on appeal. No California case in point has been cited or found by us but the Supreme Court of Oklahoma in National Credit Co. v. Franklin, 177 Okl. 417, 60 P.2d 744, reached a similar conclusion on a statute apparently not so clearly limiting the fee to the trial of the action as ours.

The judgment is affirmed on both appeals.

NOURSE, P. J., and STURTEVANT, J., concurred.

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53 Cal.App.2d 736

STERLING v. TITLE INS. & TRUST CO.

Civ. 13339.

District Court of Appeal, Second District, Division 3, California.

July 31, 1942.

Hearing Denied Sept. 28, 1942.

1. Limitation of actions 🔑151(3)

Where executor of maker of note admitted that note was given and that none of the principal, and only part of the interest, had been paid, letters written by maker to payee, prior to expiration of the four-year limitation period, assuring payee of maker's appreciation of payee's forbearance and that note would be paid, when considered together, constituted an "acknowledgment" and the proper basis for an implied unconditional promise to pay within statute providing that a written acknowledgment takes the case out of the limitation statute, and lifted the bar of the four year limitation statute, starting it to run anew after the date of the first letter. Code Civ.Proc. § 360; § 337, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Acknowledgment".

2. Limitation of actions 🔑199(3)

The sufficiency of an acknowledgment as evidence of a continuing contract so as to lift the bar of a limitation statute and start it running anew is a matter of judicial interpretation as a "question of law". Code Civ.Proc. § 312 et seq., and § 360.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

3. Limitation of actions 🔑151(1)

A distinct and unqualified written admission of an existing debt, signed by the party to be charged, without intimation of intent to refuse payment, establishes the debt as a "continuing contract", so as to interrupt the running of a limitation statute, and the law implies a promise to pay from the acknowledgment. Code Civ.Proc. § 312 et seq., and § 360.

See Words and Phrases, Permanent Edition, for all other definitions of "Continuing Contract".

4. Appeal and error 🔑176

In action against estate of maker of note, appellate court was required to treat allegation of complaint that claim had been presented on the note, which was admitted by the answer, as a fact.

5. Appeal and error 🔑931(8)

In action against estate of maker of note, finding that cause of action was barred by four-year limitation statute was required to be construed as a finding that there was neither an acknowledgment of the debt nor a new promise, so as to authorize review of executor's contention that payee had failed to allege and prove facts showing liability under a new conditional promise. Code Civ. Proc. § 337, subd. 1; § 360.

6. Limitation of actions 🔑151(3)

The distinction between a "new contract" and a "continuing contract", both operating to take a case out of the limitation statutes, is that a continuing contract is established by acknowledgment or promise while the contract is a subsisting liability, and a new contract is established when the acknowledgment or promise is made after the statutory bar has attached. Code Civ. Proc. § 312 et seq., and § 360.

See Words and Phrases, Permanent Edition, for all other definitions of "New Contract".

7. Limitation of actions ⚷148(2)

A promise sufficient to supplant the original one and take the case out of a limitation statute cannot be inferred because the debtor in making the acknowledgment also expresses hope either as to time or manner of payment, and an express promise necessarily excludes a promise by implication, whereas the mere acknowledgment carries with it a promise furnished by law. Code Civ.Proc. § 312 et seq., and § 360.

8. Executors and administrators ⚷226

Where distribution decree had not been rendered and payee of note was a nonresident and had no notice of the time within which claims were required to be filed, payee's claim was not barred by failure to present it to the executor within the time limited by the notice to creditors, notwithstanding that payee was informed of maker's death shortly after it occurred, since payee had no duty to pursue inquiry but was entitled to present her claim any time before distribution decree was rendered. Civ.Code, § 19; Probate Code, §§ 700, 702, 707.

9. Executors and administrators ⚷226

The statute providing that every person having actual notice of circumstances sufficient to put a prudent man upon inquiry has constructive notice of the fact itself where inquiry would have disclosed such fact does not cut off a nonresident creditor's right to present his claim against a decedent's estate anytime before distribution if he is without actual notice of the time for presentation of claims as limited by published notice to creditors. Civ.Code, § 19; Probate Code, §§ 700, 702, 707.

10. Notice ⚷6

Under statute providing that every person having actual notice of circumstances sufficient to put a prudent man upon inquiry has constructive notice of the fact itself, where, by prosecuting inquiry, he might have learned such fact, before a party may be charged with "implied notice" he must have a duty to pursue the inquiry. Civ.Code, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Notice".

11. Notice ⚷6

If a party has information of extraneous facts, not amounting to or showing actual notice but sufficient to put a reasonably prudent man upon inquiry respecting a conflicting interest, and the circumstances are such that the inquiry if made and followed up would lead to a discovery of the truth, to a knowledge of the interest really existing, the party is charged with "constructive notice" of such interest.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

12. Notice ⚷6

If no duty is imposed by law upon a person to make inquiry and where a prudent man would not be put upon inquiry, that means of knowledge are open to a party and he has not availed himself of them does not debar him from relief when thereafter he makes actual discovery. Civ.Code, § 19.

13. Notice ⚷6

The doctrine of "implied notice" applies only to situations where failure to make inquiry would amount to dereliction of duty or failure to take ordinary care of one's own concerns. Civ.Code, § 19.

14. Executors and administrators ⚷449

In action against estate of maker of note, executor's answer, admitting execution of note and nonpayment of principal or more than a designated amount of interest, raised no issue of fact.

◆

Appeal from Superior Court, Los Angeles County; Norman A. Bailie, Judge.

Action by Emma A. Sterling against Title Insurance & Trust Company, as executor of the estate of Alice Bolan Emery, also known as Alice Bolan Sterling, deceased, on a note. From an adverse judgment, plaintiff appeals.

Reversed with directions to enter judgment for plaintiff.

Geo. W. Rochester and Harry P. Bowman, both of Los Angeles, for appellant.

H. Sidney Laughlin, of Los Angeles, for respondent.

SHINN, Justice.

Appeal by plaintiff from an adverse judgment in an action against defendant executor upon a rejected claim. Judgment went for defendant upon the ground that the promissory note which was the subject of the action was barred by the provisions of section 337, subd. 1, of the Code of Civil Procedure and sections 700, 702, and 707 of the Probate Code. The first section relates to the time for commencement of actions, the latter sections to the time for presentation of claims.

Plaintiff holds a note executed by decedent April 6, 1932, for $10,000; it was due March 16, 1933, and would have been barred March 16, 1937. The maker, Alice B. Sterling, later Alice Bolan Emery, lived in Beverly Hills, California, and plaintiff, payee of the note, at all times material to the case, lived in Pennsylvania. Alice Bolan Emery died in Los Angeles County March 11, 1939; defendant executor was appointed and qualified April 4, 1939, and on that date notice to creditors was first published, fixing October 8, 1939, as the last day for the presentation of claims against the estate. On the 24th day of April, 1940, plaintiff presented to the executor her claim, showing unpaid principal in the sum of $10,000 and unpaid interest in the additional sum of $2,880. The claim was rejected and this action was brought.

From the foregoing dates it will be observed that the note matured almost six years before the death of the maker and that action thereon would then normally have been barred for almost two years. It will be noted further that the claim was presented to the executor more than six months after the time limited for presentation of claims as stated in the notice to creditors. If, therefore, the operation of the statute of limitations was not interrupted, the claim was properly rejected by the executor upon the ground that the statute had run, and with reference to the presentation of the claim, if plaintiff's delay was not legally excusable it was properly rejected because it was presented too late.

Upon the first point plaintiff relies upon four letters written to her by the debtor, portions of which were pleaded in the complaint and proved at the trial and which were dated and read as follows:

"October 20, 1936. I am so sorry I cannot send you more money. I worry about it all the time, but if things come back like people think, I hope I will be able to sell that house and get you your money. You have been so nice about it. I can't tell you how much I appreciate it, but I assure you you will get it all just as soon as I can manage it."

"December 15, 1936. Am enclosing a check for $25.00 and I am always ashamed to send it. You have been so patient, that I am doing the best I can until I can sell some property which I hope will not be long now."

"March 2, 1937. Mama Tade I feel terribly that I haven't been able to send you some money, but I have had the most awful time with that house, the people haven't paid any rent since November, and I had to go to court to have them put out and each time the day would come, they got a doctor's certificate that one of the children were ill and according to the law you can't evict them when there is sickness. * * * but I will do the best I can to sell it as soon as possible so I can get you some money I know you need it."

"August 10, 1938. I am sorry I haven't been able to send you any money, but I just haven't got it. I have had to put a mortgage on the Walden house to pay my taxes, etc., that this fall I am going to put that Wilshire lot on the market and taking anything I can get for it and if I can sell it I will pay off part of that note."

It will be observed that three of the letters were written prior to the expiration of the four-year period and one was written afterward. We shall consider the first three as a group. The conclusion we have reached as to the effect which should be given to them as acknowledgments of the debt renders it unnecessary for us to consider the fourth letter in that connection.

Upon this point three principal questions are discussed in the briefs: (1) Do these letters constitute an acknowledgment of the debt so as to suspend the operation of the statute of limitations? (2) Do the expressions in the letters constitute a promise of payment which should be recognized as a substitute for the original obligation? And (3) if the letters do express a new promise, was it a conditional one?

The first question is presented on the record as a clean-cut question of law. The second and third questions, while they are argued in the briefs, involve questions of law which were not raised at the trial and questions of fact which were only impliedly put at rest by the findings of fact.

[1, 2] The three letters, considered together, as they should be (Searles v. Gonzalez, 1923, 191 Cal. 426, 432, 433, 216 P. 1003, 28 A.L.R. 78), amounted to an acknowledgment which lifted the bar of the statute of limitations and started it running anew, as of the date of the first letter, October 20, 1936, which was less than four years prior to the institution of this action. Section 360 of the Code of Civil Procedure reads as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby." This section, which is the only one on the subject, has always been given affirmative effect as if it provided that an acknowledgment or promise in writing signed by the party to be charged thereby does take the case out of the operation of title II, pt. 2, of the Code of Civil Procedure relating to the time of commencing civil actions. The sufficiency of an acknowledgment or promise as evidence of a continuing or new contract is a matter of judicial interpretation. The question is one of law. Concannon v. Smith, 1901, 134 Cal. 14, 20, 66 P. 40.

[3] The essentials of a sufficient acknowledgment have been frequently stated and were well expressed in Southern Pacific Co. v. Prosser, 1898, 122 Cal. 413, at page 415, 52 P. 836, 837, 55 P. 145, as follows: "The distinct and unqualified admission of an existing debt, contained in a writing signed by the party to be charged, and without intimation of an intent to refuse payment thereof, suffices to establish the debt to which the contract relates as a continuing contract, and to interrupt the running of the statute of limitations against the same. From such an acknowledgment the law implies a promise to pay." There was before the court in that case a letter reading as follows: "Dear Sir: Referring to that traction engine at Auburn, owned by me, and mortgaged to S. P. Co., I have not been able to sell it. * * * Now, sir, can't you give me a chance to pay you in work? The Co. employs many men, and, if you choose, you can procure some employment for me. I have a sick family, and am hard up personally, and need work, and want to pay you, besides. * * * W. S. Prosser." Of that letter the court said at page 415 of 122 Cal., at page 837 of 52 P.: "The defendant contends that his said letter was nothing but an inquiry whether plaintiff would accept payment in work. We think it was more significant than this. As we read the document, it was an unqualified admission of an existing debt which defendant desired to pay, and also a request for leave to pay in a manner more convenient to the writer than that provided in the original contract. * * * We have no doubt that the latter [(letter) see 122 Cal. page 419, 52 P. 836, 55 P. 145] interrupted the running of the statute, as to the debt sued on."

The inquiry as to whether the three letters before us amounted to a "distinct and unqualified admission of an existing debt" must take into account the fact that it was admitted by defendant's answer that the note was given, that no part of the principal had been paid, and that only the sum of $1,070 had been paid as interest. In other words, the letters must be construed as having been written by a debtor to a creditor holding a $10,000 note bearing interest quarterly and upon which the debtor was making periodic interest payments. A connection between the letter of December 15, 1936, and the note may be drawn from the fact that a $25 check was apparently enclosed with the letter and that the same amount was credited on the note December 21, 1936, as shown by schedule of interest payments alleged in the complaint and admitted by the answer. That the letters referred to a debt is clear from their general tenor, which is consistently one expressing an obligation of the writer to send money to the addressee which was due to the latter. The letter of October 20, 1936, speaks of sending "your" (plaintiff's) money and each letter makes mention of plaintiff's forbearance. The expression of this letter, "I can't tell you how much I appreciate it but I assure you you will get it all just as soon as I can manage it," was a distinct and unqualified acknowledgment of the debt and the letters throughout clearly negative any intent of the writer to refuse payment. That they referred to the debt evidenced by the note is sufficiently established. The letters mention periodic payments, at least one of which was identified circumstantially as a payment of interest on the note, and since it is not contended that there was any other debt owing by the writer to the addressee and there is no basis for assuming that there was one, it is to be inferred that all of the references were to the particular debt in question. Taken as a whole they were at least as definite and expressive as the acknowledgment held to be sufficient in Southern Pacific Co. v. Prosser, supra. Writings of similar import were held sufficient as acknowledgments and effective to start anew the running of the statute of limitations in Bank of America, etc., Ass'n v. Hunter, 1937, 8 Cal.2d 592, 67 P.2d 99; Searles v. Gonzalez, supra, 1923, 191 Cal. 426, 216 P. 1003, 28 A.L.R. 78; Concannon v. Smith, 1901, 134 Cal. 14, 66 P. 40; Weatherwax v. Hills, 1931, 113 Cal.App. 557, 298 P. 853, and First Nat. Bk. of Park Rapids v. Pray, 1927, 86 Cal.App. 484, 260 P. 933.

Respondent, in arguing the second and third questions above stated, singles out the fourth letter, written after the statute had run, and contends that it contained a promise conditioned upon the debtor's ability to sell certain real property which she owned. Upon this construction of the letter respondent invokes the rule stated in Curtis v. City of Sacramento, 1886, 70 Cal. 412, 11 P. 748; Rodgers v. Byers, 1900, 127 Cal. 528, 60 P. 42, and cases therein cited, to the effect that where a new promise is made, the action must be upon that promise and not upon the original one, and that if the new promise is conditional, facts must be alleged and proved showing that the conditional liability has become absolute. Respondent then says: "It would follow from the above that no matter how the four letters, or any of them, are construed appellant's action must fail because not founded on the assumed new contract."

[4] We are in some doubt as to how these questions are presented by the record before us. When the letters were offered at the trial they were not objected to upon the ground that they constituted a new contract and that they were inadmissible because the claim had been presented on the original obligation, the note, and not upon the new contract; nor were they objected to upon the ground that the action was brought on the note and not on a substituted contract. There is no copy of the claim in the record but counsel would seem to be in agreement that the claim was presented on the note. That is the allegation of the complaint, which was admitted by the answer, and we must treat it to be the fact.

[5] The finding that the cause of action was barred by section 337, subd. 1, of the Code of Civil Procedure must be construed as a finding that there was neither an acknowledgment of the debt nor a new promise, for if there had been either, the action would not have been barred, and the finding therefore must be construed as negating either a conditional acknowledgment or promise. If the trial judge had been of the opinion that there was either an acknowledgment or a promise that was conditional, the findings would have disclosed that fact and the question of variance would have arisen. But as that question was not raised at the trial it would seem that the defendant stood on the denials of its answer that there had been any acknowledgment or promise, conditional or otherwise. However, even though the point was not raised at the trial, it appears necessary for us to examine it in order to make a complete disposition of the case upon this appeal.

[6] The distinction between a new contract and a continuing contract recognized in section 360 of the Code of Civil Procedure was pointed out in Southern Pacific Co. v. Prosser, supra, 1898, 122 Cal. 413, at page 417, 52 P. 836, 55 P. 145, where the court quoted from McCormick v. Brown, 1868, 36 Cal. 180, 184, 95 Am.Dec. 170: "There are two ultimate facts that may be proved in the mode prescribed—a continuing contract, and a new contract. The acknowledgment or promise made while the contract is a subsisting liability establishes a continuing contract; and when made after the bar of the statute, a new contract is created."

[7] As we read the first three letters there was no new promise, only an acknowledgment of an existing one. The strongest expressions used in any of them were no more than assurances that the money would be paid eventually and in part at least when the debtor should sell some property. The acknowledgment was unconditional and absolute. A promise sufficient to supplant the original one can-

not be inferred from the fact that the debtor in making the acknowledgment also expresses hopes either as to time or manner of payment. The letters suggest no alteration of the original obligation nor any reluctance to pay as soon as possible. The references to the expected sale of real property were but a disclosure of the debtor's plans such as would commonly be found in such correspondence. Having in mind the distinction which the code recognizes between an acknowledgment and a promise, we should be careful not to place a construction upon the writings which would attribute to the debtor intentions not expressed therein. It is true that an express promise necessarily excludes a promise by implication (McCormick v. Brown, 1868, 36 Cal. 180, 185, 95 Am.Dec. 170), whereas a mere acknowledgment carries with it a promise furnished by the law. But as we have stated, we construe the letters as mere acknowledgments of the debt and the proper basis for an implied unconditional promise to pay the same.

[8] Plaintiff, as an excuse for her failure to present her claim to the executor within the time limited by the notice to creditors or until about six months after that time had expired, relies upon the fact that she was a nonresident and had no notice of the giving of notice to creditors or of the time within which claims were required to be filed. This appears to be a tenable position. Her nonresidence and the fact that she had no actual notice are admitted. (We shall refer to creditors who are out of the state as nonresident creditors solely for convenience and because plaintiff was not at any time within the state.) Alice Bolan Emery was her daughter-in-law, the widow of a son, and plaintiff learned of Mrs. Emery's death a few days after it occurred on March 11, 1939. She testified by deposition that she did not know prior to November, 1939, of the administration of said estate nor that an administrator had been appointed or notice to creditors given or that claims were required to be filed on or before October 8, 1939, and that she first became aware of the administration of the estate during the first part of 1940. She testified to a visit made to her by her granddaughter, Paula Sterling, a daughter of Mrs. Emery, in the latter part of August, 1939, and of having discussed with her the death of Mrs. Emery and she stated that she might have discussed the estate. Paula Sterling testified to the same visit and of discussing the money that Mrs. Emery owed plaintiff, but she testified to having told plaintiff and plaintiff's son that she knew nothing about the estate, which was being handled by her guardian in California.

Plaintiff also testified that her business was managed by her son, Harry E. Sterling, and the latter testified substantially the same as plaintiff and Paula Sterling as to conversations concerning Mrs. Emery and the debt in August of 1939. Defendant introduced two letters from Harry E. Sterling to defendant's attorney, dated respectively, January 22, 1940, and February 18, 1940, in the first of which he stated that he had just received word from the court in Los Angeles that the addressee was the executor of the estate; that he had given Paula Sterling a statement of the note to give to the executor but had heard nothing from them; that he had written to "both of the children asking for your address" but had received no reply; that plaintiff held a mortgage of $10,000 against the estate with interest. In the letter of February 18, 1940, he stated, in reply to a letter of the attorney dated February 2, that the money had been loaned to his brother James, deceased husband of Mrs. Emery, on a mortgage; that the property had been sold, the mortgage was to have been placed on another property, which plaintiff had always thought had been done, and that they were surprised to learn upon receiving a letter from the attorney that he knew nothing about this.

Under section 707 of the Probate Code, except in cases not material here, the failure to file a claim arising upon contract within the time limited in the notice bars the claim "unless it is made to appear by the affidavit of the claimant to the satisfaction of the court or a judge thereof that the claimant had not received notice, by reason of being out of the state, in which event it may be filed or presented at any time before a decree of distribution is rendered." It appears that an affidavit was made as required and that the claim was presented to the executor before a decree of distribution had been rendered.

It is defendant's position that a nonresident creditor, although without actual notice or knowledge of the publication of notice to creditors or of the time within which claims must be filed as limited by the notice, is nevertheless bound by the limitation and will be deemed to have had notice if he has received "any timely knowledge or information which, if inquiry were pursued by such creditor, would lead to a full disclosure of the fact." Assuming that this rule applies, defendant asserts that as plaintiff was informed of the death of Mrs. Emery shortly after it occurred, she was put on notice that there would be probate proceedings; that a notice to creditors would be given; that the time for the presentation of claims would be limited; and that if she had made proper inquiry she would have learned that the time for presentation of claims would expire October 8, 1939, and that therefore she must be deemed to have had notice as effectually as if she had at all times been a resident of California.

[9] Section 19 of the Civil Code reads as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." This is but a statement of a principle long recognized by the courts and text writers. But we think it cannot be so applied to the case of a nonresident creditor as to cut off his right to present his claim at any time before distribution if he is without actual knowledge as to the time for presentation of claims as limited by published notice to creditors. In Cullerton v. Mead, 1863, 22 Cal. 95, the plaintiff creditor was absent from the state during all of the time when notice to creditors was being published and for about seven months after the date of the first publication. He then returned to California and learned of the death of his debtor but was ignorant of the appointment of an administrator and of the publication of notice to creditors, which he had never seen. As the law then stood, some three months remained after he learned of the death of the debtor within which he might have presented his claim. He was informed of the limited time shortly after it had expired and then presented his claim, which was rejected because it was filed too late. The law at that time required the giving of notice to creditors and the rights of claimants who had received no notice by reason of being out of the state did not differ in substance from their rights as specified in section 707 of the Probate Code which we have quoted. In reversing a judgment for the defendant on demurrer, the court held that since plaintiff had been absent from the state during the entire five weeks in which weekly publication had been made and had no actual notice of the time stated in the notice for filing claims, he came clearly within the exception of the statute and had the whole time up to the decree of distribution in which to present his claim for allowance. The court said at page 99 of 22 Cal.: "The fact that he returned to the State before the ten months expired can make no difference, for the law had extended the time for presenting his claim, he being absent from the State during the time of publication. The law will not presume that immediately upon his return he had notice of a publication in a newspaper months before, and if he had had actual notice of the fact of publication, he had only to look at the law, when he would find that the time was extended in his case." And of the statute the court said at page 98 of 22 Cal.: "This is a remedial statute, and it must therefore be construed liberally, and when the meaning is doubtful, it must be so construed as to extend the remedy."

In MacGowan v. Jones, 1904, 142 Cal. 593, 76 P. 503, a claim was held to be barred where the claimant was within the state at the time of the first two publications of notice to creditors, then left the state and later returned and more than one month before the time for presenting his claim had expired received actual notice that the administrator had published notice to creditors. The court said at page 595 of 142 Cal., at page 504 of 76 P.: "The facts in Cullerton v. Mead, 22 Cal. 95, 96, upon which plaintiff relies, were widely at variance from those here presented. * * * In the Cullerton case, therefore, the plaintiff was not only absent from the state during the time of publication, but received no actual notice or knowledge of the fact that publication had been made until after the time for the presentation of the claims had expired—a very different case from that where plaintiff, being the attendant physician, knew of the death of deceased, was present in the state during the first two publications, returned to the state, and had actual notice of the publication for more than one month prior to the expiration of the time for filing his claim, and still neglected to do so until long after that date." The MacGowan case is the only one we have found which refers to Cullerton v. Mead, supra. It is a significant fact that the doctrine of the Cullerton case has been accepted for 80 years as the law in the application of statutory provisions which have stood for that period without substantial change, during which time the entire wealth of the state subject to administration has passed through the probate courts at least once and the greater share of it several times. It is true that in the Cullerton case the court did not discuss the rule of constructive notice as declared by section 19 of the Civil Code, although as appears from the facts in that case, the claimant had actual knowledge of the death of his creditor some three months before the last day for presentation of his claim.

Defendant has cited to us the case of State Bank of Seneca, Missouri, v. Miller, 1935, by the Supreme Court of Oklahoma, reported in 171 Okl. 253, 42 P.2d 834. There judgment was rendered on a verdict in favor of defendant in a suit by a nonresident creditor on a claim which had been rejected because presented too late. The evidence was held sufficient to prove that the nonresident creditor had actual notice of the giving of notice to creditors and this was held to be a proper basis for the verdict. In the opinion, which is shown to have been prepared by a committee of the State Bar, appointed by the Judicial Council and approved by the Supreme Court, and which opinion was adopted by the Supreme Court, there is dictum to the effect that the rule of constructive notice applied to the case of a nonresident creditor of a decedent under a statute which probably resembled in some respects our own. We are not inclined to follow this doctrine, especially in view of the fact that the careful research that appears to have been made in the preparation of the opinion seems to have disclosed no authority for the proposition.

[**10, 11**] The cases within our own state where the Civil Code section has been applied are legion. In attempting to apply the rule to the facts of the instant case defendant overlooks one important feature, namely, that before a party having notice of facts sufficient to put him on inquiry will be charged with implied notice of the material facts which a diligent inquiry would have disclosed, the situation must be one which imposes upon him a duty to pursue the inquiry. The situations where inquiry is called for are too many to enumerate but a few of them may be noted by way of example. There is a special duty on the part of officers and directors of corporations to keep themselves advised as to the manner in which the corporate affairs are conducted and upon stockholders to inform themselves of actions taken at stockholders' meetings; there is a duty on the part of one dealing with an agent known to have limited authority, to inquire as to the extent of his authority. A common situation is one where conflicting property rights are involved, and of these Mr. Pomeroy says (Pomeroy's Equity Jurisprudence, Vol. 2, fourth edition, p. 1154, sec. 608): "Whenever a party has information or knowledge of certain extraneous facts, which of themselves do not amount to, nor tend to show, an actual notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right, and the circumstances are such that the inquiry, if made and followed up with reasonable care and diligence, would lead to a discovery of the truth, to a knowledge of the interest, claim, or right which really exists, then the party is absolutely charged with a constructive notice of such interest, claim, or right." Another familiar situation is where one who claims to have been defrauded becomes aware of facts sufficient to reasonably arouse a suspicion that a fraud has been committed and is thereby placed under a duty to institute an inquiry for the truth. Still another case is one in which stockholders of corporations are charged with a duty to make inquiry as to alleged breaches of duty on the part of the management when their attention is called to circumstances reasonably suggesting acts of malfeasance.

[12] In Tarke v. Bingham, 1898, 123 Cal. 163, at page 166, 55 P. 759, 760, the court, after quoting section 19 of the Civil Code said: "But the converse of the proposition is equally true. Where no duty is imposed by law upon a person to make inquiry, and where, under the circumstances, 'a prudent man' would not be put upon inquiry, the mere fact that means of knowledge are open to a plaintiff, and he has not availed himself of them, does not debar him from relief when thereafter he shall make actual discovery. The circumstances must be such that the inquiry becomes a duty, and the failure to make it a negligent omission."

[13] The foregoing illustrations are sufficient to show the reason which underlies the rule of implied notice. It will be found invariably that where the doctrine of implied notice is applied, the party chargeable with notice has had a specific duty to perform which required him to inform himself of pertinent facts or has had a right involved, the protection of which has required that he proceed with diligence and as a person of reasonable prudence would proceed to ascertain the facts affecting his right. It may be said generally that the doctrine applies only to situations in which failure to make inquiry would amount to dereliction of duty or a failure to take ordinary care of one's own concerns. It cannot be applied to the conduct of nonresident creditors of decedents so as to require them to inform themselves as to steps that have been taken to give notice to creditors. They are presumed to know the laws of California. They have an absolute right to present their claims at any time before a decree of distribution is rendered, except in the single event that they have received actual notice of the terms of the statutory notice required to be given to creditors. Having an absolute right to present their claims within the longer period of time, they are under no duty to make inquiry as to facts which, when brought to their knowledge, would limit the time within which they must act. They have a right to rely upon their lack of knowledge. A nonresident creditor who learns of the death within this state of his debtor may stand upon his right to present his claim at any time before distribution, unless he has actual notice of the fact of which creditors in the state have constructive notice by the publication and is not obliged to inquire whether notice to creditors has been given or as to a limitation of time prescribed thereby, and if he is under no duty to make such inquiry the law charges him with no notice of facts which would have come to him through an inquiry. Unmeasured uncertainty in the duties of personal representatives and the court in probate in the allowance and approval of claims would result should section 707 of the Probate Code be so construed as to place nonresident creditors who receive knowledge of the death of their debtors under the same limitations as are prescribed for the presentation of claims by resident creditors, who are conclusively presumed to have knowledge of the facts stated in the notice to creditors. We conclude therefore that plaintiff's claim was presented in time.

[14] Defendant's answer admitted all of the material allegations of the complaint, although it contained denials of allegations that there are "now due, owing and unpaid from said decedent and estate of said decedent to the plaintiff herein" the alleged sums of principal and interest. In view of the admission of the execution of the note and nonpayment of the principal or of any more than $1,070 interest, no issue of fact was raised by the denials. The special defenses presented the only issues to be tried, and since they have been held to be untenable, nothing remains to be done in the trial court but to enter judgment in favor of plaintiff for the principal of the note and the unpaid interest.

The judgment is reversed with directions that judgment be entered for plaintiff for the sum of $10,000, with interest as provided in the note, giving credit for sums paid as interest as alleged in the complaint, the same to be payable in due course of administration.

SCHAUER, P. J., and PARKER WOOD, J., concur.

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53 Cal.App.2d 564

PEOPLE v. ABRAHAM.

Cr. 3573.

District Court of Appeal, Second District,
Division 2, California.
July 24, 1942.

Gaming 🔑98(1)

Evidence sustained conviction for receiving money to be wagered on a horse race. Pen.Code, § 337a, subd. 3.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Mike Abraham was convicted of the offense of receiving money to be wagered on a horse race in violation of Penal Code,

§ 337a, subd. 3, and from the judgment of conviction and order denying his motion for a new trial, he appeals.

Judgment and order affirmed.

George Stahlman, of Los Angles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 337a, subdivision 3 of the Penal Code after trial before the court without a jury, defendant appeals. There is also an appeal from the order denying defendant's motion for a new trial.

The evidence being viewed in the light most favorable to the People (respondent), the essential facts are:

Officer Stewart Jones stated that he saw defendant on or about September 22, 1941, on the sidewalk between Broadway and Hill on Fifth Street in the city of Los Angeles; that he, Officer Jones, in company with Officer Allen had driven around the block several times and saw defendant contacting a man and woman who were looking at a newspaper and he saw the man and woman hand defendant some money; that the officers drove around the block a second time and saw a young man motion to defendant and that defendant approached him; that Officer Jones stepped out of the car and stood behind a pillar and watched the two men talking and saw them looking at a scratch sheet defendant had in his hand; that he saw the young man hand defendant some United States currency; that defendant then walked west on Fifth Street and as he did so he, Officer Jones, followed him and saw him making a notation on a scratch sheet with a pencil opposite the "sixth race at Hawthorne"; that defendant then walked to a cigar stand at the corner of Fifth and Hill, went to a telephone, inserted a nickel, dialed a number, and hung the telephone receiver up; that he, Officer Jones, waited outside while the defendant inserted another nickel and dialed the telephone; that a moment or two later defendant moved from the telephone to the cigar counter, where, with a scratch sheet in his hand, he was placed under arrest. The witness then stated that he went to the telephone where defendant had been and on the bell box underneath the telephone he found several other scratch sheets for previous dates. Defendant had $151.50 in his possession when arrested. The witness stated further when shown a scratch sheet that it was the one upon which defendant had made a notation and that after the sixth race was the name "Prairie Dog" and the initials "J.J."

After establishing himself as an expert upon the subject, the witness testified that the initials "J. J." upon the scratch sheet indicated a person or player's initials and that the person making the bet places those initials on the scratch sheet in a position so that it will indicate to him whether the bet was to win or otherwise; that if it was a win bet the initials would be placed in front of the horse's name, if a place bet behind the horse's name, if the amount bet is $1 there is just one initial, if it is a $2 bet the initial is written and above the initial a small "2" or other amount bet is placed.

Defendant relies for reversal of the judgment on the ground *that there is no substantial evidence to sustain the conviction.*

This proposition is untenable, in view of the decision of our Supreme Court in People v. Newland, 15 Cal.2d 678, 104 P.2d 778, and the decision in People v. Kahn, 27 Cal.App.2d 645, 81 P.2d 632. In the two cases cited the evidence was no stronger than in the instant case, nevertheless the convictions were sustained, in one case by the Supreme Court and in the other by this court.

For the foregoing reasons, the judgment and order are and each is affirmed.

MOORE, P. J., concurred.

53 Cal.App.2d 479

BOYD v. LANCASTER.

Civ. 3037.

District Court of Appeal, Fourth District, California.

July 20, 1942.

1. Appeal and error 🔑14(2)

Where issues raised by appeal taken by present respondent from judgment entered by direction of appellate court had not been presented or considered on two prior appeals, and appeal offered appellant his first chance to attack essential findings upon which a judgment for respondent must be based, appellant was entitled to appeal.

2. Appeal and error 🔑1202

Where judgment rendered against defendant by direction of appellate court after two appeals by plaintiff was the first judgment adverse to defendant, he was entitled to move for a new trial before appealing.

3. Appeal and error 🔑1202

The right of appeal carries with it the right to have considered such matters as were formerly considered on an appeal from an order denying new trial and movant's contention that judgment as entered did not comply with the appellate court's direction may be passed upon, on motion for new trial before resorting to appeal.

4. Appeal and error 🔑345(1)

Where appeal from judgment entered by direction of appellate court after two previous appeals by respondent was taken within the statutory time after appellant's motion for new trial was denied, the appeal was timely.

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Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by C. M. Grove, guardian ad litem of Henry O. Boyd, against J. M. Lancaster, to set aside a deed, wherein defendant filed a cross complaint to quiet title. Henry O. Boyd died, and Joseph L. Boyd, as administrator, was substituted as plaintiff. Judgment for plaintiff and defendant appeals. On plaintiff's motion to dismiss.

Motion denied.

J. O. Reavis, of Bakersfield, and John S. Chapman, of Los Angeles, for appellant.

Edgar T. Fee, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action to set aside a deed from Henry O. Boyd to J. M. Lancaster. On June 29, 1937, the court found that the deed was voidable because of the mental condition of Boyd and the inadequacy of the consideration, but that $5,300 was due to Lancaster on account of advancements made to Boyd. It was concluded that the property should be reconveyed to Boyd on the payment of $5,300 to Lancaster within sixty days and if the amount was not paid title was to be quieted in Lancaster. In September, 1937, and after the death of Boyd, it was found that the money had not been paid within the time allowed and judgment was entered quieting title in the defendant. On appeal, that judgment was reversed because no substitution of parties had been made after the death of Boyd. Boyd v. Lancaster, 32 Cal.App.2d 574, 90 P.2d 317.

On August 17, 1939, another judgment was entered decreeing that the $5,300 had not been paid within the time allowed, that no extension of time therefor had been given, and quieting title to the property in the defendant. The plaintiff again appealed from that judgment and the same was reversed on the ground that the time for the payment of the money had been extended and that there had been a substantial and actual compliance on the part of the plaintiff with the terms of the interlocutory order. Boyd v. Lancaster, 43 Cal.App.2d 161, 110 P.2d 532, 535. The order of reversal was as follows: "The judgment is reversed with directions to enter judgment in favor of the appellant, with an appropriate order turning over the money deposited to the respondent."

In compliance with said order the trial court on July 9, 1941, entered a judgment in favor of the plaintiff. The defendant moved for a new trial, which motion was denied on September 8, 1941. The defendant then gave notice of appeal from this judgment on September 16, 1941, and the appeal is presented upon a transcript of the evidence.

The appellant filed his opening brief and thereafter the respondent moved to dismiss this appeal on the grounds that all matters in controversy have been finally determined on the previous appeals, that these decisions have become the law of the case, and that notice of appeal, being filed more than sixty days after the entry of the judgment, was too late since the appellant had no right to move for a new trial and the purported motion therefor could not have extended the time for taking an appeal.

The respondent particularly relies on Kramer v. Superior Court, 35 Cal.App.2d 239, 95 P.2d 158; Snoffer v. City of Los Angeles, 14 Cal.App.2d 650, 58 P.2d 961; and Lial v. Superior Court, 133 Cal.App. 31, 23 P.2d 795. These cases are not controlling under the circumstances which here appear. The Kramer case held, in effect, that when a judgment has been entered as rendered by an appellate court the trial court has no jurisdiction to entertain a motion for a new trial or to otherwise modify the judgment insofar as the issues have been settled on the previous appeal. In the Snoffer case a judgment and order granting a new trial had been reversed on a previous appeal on the ground that the plaintiff's cause of action was barred, with directions for the entry of judgment in favor of the defendant. Such a judgment was entered, followed by an order granting a new trial. On appeal, this order was reversed on the grounds that the previous appeal had finally determined that the plaintiff could not maintain his action and that the complaint could not be so amended as to set up a good cause of action. On a previous appeal in the case of Lial v. Superior Court, supra, it had been held that the contract on which the plaintiff relied was void and the judgment was reversed with directions to enter judgment against the plaintiff. This was done but a motion for a new trial was then granted. This order was reversed on the ground that the cause had been determined on its merits and that new issues could not, therefore, be set up by amendment in order to secure a trial de novo.

In Phillips v. Patterson, 34 Cal.App.2d 481, 93 P.2d 807, 811, the question was presented whether a plaintiff was entitled to execution after final judgment entered as directed by the appellate court. A prior appeal had been taken under section 953a of the Code of Civil Procedure but which, by stipulation, had presented the sole question as to whether the negligent person was an independent contractor or the agent of the company sought to be charged, and waiving all other issues. It had been held on that appeal that the negligent person was an agent of the company and not an independent contractor and judgment had been ordered entered against the company. This had been done and no appeal was taken from the directed judgment and no motion for a new trial was made. It was held that the original appeal taken under section 953a had raised every issue involved in the action, that all issues had been specifically waived except the issue of agency, and that the directed judgment was, therefore, final and conclusive. It was pointed out in that case, however, that "There is no specific statutory authorization to move for a new trial, or to appeal from a directed judgment, but the language of some of the last-cited cases seems to indicate a recognition of a right to appeal from a failure or refusal of a trial court to enter judgment in the manner directed by a reviewing court, or from a directed judgment against a party to litigation in whose favor the original judgment was rendered, when errors occur at the trial 'that were not presented in the record upon the former appeal.'" After reviewing several such cases, the court said:

"In reconciling the cases relied upon by the respondents with those cited by the petitioners, in the light of the Constitution, article VI, section 4¾, and sections 53 and 956a of the Code of Civil Procedure, we assume that an appeal may lie from a judgment directed by a reviewing court which for the first time fixes a liability upon a party to the litigation, when the method of the original appeal gave him no opportunity to review errors alleged to have occurred at the trial. There is no doubt that, in justice, such a privilege should exist."

In Klauber v. San Diego St. Car Co., 98 Cal. 105, 32 P. 876, 877, a judgment for the defendant had been reversed on a former appeal on the judgment roll alone with directions to enter a judgment for the plaintiff, which was done. The defendant then appealed from that judgment and prepared and presented a bill of exceptions. The plaintiff moved to dismiss that appeal on the ground that the directed judgment was final. After pointing out that the defendant had had no opportunity on the former appeal to present for review errors which had been committed against him at the trial, the court said: "As it is only when, upon the second appeal, the record presents the same matters, either of fact or of law, upon which the determination of this court was rendered at the former appeal, that that determination is held to be final, it follows that if there is presented upon the second appeal a different state of facts, or any errors that were committed by the trial court which were not presented in the former record, this court is at liberty to consider them as fully as though presented upon a first appeal." And further, after discussing Heinlen v. Beans, 73 Cal. 240, 14 P. 855: "The present case differs materially from that, however, in that it presents a bill of exceptions containing matters directly affecting the findings of fact upon which the judgment rests; and as those matters were not before the court upon the former appeal the 'law of the case' has no application." In Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17, 18, it is said: "A final judgment entered by a superior court under the direction of an appellate court is appealable. [Citing cases.] * * * The second appeal must be limited to questions arising from the action of the trial court which were not involved in the prior appeal."

Beyond question, issues are raised on this appeal which were not presented or considered on the two prior appeals, each of which was presented upon a bill of exceptions and each of which was taken by this respondent. On the first appeal the only matter considered was the failure to make a proper substitution of parties before entry of the judgment. On the second appeal, the only issue decided was as to whether there had been a failure to comply with the terms of the preliminary order requiring the payment of money to the other party. The judgment now appealed from was the first one entered against this appellant and this appeal offers him his first chance to attack the essential findings upon which a judgment in favor of the respondent must be based. A number of questions are here presented which were not presented or considered on the former appeals, including the sufficiency of the evidence to support the court's findings as to the mental condition of Henry O. Boyd, the failure to give a proper notice of rescission, the absence of a necessary party and other questions.

[1-4] There can be no question that this appellant had the right to appeal from this judgment and we think it should also be held that he had a right to move for a new trial, this being the first judgment entered which was in any way adverse to him. While there is no statute specifically giving such a right after the entry of a directed judgment no reason appears, under these circumstances, why this judgment should not be treated like any other judgment for this purpose or why the usual rules relating to motions for a new trial should not apply. The right of appeal carries with it the right to have considered such matters as were formerly considered on an appeal from an order denying a new trial. The moving party might, in many cases, contend that the judgment as entered did not comply with the directions of the appellate court and there is good reason for allowing such questions to be passed upon on motion for a new trial before resorting to an appeal. In the absence of authority to the contrary, we therefore hold that the appellant had a right to move for a new trial and his appeal having been taken within the statutory time after that motion was denied, it follows that the appeal was taken in time.

For the reasons given the motion to dismiss the appeal is denied.

MARKS, J., concurred.

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53 Cal.App.2d 602

AVILA v. LEONARDO et al.

Civ. 6711.

District Court of Appeal, Third District, California.

July 27, 1942.

Hearing Denied Sept. 24, 1942.

1. Divorce 🔑289

The authority of court in divorce action to make necessary orders for maintenance and support of minor children is conferred by statute, and its exercise cannot be limited or abridged by the parties.

2. Divorce 🔑310

The statutory provision that remarriage of former wife does not affect father's duty to provide for maintenance of his children is read into every divorce decree which purports to deal with care, custody and support of minor children. Civ.Code, § 139.

3. Divorce ⚷297

Under divorce decree purporting to approve property settlement previously executed, but requiring husband to make certain payments monthly for support of children without referring to mother's remarriage, notwithstanding that settlement provided that mother should hold father harmless from obligation to support children on her remarriage, mother's obligation to hold father harmless could not be set off, after mother's remarriage, against father's obligation under decree. Civ.Code, § 139.

4. Divorce ⚷297

A decree in divorce action requiring husband to make certain payments monthly for support of children without referring to mother's remarriage, notwithstanding that property settlement provided that mother should hold father harmless from obligation to support children on her remarriage, could not be modified so as to permit mother's obligation to hold father harmless to be set off against father's obligation to pay accrued installments under decree, especially where father had unsuccessfully attempted to obtain termination of obligation to support children. Civ.Code, § 139.

◆

Appeal from Superior Court, Stanislaus County; J. T. B. Warne, Judge Assigned.

Action by Manuel J. Avila against Rose Gertrude Leonardo and another to enjoin the payment over of certain moneys levied on under execution. From a judgment for defendants, plaintiff appeals.

Affirmed.

Hawkins, Hawkins & Cardoza, of Modesto, for appellant.

Nathan B. McVay and Theodore W. Martz, both of Modesto, for respondents.

ADAMS, Presiding Justice.

This is an appeal from a judgment for respondents in an action wherein plaintiff sought to enjoin respondent Hogin, Sheriff of Stanislaus County, from paying over to respondent Leonardo certain moneys levied upon under execution issued upon a judgment in favor of said respondent Leonardo, plaintiff claiming an equitable set-off against said judgment.

In November, 1931, plaintiff and respondent Leonardo, who were then husband and wife, entered into a separation agreement wherein they settled their property rights, and also provided that the husband should have the custody of two of their four children and the wife the custody of the other two, plaintiff Avila to pay to his wife for the support of the two children in her custody, the sum of $20 per month and necessary doctor and hospital bills. The agreement further provided: "But, if the party of the second part shall hereafter marry, then, in that case, she shall care, support and maintain said Anthony Avila and Edward Avila at her own cost and expense and save and hold harmless the party of the second part from his obligation to maintain and care for said children, and his obligation to pay $20.00 per month for their care, support and maintenance shall cease."

It also recited: "Both parties to this agreement have had the benefit of disinterested advice of legal counsel and understand the provisions of this agreement relating to the care, custody and control of the minor children of the parties hereto are only binding upon the parties hereto as between themselves, and the State has the right to demand of the parties hereto or either of them support and maintenance different and other than that herein provided for, and the Court has the right to provide for other custody than that herein provided for."

Thereafter Avila began a divorce action against his wife. In the prayer thereof he asked the court to make an order requiring him to pay $20 per month to defendant for the care of the two minor children, and in addition thereto necessary expenses of illness. There was no request that such order should provide for the termination of such payments on the remarriage of defendant. After trial the court granted a divorce to plaintiff. Findings of fact were made which recited that "plaintiff and defendant have settled their property rights by a written instrument in the preparation and execution of which the defendant had the aid of independent legal counsel." Said findings then set out the property belonging to the parties as stated in their property settlement, and further recited that plaintiff had agreed to pay to defendant the sum of $20 per month for the care, support and maintenance of the two children Anthony and Eddie, and all sums of money that might be necessary for doctors' bills and any other bills connected with their sickness. Nothing was said as to a termination of these payments on the remarriage of defendant. As conclusions of law the court said that plaintiff was entitled to a divorce from defendant on the ground of extreme cruelty; that "said contract is fair, just and should be ratified and approved"; that the property of the parties should be awarded in accordance with the terms of said contract; that the custody of two of the children should be granted to plaintiff, and of the other two to defendant; and that plaintiff should pay to defendant for the support of the children awarded to her the sum of $20 per month, and expenses of any sickness.

The interlocutory decree thereafter entered adjudged "that the property settlement executed between the parties to this action should be and the same is hereby approved and confirmed." It was not made a part of the decree. The property of the parties was divided in accordance with the agreement; the custody of the children Anthony and Eddie was awarded to defendant, and plaintiff was ordered to pay to defendant $20 per month for their support and maintenance on the first of each and every month. It is significant that the court did not limit that payment by any reference to the remarriage of defendant. The final decree of divorce thereafter entered followed the language of the interlocutory decree.

Thereafter defendant married one Leonardo, and plaintiff ceased to make payments to her. Subsequently plaintiff, in a proceeding on order to show cause, sought a modification of the decree of divorce so that he would not be compelled to pay any sum whatsoever to defendant, setting up and relying upon the provisions of the separation agreement releasing him from liability in the event of defendant's remarriage. In a counter affidavit Mrs. Leonardo sought the custody of all of the children of the marriage and an increased amount for their support. The court denied the applications of both parties. No appeal was taken from that order. A subsequent application of Mrs. Leonardo for modification of the decree was also denied by the court "without prejudice."

In 1939, plaintiff being then in arrears to defendant in the sum of some $1,400, Mrs. Leonardo secured the issuance of an execution under which the sheriff levied upon a debtor of plaintiff, and took into his possession some $400. Avila then began the present action seeking to enjoin the defendant sheriff, and praying for an order that plaintiff owed the defendant Leonardo nothing. In his complaint plaintiff recited the provisions of the divorce decree that he should pay the sum of $20 per month for the support of the children to his wife, but contended that the obligation in said judgment had been and was compensated by the obligation of defendant Leonardo to save and hold him harmless from such payment in the event of her remarriage, as set forth in the separation agreement. The insolvency of Mrs. Leonardo was also alleged as ground for the interposition of a court of equity.

Defendants answered, specifically denying that plaintiff's obligation to pay the $20 per month to defendant Leonardo was compensation by an obligation on her part to hold plaintiff harmless upon her remarriage. After trial of the issues the court made findings of fact in which it was recounted that in the divorce action plaintiff's complaint made no mention of the termination of payments to defendant on her remarriage, but, on the contrary, his prayer was that he pay her the said sum of $20 per month; also that in the divorce decree no mention was made of the termination of such payments on the remarriage of defendant. The refusal of the court to relieve plaintiff of further payments when he applied for such relief after the remarriage of defendant was also recited. As conclusions of law it was held that the said property settlement agreement did not deprive the divorce court of jurisdiction to make provision for the support of the minor children, that in executing it the wife did not forfeit the claim of the minor children for support, that her remarriage did not terminate the payments ordered to be made under the interlocutory and final decrees, and that the provision of the property settlement wherein defendant Leonardo agreed to save and hold plaintiff harmless from such payments upon her remarriage is not an offset against the amount due her by virtue of the divorce decree. Judgment for defendants was entered accordingly.

The contention of appellant herein is that as defendant Leonardo remarried and thereafter performed her agreement and supported the children for several years and then became insolvent, a court of equity should declare as an equitable set-off against the judgment her liability for breach of contract of indemnity to save him free from liability for support of the children after her remarriage. He argues that the case does not involve the question of the rights of the parents to limit or abridge the authority of the court to make provision for the minor children of the parties; that should the defendant thereafter be financially unable to care for or support said minor children she may obtain and enforce an order requiring plaintiff to care for them, but that in such case plaintiff would be entitled to be reimbursed by her if and when she became financially able to respond to her obligation to save and hold plaintiff harmless; that if plaintiff is forced to pay this judgment he will then have a claim against defendant for breach of her warranty of indemnity to hold him free from liability, and that the amount of the "damages" for breach of that contract will be exactly the amount plaintiff would be compelled to pay on execution of the judgment; that defendant Leonardo is insolvent and plaintiff would be unable to collect any judgment against her, and if an injunction will not lie defendant will have been permitted by a court of equity to take advantage of her own wrong to plaintiff's damage. He admits that if the separation agreement does abrogate the power of the court to make provision for the support of minor children it is unlawful and to that extent void. He cites cases dealing with equitable set-off, summarizing the holdings therein to be that the right of set-off exists when parties hold cross-demands under such circumstances that in equity they should be applied one against the other to the extinguishment of both, and asserts that the facts of this case bring it strictly within the rule of equitable set-off, defendant being admittedly insolvent.

Respondent, on the other hand, contends that the court in rendering its decrees in the divorce action undoubtedly intended to provide for the support of the children in terms at variance with those of the separation agreement; that insofar as the agreement is at variance with the express order of the court it is void; and that to uphold appellant's contention would mean that the broad powers of the courts with respect to the support of minor children could be thwarted by the subterfuge of an indemnity provision in a separation agreement of the parents and a setting off of the obligation of the father under the order of the court against the asserted obligation of the mother under such an agreement.

It is to be noted that plaintiff herein, when he claims a right to set-off cross-demands, admits his liability to pay the amount awarded to defendant under the divorce decree; likewise he admits an arrearage in the sum of some $1,400; but while admitting his own dereliction he asks the interposition of a court of equity to set off against his admitted debt to defendant Leonardo her assumed liability to hold him harmless, and all this while admitting, as stated in the agreement itself, that the state has the right to demand of the parties or either of them support and maintenance different and other than that provided for in the agreement and for custody other than that provided for therein.

[1] We are of the opinion that the holding of the trial court was right. The authority of the court in a divorce action to make necessary orders for the maintenance and support of the minor children of the marriage is conferred by statute, and its exercise cannot be limited or abridged by the parties. 9 Cal.Jur. 803, § 144; Lewis v. Lewis, 174 Cal. 336, 341, 163 P. 42; Wilson v. Wilson, 45 Cal. 399; Karlslyst v. Frazier, 213 Cal. 377, 2 P.2d 362; Adams v. Adams, 2 Cal.App.2d 173, 37 P.2d 729; Merritt v. Merritt, 106 Cal. App. 234, 289 P. 240; Evans v. Evans, 154 Cal. 644, 645, 98 P. 1044.

In Fernandez v. Aburrea, 42 Cal.App. 131, 183 P. 366, an agreement had been entered into between the parties in which Mary Fernandez discharged Aburrea of all obligations he might have toward her and their unborn child. Subsequently plaintiff began this action to compel defendant, as the father of her illegitimate child, to support it. Defendant relied upon the release, but the court held that, assuming that the agreement included an undertaking by plaintiff to relieve defendant of his obligation to support his child, it would have no binding force or effect, for it is settled law in this state that a minor's right to support by its father may not be limited or contracted away by its parents; and that so much of the agreement as purported to release the father was void.

In D'Arcy v. D'Arcy, 89 Cal.App. 86, 91, 264 P. 497, it was said, also, that the authority of the court in a divorce action to make necessary orders for the support of the minor children of the marriage is conferred by statute and its exercise cannot be limited or abridged by the parents; and that an agreement of the parties insofar as the minor children were concerned was void.

Appellant recognizes that lack of power of the parties to abridge the power of the court, as held in the foregoing cases, but refuses to admit that the provisions of their separation agreement attempting so to do are void. He argues that the cases above cited are distinguishable from the instant case because here the wife agreed to hold the husband harmless from his obligation imposed by the order of the court, and that they could make such an agreement as between themselves without abridging the power of the court to provide for the support of the children; and that at least as to unpaid installments her assumed liability should be set off against the amount accrued, as this would not affect the rights of the children for support, they having already been supported by the mother.

This agreement is specious but unsound. If plaintiff can set off the assumed liability of the wife against the installments now accrued he can defeat the collection of all future installments by the simple expedient of refusing payment as they became due, and, offsetting the assumed liability of the wife thereafter as he seeks to do here. Such an evasion of the law and the orders of the court cannot be countenanced. Nor can a court of equity assist a husband who comes into it admitting that he has failed to obey the valid orders of that court. The very nature of plaintiff's action assume cross-demands of the parties, and a valid demand on the part of the wife. 23 Cal.Jur. 220.

[2, 3] Appellant relies upon section 159 of the Civil Code, but it has no application here. Section 139 of the Civil Code provides that the remarriage of a former wife does not affect the duty of a father to provide for the maintenance of the children of his marriage. This language is read into every decree of divorce which purports to deal with the care, custody and support of minor children. Moore v. Superior Court, 203 Cal. 238, 263 P. 1009; Rosher v. Superior Court, 9 Cal.2d 556, 560, 71 P.2d 918. It entered into the decree in the instant case and the trial court recognized it when it declined to provide therein that the obligation of Avila to support his minor sons should terminate upon the remarriage of their mother. It was recognized by the parties to the separation agreement when they provided therein that both parties thereto undertood that the state has the right to demand of either of them support and maintenance different and other than that provided in such agreement. After the decree was entered the rights of the parties rested upon it and not upon the agreement, and it cannot be argued successfully that the contract herein was made a part of the decree in toto. While, as hereinbefore stated, the court did state in its conclusions of law that the contract was fair and just and should be ratified and approved, and that the property of the parties should be awarded in accordance with its terms, it did not make it a part of its decrees; on the contrary it made specific provision therein contrary to the agreement insofar as the payment for support of the minor sons was concerned. It has so construed its own decree in declining to modify it at the request of plaintiff to relieve him of his obligation after the remarriage of defendant.

[4] There is a further reason why plaintiff may not resort to the set-off claimed and that is that the decree of the court could not be modified as to accrued installments. In Keck v. Keck, 219 Cal. 316, 26 P.2d 300, where, on an order to show cause, the trial court set off against accrued installments of alimony, an alleged debt of the wife to the husband, the court held that the marital duty of the husband to support the wife was not suspended because the wife was indebted to him and that the obligation to pay alimony is founded on this duty and is not an ordinary debt; also that a decree for alimony may not be modified as to accrued installments and that the set-off had that effect, the divorce decree having been silent as to any indebtedness of the wife to the husband. In the case before us plaintiff attempted, on an order to show cause to have the order for payment to defendant for the support of the minor sons terminated because of the provision of the separation agreement relied upon here. This request was denied. Plaintiff cannot be granted in this collateral attack upon the divorce decree, the relief heretofore denied him upon the same grounds. Snyder v. Snyder, 219 Cal. 80, 25 P.2d 403.

The judgment is affirmed.

THOMPSON, J., and SCHOTTKY, Justice pro tem., concurred.

53 Cal.App.2d 639

FERENZ et al. v. SUPERIOR COURT OF SACRAMENTO COUNTY.

Civ. 6892.

District Court of Appeal, Third District, California.

July 28, 1942.

1. Criminal law 🔑573

The constitutional provision that the party accused shall have right to a speedy and public trial merely guarantees the accused a speedy and public trial and does not fix a period of time within which a person charged with a crime must be tried. Const. art. 1, § 13.

2. Criminal law 🔑576(1)

The statutory provision that the court, unless good cause to the contrary is shown, must order prosecution to be dismissed if defendant is not brought to trial within 60 days after finding of indictment, merely designates 60 days as a maximum time after the finding of indictment within which cause shall be tried in the absence of a showing of good cause for extending that time. Pen. Code, § 1382.

3. Criminal law 🔑576(2)

Where prosecution established that it would be in interest of justice that nine defendants jointly indicted for violation of statute intended to prevent subversive conduct tending to overthrow government should be jointly tried, but two of the defendants were in actual trial in federal court on conspiracy charge by reason of which it was impossible to secure their presence and the presence of certain necessary witnesses, continuance of trial to twenty-second day beyond the 60-day period after finding of indictment was for "good cause" and did not entitle defendants to dismissal of indictment on ground that they were not given a "speedy trial". St.1941, p. 1236; Pen.Code, § 1382; Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Cause" and "Speedy Trial".

4. Mandamus 🔑7

A petitioner is not entitled to the extraordinary remedy of mandamus as a mere matter of right.

5. Mandamus 🔑7

The court has a sound discretion in issuing or denying a writ of mandamus, dependent on the circumstances of the particular case.

6. Mandamus 🔑16(1)

Where granting of writ of mandamus is likely to result in great public detriment, the court is warranted in denying it.

◆

Mandamus proceeding by F. K. Ferenz and others against the Superior Court of Sacramento County to require the respondent to dismiss an indictment and to discharge petitioner from custody.

Petition for writ of mandamus denied.

J. M. Inman, Fred J. Harris, and Lawrence J. Skirving, all of Sacramento, and Roy Daily, of North Sacramento, for petitioners.

Earl Warren, Atty. Gen., Sherrill Halbert and Lewis Drucker, Deputy Attys. Gen., and Otis D. Babcock, Dist. Atty., of Sacramento, for respondent.

PER CURIAM.

This is a petition for a writ of mandamus to require the respondent to dismiss the indictment against the petitioners and to discharge them from custody on the ground that the cause was not brought to trial within sixty days of the filing of the indictment, as required by section 1382 of the Penal Code. To this petition the respondent has filed a demurrer on the ground that the pleading fails to state facts sufficient to constitute a cause of action or to authorize the issuance of the writ of mandate.

The pleadings show that these seven petitioners were jointly indicted by the grand jury of Sacramento County, with two other defendants named Robert Noble and Ellis O. Jones, on May 5, 1942, of the crime of failing to register with the Secretary of State as officers or members of the board of directors of the "Friends of Progress," a subversive organization advocating the overthrow of the United States Government by means of force and violence, contrary to the provisions of the Statutes of 1941, page 1236, chapter 183; that the petitioners were subsequently duly arraigned, and a plea of not guilty was entered as to each; that the trial of these petitioners was first set by consent for July 20th; that on motion the trial of said cause was subsequently re-set by consent of all parties for July 6th; that on the last-mentioned date the prosecution moved to continue the trial to July 21st, which was opposed by the petitioners on the ground that they were entitled to a speedy trial.

This motion was presented on affidavits of the respective parties. The affidavits in behalf of the prosecution show that the defendants Noble and Jones had been previously indicted by the federal grand jury and were then on trial at Los Angeles in the United States district court on a charge of conspiracy to violate the sedition laws of the United States; that Noble and Jones were then in the exclusive custody of the United States officers and that it was impossible to secure their presence, and the presence of certain necessary witnesses until after the completion of that trial; that it is desirable and necessary, to prevent a miscarriage of justice, that the nine defendants who are charged in this indictment be tried jointly, for the reason that the trial will require the presence of some fifty witnesses, including several who reside at Washington, D. C., and a large number at the city of Los Angeles, and that the trial of this cause will consume eight to ten weeks of time. Upon that showing, over the objection of the petitioners, the court ordered that the trial of this cause be set for July 21st; that on the last-mentioned date the prosecution moved for a continuance of the trial to July 28th. This motion was heard on affidavits of the respective parties upon the grounds heretofore mentioned and upon the further ground that the trial of the defendants Noble and Jones had not then been completed and that it was impossible to procure their attendance at the trial of this cause on July 21st. It appeared that if the cause was continued to July 28th, for trial, the prosecution would then be enabled to secure the presence of Noble and Jones and the numerous witnesses whose presence would be required. This motion was opposed by the petitioners on the same ground previously mentioned. The court determined from the evidence adduced on that motion that there was good cause for continuing the trial to July 28th and so ordered.

The petitioners subsequently moved to dismiss the indictment as to themselves for failure to bring the cause to trial as required by section 1382 of the Penal Code and to discharge them from custody. This motion was denied.

A previous petition for a writ of mandamus which was filed in this court by the same petitioners upon the same grounds was denied without prejudice. This petition was then filed in this court on July 22nd, to which a demurrer was filed, and the affidavits and proceedings of the trial court were also filed for consideration on this hearing.

The petitioners contend that they are entitled to a dismissal of the indictment and to a discharge from custody on the ground that their cause was not brought to trial speedily or within sixty days after the filing of the indictment as required by article I, section 13, of the Constitution, and section 1382 of the Penal Code.

We are of the opinion that the facts disclosed by the record in this case show good cause for the continuance of the trial of the petitioners in this case beyond the sixty-day period prescribed by section 1382 of the Penal Code, which reads in part:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment, or filing of the information."

Article I, section 13, of the Constitution merely provides in that regard: "The party accused shall have the right to a speedy and public trial."

[1-3] The Constitution does not purport to fix a period of time within which a person charged with a crime shall be tried. It merely guarantees the accused a "speedy and public trial." While it is true that section 1382 of the Penal Code has been held to be mandatory, that section merely designates sixty days as the maximum time after the finding of the indictment or filing of the information within which the cause shall be tried "in the absence of a showing of good cause for extending that time." It does not necessarily follow that a defendant who has not been brought to trial within sixty days from the finding of the indictment or the filing of the information shall be entitled to a dismissal of the charge for lack of diligence in the prosecution of the cause. In re Begerow, 133 Cal. 349, 65 P. 828, 56 L.R.A. 513, 85 Am.St.Rep. 178; People v. Romero, 13 Cal.App.2d 667, 57 P.2d 557;

8 Cal.Jur. 202, § 276. In the present case we are convinced the prosecution has adequately shown good cause why the trial of this case against the petitioners should reasonably be continued to the 28th day of July, which is only twenty-two days beyond the period designated by section 1382 of the Penal Code.

It satisfactorily appears that it would be desirable and in the interest of justice that the nine defendants mentioned in the indictment should be jointly tried for the reason that they are all involved in the same violation of the statute intended to prevent subversive conduct tending to overthrow the government of the United States by force and violence and to impede organized efforts of government agencies in conducting the world-wide war in which this country is now engaged. It appears that during all of the time subsequent to the finding of the indictment in this case the two defendants Noble and Jones were in the actual custody of Federal officers and in actual trial in the United States district court at Los Angeles on a charge of conspiracy to violate the sedition laws of the United States, of which charge they were recently convicted. It also appears that the district attorney of Sacramento County has been unable to procure the attendance of said defendants Noble and Jones, or of the numerous witnesses hereinbefore referred to, at the trial of the cause prior to said 28th day of July; that a number of said witnesses reside in the city of Washington, D. C., and are not subject to process of the courts of California to procure their attendance at the trial; that said witnesses, who are connected with the Federal Government, have assured said district attorney they could and would voluntarily attend the trial as witnesses but would be unable to do so on more than one occasion; that the trial of the cause would consume eight to ten weeks of time and the attendance of approximately fifty witnesses, many of whom reside at Los Angeles, and that the necessity of severing the trials of these petitioners from that of the defendants Noble and Jones would be likely to result in great inconvenience and expense, with the likelihood of a miscarriage of justice.

For the foregoing reasons we assume good cause has been shown justifying the continuance of the trial of said cause to July 28th. This proceeding involves facts and conditions of unusual present interest to this State and Nation.

[4-6] A petitioner is not entitled to the extraordinary remedy of mandamus as a mere matter of right. The court has a sound discretion in issuing or denying a writ of mandamus, dependent upon the circumstances of the particular case. Wiedwald v. Dodson, 95 Cal. 450, 30 P. 580; 16 Cal.Jur. 768, § 7. We assume that where the granting of a writ of mandamus is likely to result in great public detriment the court is warranted in denying it. 34 Am.Jur. 830, §§ 35, 36.

The petition for a writ of mandamus is therefore denied.

53 Cal.App.2d 644

NILES v. LOUIS H. RAPOPORT & SONS, Inc., et al.

Civ. 13556.

District Court of Appeal, Second District, Division 1, California.

July 29, 1942.

Rehearing Denied Aug. 24, 1942.

1. Trusts 🔑44(1), 110

In action to recover for legal services rendered to defendants by plaintiff's assignor, an attorney at law, under alleged agreement whereby defendants were to hold note payable to one of the defendants in trust for plaintiff's assignor who was to receive one half of the proceeds, evidence warranted finding that defendants became voluntary as well as involuntary trustees for plaintiff's assignor, and in such capacity were required to hold the note in trust for plaintiff's assignor. Civ.Code, §§ 2216, 2223, 2224; Code Civ.Proc. § 1960.

2. Trusts 🔑110

Where court, on competent evidence, found that after defendants obtained note, half of the proceeds of which were to be paid to the plaintiff's assignor for legal services, defendants denied that plaintiff's assignor had any interest in the note, and wrongfully retained the note and the proceeds received therefrom, a finding that an "involuntary trust" or "constructive trust" was created in favor of plaintiff's assignor was justified. Civ.Code, §§ 2223, 2224.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trust" and "Involuntary Trust".

3. Attorney and client ⚷144

In construing oral contracts between attorney and client concerning compensation, there may be circumstances where the contract is to be construed most favorably to the interests of the client by reason of the confidential relationship which exists, but those circumstances are present only where there is some ambiguity as to the intent of the parties.

4. Limitation of actions ⚷46(1)

A statute of limitations does not begin to run from the time of the making of a contract, but commences from the time that the cause of action accrues or the breach of contract. Code Civ.Proc. § 312.

5. Limitation of actions ⚷50(3)

Where original agreement between defendants and plaintiff's assignor, an attorney, for payment of 50 per cent. of recovery on litigation to assignor for legal services was made in 1931, but was by defendants confirmed from time to time, and plaintiff's assignor continued to work on the matter of collecting the account up to and beyond time that note, half of the proceeds of which were allegedly to be held by defendants in trust for plaintiff's assignor, was made in 1939, shortly before action was brought to recover for legal services rendered, the action was not barred by limitations. Code Civ.Proc. § 339.

6. Appeal and error ⚷1071(6)

Where more complete findings, if made, would have been adverse to appellants' contentions, appellants were not entitled to have judgment set aside because of failure to make more complete findings.

7. Judgment ⚷21

A judgment which ordered that plaintiff recover from defendants a specified sum and one half of the sums received by defendants on certain note since date of trial, was not invalid on ground that it was uncertain.

8. Judgment ⚷230

That portion of judgment requiring that note be delivered to clerk of court, to be impounded by clerk and one half of the proceeds paid over to plaintiff as the proceeds were received, was ordered stricken from the judgment as unauthorized.

9. Trial ⚷398

Where there is in the record evidence to support a recovery on either of two theories, the findings on the inconsistent theory may be disregarded as "surplusage".

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

10. Appeal and error ⚷1071(1)

Defendants were not prejudiced by trial court's finding on quantum meruit count of plaintiff's complaint, where there was ample evidence to support findings as to the reasonableness of recovery, both on quantum meruit basis and on express agreement, and court found that plaintiff was entitled to the same amount on quantum meruit basis and on express agreement.

11. Attorney and client ⚷153

Where agreement between defendants and defendants' judgment debtors by which defendants were to reconvey under certain conditions certain realty on payment by judgment debtors to defendants of expenses and taxes incurred by defendants, was separate from deficiency judgment transaction which resulted in the execution of a note by defendants' judgment debtors to defendants under alleged agreement that one half of the proceeds were to go to plaintiff's assignor for services as attorney, plaintiff's assignor was entitled to one half of the recovery on the note without any deduction because of the agreement between defendants and the judgment debtors.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by T. E. Niles against Louis H. Rapoport & Sons, Inc., and others to recover for legal services rendered to defendants by the plaintiff's assignor. From an adverse judgment, the defendants appeal.

Judgment modified, and, as modified, affirmed.

Isaac Pacht, Clore Warne, and Pacht, Pelton, Warne, Ross & Bernhard, all of Los Angeles, for appellants.

Charles A. Bank and Harold D. Geffen, both of Los Angeles, for respondent.

WHITE, Justice.

This litigation arises out of an action commenced by plaintiff to recover for legal services rendered to defendants by plaintiff's assignor, Harold D. Geffen, an attorney at law. Originally, the complaint contained three causes of action, the first of which charged that within two years prior to the commencement of the action plaintiff's assignor and the defendants "entered into an oral agreement, wherein, for legal services rendered by plaintiff's assignor, defendants agreed to hold a certain promissory note made by one Abe Stern, as payor, to Louis H. Rapoport & Sons, Inc., designated therein as payee, for the benefit of plaintiff's assignor and defendants, and each of them, share and share alike," and further, that it was also then and there agreed that Geffen "should own a one-half interest in said note and the proceeds thereof, and that defendants, and each of them, would hold said note in the name of Louis H. Rapoport & Sons, Inc., in trust for plaintiff's assignor, and that the same is now so held." It was also alleged that the note was executed September 21, 1939, in the sum of $3,050, and that defendants claimed the whole thereof and had collected upon it and refused to account to Attorney Geffen.

The second cause of action was presented upon the theory of an account stated, but as to such claim the trial court held against plaintiff, and we need not concern ourselves therewith on this appeal. The third cause of action was based upon services allegedly rendered by plaintiff's assignor to defendants "within two years last past" of the claimed reasonable value of $5,000.

By their answers the individual defendants denied any liability whatsoever. Defendant corporation by its answer denied all allegations of the first and second causes of action and admitted liability in the amount of $250 on the third or quantum meruit cause of action. Defendant copartnership likewise denied the allegations contained in the first and second causes of action, but admitted liability in the sum of $100 by reason of the allegations contained in the third cause of action. Each defendant, by supplemental answer, set up the bar of the statute of limitations (Code Civ.Proc. § 339) as to the first cause of action.

During the trial the court granted plaintiff, over defendants' objections, leave to file a fourth cause of action by way of amendment to the complaint. In general, the allegations contained therein were that about September, 1931, plaintiff's assignor entered into an oral agreement with defendant corporation under the terms of which he was employed to collect a certain indebtedness allegedly due from Abe Stern and Mollie Stern, and as compensation therefor he was to be paid fifty per cent of all sums collected upon such obligation; that on September 21, 1939, defendant corporation took possession of a promissory note in the sum of $3,050, executed by Abe and Mollie Stern and payable to such corporation, in liquidation of the aforesaid indebtedness; that said note provided for installment payments, on account of which $1,100 had been paid. It was further alleged that on September 21, 1939, "defendants became involuntary trustees of said above mentioned promissory note, and one-half the proceeds collected and to be collected in the future thereon" for the benefit of plaintiff's assignor. Then followed the allegation that defendants claimed the whole of said note and had converted the proceeds thereof to their own use.

Following trial the court found that the defendants had collected $1,100 on account of what we shall designate as the "Abe Stern note transaction"; that the defendants within two years prior to the commencement of the action agreed to hold such note for the benefit of plaintiff's assignor and defendants, share and share alike; that plaintiff was entitled to one-half the proceeds collected and to be collected thereon and was the beneficial owner of one-half of said note as well as the proceeds received and to be received therefrom; that the defendants were indebted to plaintiff in the sum of $2,200 (this apparently including the $1,100 theretofore found to have been collected on account of the Stern note), and further, that plaintiff was entitled to "one-half of such sum as has been paid to defendants or any of them on the Stern note since the date of trial"; that the reasonable value of the services rendered by plaintiff's assignor to defendants was $2,200, together with one-half of such sum as had been paid on the note by the Sterns since the date of trial and one-half of such sums as might be received or paid on said note in the future.

Upon these findings the court entered judgment against all the defendants and in favor of plaintiff in the sum of $2,200 "and one-half of such further sums as have been paid since the date of trial by Abe Stern and sons to defendants or any of them." The judgment further recited that plaintiff was entitled to receive one-half of all sums that might be paid on said note thereafter and "that defendants and each of them convey to plaintiff by good and sufficient assignment, one-half interest in said note and the proceeds that may be received therefrom," and "that said note be delivered up to the clerk of the court to be impounded by him, and one-half the proceeds paid over to plaintiff when the same are received."

Upon this appeal defendants are urging a reversal only in so far as the Abe Stern promissory note trust transaction is concerned. As to the items found by the court to be due under plaintiff's third cause of action, which had reference to services rendered by plaintiff's assignor for defendants in connection with transactions other than the Stern promissory note, no question is here raised. Appellants concede that as to the amount due on these items the evidence is in conflict and the trial court's determination of the matter must be final.

Appellants first contend that there is no evidence to sustain and support any findings of a trust relationship, either voluntary or involuntary, between plaintiff's assignor, Attorney Geffen, and his clients, the defendants herein, as to the Abe Stern promissory note transaction. Viewing the evidence in the light most favorable to the findings and the judgment predicated thereon, the record reveals that in 1931 plaintiff's assignor was retained by defendant Harry Rapoport to bring an action against Abe and Mollie Stern to recover a deficiency judgment after foreclosure of a mortgage or trust deed. The original note was for $2,777.65, and the property, consisting of several lots, was sold to the Rapoports at a foreclosure sale for $1,000, leaving a deficiency of $1,778.41. Attorney Geffen filed the action August 12, 1931, and judgment was entered September 4, 1931, for $1,911.92, which amount included attorney's fees of $100. Execution was issued, and was returned wholly unsatisfied on January 12, 1932. Attorney Geffen testified that so far as his fee was concerned, it was agreed that the same would be "fifty per cent of anything recovered" and that this fee arrangement was confirmed by defendants "from time to time." Attorney Geffen testified that defendant Harry Rapoport continually urged him to attempt to collect the judgment; that he advised Rapoport not to be too insistent, because there was some question as to the validity of the judgment by reason of the fact that Mr. Stern had been discharged in bankruptcy after his debt to the Rapoports had been incurred, and that the latter's claim was listed in the schedule in bankruptcy. In his testimony Attorney Geffen then detailed the plans he unfolded to defendant Harry Rapoport looking toward the collection of the judgment. Finally, according to the witness, appellants secured a financial statement of the Sterns' business, which disclosed possession by them of certain assets. This occurred in July or August, 1939, and thereupon Attorney Geffen caused execution to be issued and levy made upon the Sterns' business. This action resulted in a meeting at which, according to Mr. Geffen's testimony, through his efforts a settlement was reached. The terms of the settlement called for the execution of a note by Abe Stern, Mollie Stern and their sons, to defendants herein, in the sum of $3,050, representing the amount of principal on the judgment plus accumulated interest since 1931. According to Attorney Geffen's testimony, he and defendant Harry Rapoport agreed that it would be sufficient to designate Louis H. Rapoport & Sons, Inc., as payee on the last-mentioned note and that Mr. Geffen was to be paid one-half of the monthly amortized payments provided for in the note.

[1] With reference to the existence of a trust agreement as to the Abe Stern note, plaintiff's assignor testified: "I told Harry to take the note in the name of his company as payee, and that he did not have to name me as one of the payees, but that he could send me one-half monthly as collected. He said that was all right. I then said that inasmuch as there was nothing more to do but sign a form of bank note I would leave. He said that he would show me the note when it was executed. Louis Rapoport left with me in my car. As we were going to the office he asked me if $25 would be all right for my services in making the settlement. I told him that Harry and I had an agreement that I was to receive fifty per cent of whatever we received. He said that I would then have to take the matter up with Harry."

Much of the foregoing testimony was denied or contradicted by the appellants, but it was for the trial court to determine the value and effect of all the evidence introduced, as well as the credibility of the respective witnesses. We are persuaded that the foregoing evidence is of sufficient substantiality to warrant the finding and conclusion by the trial court that defendants became voluntary, and as well, involuntary trustees for plaintiff's assignor, and in such capacity were required to hold in trust for plaintiff's assignor the Stern promissory note in the sum of $3,050 dated December 21, 1939. Once a fact is proved, an inference may be drawn therefrom when, among other things, a consideration of the course of business warrants such deduction. Code Civ.Proc. § 1960. Viewing the foregoing evidence in the light of business practice and the usual propensities of people, we are impressed that the court was justified in concluding that plaintiff's assignor owned a one-half interest in the note in question as well as the payments made thereunder, and that defendants voluntarily accepted a confidence reposed in them by plaintiff's assignor to hold the note in trust to secure to him the payment of his one-half interest therein. Civil Code, sec. 2216.

[2] Section 2223 of the Civil Code reads, "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner," while section 2224 of the same code provides in part that one who gains a thing through the violation of a trust or other wrongful act, unless he has some other or better right thereto, is an involuntary trustee of the thing gained for the benefit of the person who would otherwise have it. When, therefore, the court upon competent evidence found that after obtaining the note and certain payments made thereon, appellants denied that respondent's assignor had any interest therein and wrongfully detained the note and proceeds received therefrom, a finding that an involuntary or constructive trust was created in favor of respondent's assignor was justified, because there were present in the transaction between the parties those conditions stated in the last-mentioned code section, and that is all that is necessary to warrant the establishment of an involuntary trust. Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430.

[3] We are not unmindful of the rule that in construing oral contracts between attorney and client concerning compensation, there may be circumstances where the contract is to be construed most favorably to the interests of the client by reason of the confidential relationship which exists, but these circumstances are present only when there is some ambiguity as to the intent of the parties. 3 Cal.Jur. 686. In the instant case we cannot say that the arrangement between the parties herein was tainted with ambiguity or uncertainty.

[4-6] Appellants' contention that the court failed to make any findings on the issue of the statute of limitations cannot be sustained. There is abundant evidence in the record to indicate that the original agreement for the payment of fifty per cent of the recovery on the Stern litigation was made by defendants in 1931 and by them confirmed "from time to time." There is also evidence that plaintiff's assignor continued to work on the matter of collecting this account up to and beyond the time that the note was made on September 21, 1939. The statute of limitations does not begin to run from the time of making a contract, but commences from the time the cause of action accrues. Code Civ.Proc. § 312; Wheatley v. San Pedro, etc., R. Co., 169 Cal. 505, 147 P. 135. The statute commences as of the date of breach of the obligation. Baker v. Joseph, 16 Cal. 173. In the instant case, the breach occurred at the time appellants took possession of the note and proceeds and failed or refused to pay Attorney Geffen his one-half interest therein. Where, as here, the court found that plaintiff's assignor was entitled to a portion of the note and proceeds, it thereby necessarily found that respondent's claim was not barred by the statute of limitations. From what we have herein said it is at once apparent that if more complete findings had been made on the issue of the bar of the statute of limitations, they would have been adverse to the contentions of appellants. That being so, the failure of the court to find further than it did is not a ground for setting aside the judgment. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Los Angeles County v. Industrial Acc. Comm., 13 Cal.App.2d 69, 78, 56 P.2d 577.

[7, 8] Appellants next contend that the judgment is uncertain, and by reason of such uncertainty, invalid. As we read the judgment, it clearly and without ambiguity orders that plaintiff recover of and from the defendants the sum of $2,200 and one-half the sums received by defendants on the Stern note since the trial date. This latter portion of the judgment was warranted because a period of some ninety days elapsed from the date of trial to the date of judgment, during which time amortized payments became due on the note, and under the judgment plaintiff owned one-half of such payments. The judgment then determines

that plaintiff is entitled to receive one-half of such sums as may be paid in the future upon the Stern note, and then directs defendants to convey to plaintiff, by good and sufficient assignment, a one-half interest in the note and the proceeds that may be received therefrom. We are in accord with appellants' claim that the portion of the judgment requiring that the note be delivered to the clerk of the court, to be impounded by him and one-half the proceeds paid over to plaintiff as the same are received, should be stricken therefrom. This for the reason that there is no authority in law for the clerk of the court, on behalf of private parties, to receive payments due under the note and transmit the same in proper proportions to such parties, and in the event payments were not made there is no authority vested in the clerk by and through which he could enforce collection of the installments due from time to time.

[9, 10] We cannot see where appellants were prejudiced by the court's finding as to the Stern note transaction on the quantum meruit count of the complaint. There was ample evidence to support the court's finding as to the reasonableness of the recovery, both on a quantum meruit basis and upon the express agreement made by the parties. Appellants assert that the effect of this is to permit plaintiff to recover on asserted inconsistent theories of express and implied contract. Where, as here, there is in the record evidence to support a recovery on either theory, the findings on the inconsistent theory may be disregarded as surplusage. Baird v. Ocequeda, 8 Cal.2d 700, 67 P.2d 1055. In the instant case the amount of the judgment, based upon either theory, was the same; that is to say, the court found that plaintiff was entitled to a specific sum, the amount of which was determined to be the same upon both a quantum meruit basis and an express agreement basis. Therefore appellants suffered no injury.

[11] Appellants finally urge that even though respondent is entitled to fifty per cent of the recovery made on the Stern indebtedness, this should be what they denominate a "net recovery." In this connection it appears that prior to 1939 Abe Stern and Mollie Stern owned certain lots which they hypothecated to secure the indebtedness to appellants represented by a promissory note. When the Sterns defaulted in the payment of their obligation under this note, appellants foreclosed on the security and caused the same to be sold at a trustee's sale. There being no bidders, appellants bought the lots in themselves, and as heretofore pointed out later retained plaintiff's assignor to file suit for recovery of a deficiency judgment. It is this deficiency judgment that was settled by execution of the promissory note hereinbefore discussed in the sum of $3,050. Appellants contend that when they acquired title to the lots they were required to pay various taxes, assessments and other expenses from 1931 to the date of trial, and that at the time the agreement to execute the Stern note of $3,050 was made it was agreed that appellants would reconvey the aforesaid real property to the Sterns upon payment by the latter to appellants of certain taxes and other expenses incurred in connection with the real property after appellants had bid it in at the trustee's sale. It is appellants' claim that the real property should be considered in connection with appellants' responsibility to plaintiff's assignor for fees in making the Stern settlement. We are not in accord with this claim, because it clearly appears that the understanding with regard to the transfer of the lots from appellants back to the Sterns was no part of the settlement of the deficiency judgment out of which this litigation grows. Plaintiff's assignor was therefore not concerned therewith, because the obligation of appellants to the Sterns did not in any way affect the appellants' obligation under the $3,050 note out of which the court found the fee of plaintiff's assignor was to be paid. The agreement between appellants and Abe Stern and sons by which the former were to reconvey under certain terms and conditions the lots in question was separate and apart from and had nothing whatever to do with the deficiency judgment transaction that resulted in the execution of the $3,050 note.

For the foregoing reasons, the judgment is modified by striking therefrom that portion which directs "that said note be delivered up to the clerk of the court to be impounded by him, and one-half the proceeds paid over to plaintiff when the saime are received." As so modified, the judgment is affirmed, respondent to recover costs on appeal.

YORK, P. J., and DORAN, J., concurred.

53 Cal.App.2d 415

WILLIAMS BROS. & HAAS, Inc., v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. 11924.

District Court of Appeal, First District,
Division 2, California.
July 15, 1942.

Rehearing Denied Aug. 14, 1942.

1. Municipal corporations ⚿247, 249

Where there was no compliance with provisions of city charter that no obligation involving expenditure of money shall be incurred unless controller first certify that there is a valid appropriation from which the expenditure may be made, no enforceable liability arose against city in quantum meruit or under contract with contractor whereby city was to pay part of the cost of repairs necessitated by a slide which damaged realty which was in process of condemnation, and on which contractor was constructing a pipe line under contract with city.

2. Municipal corporations ⚿1021

Where slide damaged a portion of realty which was in process of condemnation, and on which contractor was constructing a pipe line under contract with city, and contractor and city entered into a contract that if contractor should repair the damage, the city would pay part of the cost of repairs, but the claim against city for repairs was not presented for certification by the controller as required by charter, so that the contract was not enforceable, and contractor failed to file a claim for damages as required by the charter, contractor could not recover damages from the city.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action to recover on a contract by Williams Bros. & Haas, Inc., against the City and County of San Francisco. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Walter Shelton, of San Francisco, for appellant.

John J. O'Toole, City Atty., Dion R. Holm, Asst. City Atty., and Nora A. Blichfeldt, Deputy City Atty., all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff had a contract with the defendant for the construction of a pipe line over property which was in process of condemnation in a proceeding pending in the superior court. During operations under the contract heavy rains caused a slide which damaged a portion of the property which was condemned. A dispute arose between this contractor, the city, and the property owner as to who was responsible for this damage. The contractor and the city executed a contract agreeing that the contractor should repair the damage and that the city should pay one-half of the cost of repairs, but not to exceed $7,000. This agreement was not approved by the city controller. The contractor completed the repairs at a cost in excess of $15,000, and presented his claim to the city for $7,000. This claim was not presented within the sixty-day period prescribed by the city charter. Upon the termination of the city's suit for condemnation of the right of way it was determined that the slide was the result of natural causes, and that the city was not chargeable with damages to the property owner on that account.

In the trial of the instant case the defendant had judgment upon the pleadings and a stipulation of facts and plaintiff's appeal from this judgment presents the single question whether the charter provisions relating to the execution of contracts and the presentation of claims thereunder are controlling.

Section 86 of the charter provides that "no obligation involving the expenditure of money shall be incurred or authorized * * * unless the controller first certify that there is a valid appropriation from which the expenditure may be made. * * * All obligations incurred, * * * contrary to the provisions of this section, shall be void. * * *"

[1] It is conceded that there was a failure to comply with these provisions, and for this reason no enforceable liability arose against the city under the contract to pay for the repairs to the property. Zottman v. City and County of San Francisco, 20 Cal. 96, 81 Am.Dec. 96; Gamewell F. A. T. Co. v. City of Los Angeles, 45 Cal.App. 149, 154, 187 P. 163.

It is equally well settled that appellant cannot recover in quantum meruit where the claim is based upon a contract made void by such charter restrictions. Shaw v. City and County of San Francisco, 13 Cal.App. 547, 549, 110 P. 149, where numerous cases are cited.

[2] For these reasons it is immaterial whether the suit is based upon the written contract, on an implied contract for the reasonable value of the services performed, or is one in damages. No recovery can be had on a contract express or implied made void by the charter, and no recovery can be had in damages, because appellant failed to file a claim therefor as required by section 87 of the charter. Cathey v. City and County of San Francisco, 37 Cal.App.2d 575, 576, 99 P.2d 1109, where cases are cited.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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53 Cal.App.2d 436

NOSBONNE v. BRILL.

Civ. 11507.

District Court of Appeal, First District, Division 1, California.

July 16, 1942.

1. Automobiles 🔑9

A municipal ordinance providing that no pedestrian shall cross a roadway except at a crosswalk or regularly established pedestrian lane is invalid because in "conflict" with statute providing that every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. Vehicle Code § 562, St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Conflict".

2. Appeal and error 🔑882(12)

In pedestrian's action for injuries sustained when struck by motor vehicle, where it did not appear from record by whom challenged instruction relating to city ordinance was submitted but the instruction in effect directed a verdict for defendant, the pedestrian was not precluded, on appeal from adverse judgment, from making complaint regarding the instruction under rule of "estoppel" that person offering an incorrect instruction cannot complain if it is given and rule that it is incumbent on appellant to show error. Code Civ.Proc. § 647.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

3. Appeal and error 🔑1050(1)

In action for injuries sustained by pedestrian when struck by motor vehicle while crossing street, admission into evidence of invalid ordinance regulating pedestrian traffic and reading of it to jury was error of prejudicial nature. Vehicle Code § 562, St. 1935, p. 188.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Personal injury action by Josephine Nosbonne against George E. Brill. From an adverse judgment, plaintiff appeals.

Reversed.

H. L. Hagan, of Oakland, and Charles Reagh, of San Francisco, for appellant.

Myron Harris, William H. Older, and John Jewett Earle, all of Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment for defendant entered after an adverse jury verdict in an action brought by plaintiff to recover damages for personal injuries alleged to have been caused by the negligence of defendant. Appellant concedes that the evidence is conflicting, but urges that the trial court committed error in instructions given and refused, and in admitting into evidence an ordinance of the city of Oakland, which, it is urged, is invalid because in conflict with the provisions of the Vehicle Code. The submission of this appeal was held up to await the decision of the Supreme Court in Pipoly v. Benson, 20 Cal.2d 366, 125 P.2d 482, which involved the identical point last above mentioned. The decision in that case has now become final, and for reasons stated therein, the judgment here appealed from must be reversed.

The accident occurred between 9:30 and 10:00 p. m. on July 7, 1939, while appellant was crossing on foot from the east to the west side of College Avenue in the city of Oakland, near the intersection of College Avenue with Manila Avenue and Hudson Street. Hudson Street stops on the west side of College Avenue, while Manila Avenue continues both east and west of College Avenue. On the west side of College Avenue both Manila Avenue and Hudson Street intersect College Avenue at other than right angles. The result is, that at the intersection there are five corners. There is a pedestrian crosswalk delineated on the street extending from the northeast corner of College and Manila Avenues across College Avenue to its west side. Appellant testified that she was crossing in this pedestrian lane when she was struck. Respondent, and several other witnesses, testified that appellant was outside the pedestrian lane when hit.

The trial court admitted into evidence over appellant's objection, an ordinance of the city of Oakland which provides: "No pedestrian shall cross a roadway except at a crosswalk or regularly established pedestrian lane." An instruction was given based on this ordinance, as well as one predicated on section 562 of the Vehicle Code, St.1935, p. 188, which provides:

"(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.

"(b) The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." The court also instructed that any violation of the Vehicle Code or of the city ordinance "is presumptively an act of negligence and conclusively so until rebutted by evidence. * * *"

It is obvious that these instructions are directly conflicting. The instruction predicated on the ordinance told the jury that a pedestrian was absolutely prohibited from crossing a roadway outside a crosswalk, while the instruction predicated on the state statute told the jury that a pedestrian is simply required to yield the right of way when crossing outside the crosswalk.

[1] In Pipoly v. Benson, supra, there was involved a Los Angeles ordinance substantially similar in language and identical in legal effect, to the Oakland ordinance above quoted. The Supreme Court held that the city ordinance, at least insofar as it attempts to regulate the rights of pedestrian traffic in relation to vehicular traffic, was invalid as beyond the power of the municipality, that field of regulation having been fully and exclusively occupied by the state. It, therefore, held that the judgment for the defendant must be reversed.

[2] The same conclusion follows in this case. Counsel for respondent at the oral argument pointed out that it does not appear from the record by whom the challenged instruction relating to the city ordinance was submitted, and relies on the rule that in such cases it will be presumed on appeal that the challenged instruction was offered by appellant, who, therefore, cannot complain. Buckley v. Shell Chemical Co., 32 Cal.App.2d 209, 89 P.2d 453; see cases collected 24 Cal.Jur., p. 870, § 118; 2 Cal.Jur., p. 869, § 509. That rule is predicated on the basic rule of estoppel that the person offering an incorrect instruction cannot complain if it is given, and upon the rule that it is incumbent on the appellant to show error. The rule is usually applied to situations where an instruction on the subject matter was proper but the particular instruction was improper in form. If the presumption be indulged in in the instant case, it would mean that the court would presume that appellant offered what was in effect an instruction for a directed verdict for respondent. To apply the rule to such a situation would be to indulge in a presumption that common sense tells us is contrary to the facts. The Supreme Court, in at least one case, has refused to apply the rule. Fawkes v. Reynolds, 190 Cal. 204, 211 P. 449. That case was followed in Hayes v. Emerson, 110 Cal.App. 470, 294 P. 765. In both cases the courts emphasized that under section 647 of the Code of Civil Procedure each party is allowed, as a matter of law, an exception to every instruction. This last factor was also emphasized in Pipoly v. Benson, supra.

[3] In the instant case, however, we are not required to base our conclusion that the judgment should be reversed solely on the ground that the instructions were conflicting. Counsel for respondent referred to the city ordinance during his opening statement, and indicated that his defense of contributory negligence was predicated, partly at least, on a claimed violation of that ordinance. During the trial respondent offered the ordinance in evidence and it was admitted over vigorous objections of appellant. Counsel for respondent then

read the ordinance to the jury. The admission into evidence of the ordinance, over objection, and the reading of it to the jury, when such ordinance was unconstitutional and contained a totally incorrect statement of the standard of care required of pedestrians, was clearly error of a most serious and prejudicial nature. None of the other arguments offered by respondent requires discussion.

For the foregoing reasons the judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

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53 Cal.App.2d 660

MATHERNE et al. v. LOS FELIZ THEATRE et al.

Civ. 12925.

District Court of Appeal, Second District, Division 3, California.

July 29, 1942.

1. Judgment 🔑199(3)

Motion for judgment non obstante veredicto may properly be granted only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from such evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff.

2. Theaters and shows 🔑6

Evidence that theater owners had a bad job on the plaster of ceiling of marquee and that such plaster was cracked in several places and very much discolored did not justify an inference that theater owner should have known that water would seep through and fall upon the floor of lobby so as to render theater owners liable for injuries sustained by patron in fall allegedly caused by water on lobby floor.

3. Theaters and shows 🔑6

In action against theater owners for injuries sustained by patron in a fall allegedly caused by water on floor of theater lobby, burden was upon plaintiffs to show that owners had actual or constructive knowledge of a dangerous condition of the premises which proximately caused the accident and that such knowledge existed for a sufficient length of time, that owners had a reasonable opportunity to correct the condition or warn their patrons. Code Civ.Proc. § 1981.

4. Theaters and shows 🔑6

Patron leaving theater and seeing that it was raining heavily and that sidewalks were wet was required in exercise of ordinary care to take notice of probability that there might be water on the floor of theater lobby near the sidewalk and protect herself against dangerous condition resulting therefrom, and hence theater owners would not be liable for patron's injury sustained in a fall due to such apparent danger.

5. Negligence 🔑52

If dangerous condition of premises is so apparent that invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning so that owner of premises will not be liable for injury to invitee resulting therefrom.

6. Negligence 🔑32(1)

The true grounds of liability of property owner for injuries sustained by invitee on the premises rests on the owner's superior knowledge of the perilous instrumentality and the danger therefrom to invitees.

7. Negligence 🔑32(1), 52

Property owner must use reasonable care to keep his premises in a reasonably safe condition for invitees and give warning of latent or concealed perils, but he is not an "insurer" of safety and is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in exercise of reasonable care.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action by Anna Matherne and another against the Los Feliz Theatre and others for injuries sustained by named plaintiff as a result of fall allegedly caused by water on the floor of the entrance to defendants' theater. From judgment for defendants, notwithstanding verdict in favor of plaintiffs, plaintiffs appeal.

Judgment affirmed.

Marcus, Rabwin & Nash, Monroe R. Rubin, and A. Feldman, all of Los Angeles, for appellants.

Sidney A. Moss, of Los Angeles, for respondents.

PARKER WOOD, Justice.

The verdict of the jury was for plaintiffs, husband and wife, for damages for personal injuries to the wife as a result of slipping and falling, allegedly caused by water on the floor of the entrance to defendants' theater. The trial court granted defendants' motion for judgment notwithstanding the verdict, and judgment was entered for defendants.

Plaintiffs appeal from the judgment and assert that they established a prima facie case of negligence on the part of defendants which was a proximate cause of the injury and that plaintiff was not guilty of contributory negligence as a matter of law.

Plaintiff, Anna Matherne, referred to hereinafter as plaintiff, testified that she was taken to the Los Feliz Theatre by her husband on March 31, 1940, about 6 p.m. and at that time the condition of the weather was "drizzling," the sidewalk was wet; she bought a ticket, entered the theater and stayed about three hours; when she came out she saw it was raining; she looked to see if her husband and the car were there; that she slipped and fell when she had gone out about 8 or 10 steps into the lobby from the theater door, about "by that box office," about one foot in the lobby from the front of the building, and about the center between the box office and the wall; she "picked herself up" and noticed a considerable amount of water on each side of the place where she fell; water was dripping on her, she glanced up and saw it was water dripping from the ceiling of the marquee "as if it were raining," and she noticed the ceiling was wet; the ceiling of the marquee ended about one foot inside the lobby and that was where the water was coming down; the only place where she saw water on the floor was where she fell; it was wet from the wall to the box office and from the edge of the sidewalk into the lobby about one foot, except it was dry where her clothes wiped up the water when she fell; the floor slanted up toward the theater door, the water was seeping toward the sidewalk; from the time she left the door to the time she fell she was looking down where she was walking and out to see if her car was there; before she fell she did not see any water on the floor and did not notice that the floor was slippery; as she went out of the door, before she fell, she saw that the sidewalk was wet; it was raining "very heavy"; when she went into the theater the ticket taker was standing at the door, but she did not remember whether he was there when she came out.

It was stipulated that the lobby floor was of a material known as terrazzo. Three photographs (included in the bill of exceptions) showing the entrance of the theater were offered in evidence by plaintiffs and received.

Defendant Lewis, one of the owners of the theater, testified that the marquee did not extend farther (presumably meaning not farther toward the lobby) than the front of the box office (the photographs show that the front of that office is at the inside line of the sidewalk); he came out through the lobby when he took plaintiff to a doctor and at that time he saw no water dripping from the ceiling; the sidewalk was wet; there might have been a little damp coming in about a foot in from the sidewalk; it was raining pretty hard; plaster on the marquee was very much discolored; he had a bad job on the plaster on the marquee.

Another witness for defendants testified that plaintiff fell on the sidewalk about a foot and a half west of the front of the box office; the front part of the lobby was damp about a foot and a half, caused by people tracking it in; the plaster of the marquee was discolored.

An architect called by defendants testified that the roof of the marquee sloped toward the building into a rain trough; the ceiling of the marquee extended ten inches into the lobby, was cracked in several places and showed discoloration; he did not examine the marquee roof for leaks; the slope of the floor where plaintiff fell was about one-fourth of an inch to the foot and the Building Code allows a slope of one-half inch to the foot.

Another witness for defendants testified that he saw plaintiff come around the corner (referring to a corner outside on the sidewalk), and fall on the sidewalk, get up, and as she started to turn into the ticket office he saw her fall again.

Plaintiff testified she had never seen the last mentioned witness.

[1] The rule as to the power of a trial court to enter a judgment contrary to a verdict is stated in Neel v. Mannings, Inc., 1942, 19 Cal.2d 647, 122 P.2d 576, 577, as follows: "* * * a motion for judgment non obstante veredicto may properly be granted 'when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.'"

Viewing the evidence in the light most favorable to plaintiff, without regard to any asserted contradiction in the proof, as the rule requires the court to do in determining the propriety of a judgment notwithstanding the verdict, it appears there was sufficient basis for concluding: that the water was dripping from the ceiling at a point inside the lobby about one foot from the sidewalk; that plaintiff fell as a result of slipping caused by such dripping of water in the lobby; that she was injured; that defendants "had a bad job on the plaster"; that the plaster on the ceiling of the marquee inside the lobby was cracked in several places and very much discolored; that water was on the floor from the wall to the box office for a distance of approximately one foot in the lobby from the inside line of the sidewalk.

It does not appear, however, in viewing the evidence in such manner, that defendants knew at the time of this incident or prior thereto or at all that water dripped from the ceiling onto the floor inside the lobby, or dripped from the ceiling at all. It further does not appear that water dripped from said ceiling onto the floor of the lobby for such a length of time that defendants or any of them should have known in the exercise of ordinary care of such condition; or, if they were chargeable with such constructive knowledge of such dripping of water, that they had had a reasonable time before plaintiff fell within which to repair such condition or otherwise protect or give adequate warning to persons using the entrance.

As stated by appellants, it was a reasonable inference that the discoloration of the plaster was caused by water. It was not a reasonable inference, however, that because there was discoloration that the water which came in contact with the plaster at that point reached the floor on this or any previous occasion. The condition of the plaster was unimportant except as it may or may not have been an indication that defendants should be charged with constructive notice of a defect in the roof which, in the exercise of ordinary care to protect their patrons, defendants should have repaired.

[2] The record does not show what was meant by the statement defendants "had a bad job on the plaster," or to what extent the plaster was cracked or discolored. The testimony, in such general and comparative language as shown by the record, that defendants "had a bad job on the plaster," and that the plaster was cracked in several places and very much discolored, without further explanation or description, did not justify an inference that defendants should have known that water would leak through it and fall upon the floor.

There are many different conditions which would warrant the classification of plaster construction work as bad, such as wrong proportions of materials, improper mixture, too rough, too thick or thin in application, or unattractive in appearance, which would not be a warning that the roof should be repaired to prevent water from leaking through such plaster and falling upon the floor.

Likewise plaster may be cracked in several places and the condition of the cracks, such as width, length, whether old or new, and number, be such that the cracks would not be notice that the roof should be repaired to prevent water from falling upon the floor.

Discoloration of plaster, even if caused by water, may be of various shades depending upon numerous factors, such as time the discoloration has existed, materials of which the plaster was made, and original color of the plaster, and not be notice of such a defect in the roof that it should be repaired to keep water from the floor.

The fact that plaster on a ceiling was discolored by water leaking through a roof does not signify, because such plaster was not repaired thereafter, that the leak in the roof was not repaired. If there was a leak in the roof it may have been repaired and the plaster not repaired, and the roof may have failed again at or near the old leak. In such an event the discoloration which remained after the prior leak in the roof should not be regarded as a continuing signal of an imperfection in the roof.

[3] The burden was upon plaintiffs to show that defendants had actual or constructive knowledge of a dangerous condition of the premises which proximately caused the accident (Code Civ.Proc. § 1981; Gabriel v. Bank of Italy, 1928, 204 Cal. 244, 246, 267 P. 544, 58 A.L.R. 1039) and that such knowledge existed for a sufficient length of time that defendants had a reasonable opportunity to correct the condition or warn its patrons. Gold v. Arizona Realty, etc., Co., 1936, 12 Cal.App. 2d 676, 55 P.2d 1254.

Although plaintiffs tried the case upon the theory, heretofore discussed, that the water on the floor which caused the accident had dripped from the ceiling, another theory, that the water was in fact on the floor whether it dripped from the ceiling or not, should be considered on this appeal inasmuch as the testimony must be viewed in the light most favorable to plaintiffs. The testimony was that water was upon the floor of the lobby from the wall to the box office, about one foot into the lobby from the inside line of the sidewalk. There was no evidence that defendants knew water was there or at all on the floor, except that defendant Lewis said, in referring to a time after the accident when he went through the lobby to take plaintiff to a doctor, "there might have been a little damp coming in about a foot in from the sidewalk. It was raining pretty hard." No showing was made as to the length of time the water was on the floor, or any circumstances to indicate that defendants should have known of its presence or that they had a reasonable time in which to remove the water or warn the patrons. It was not shown how long it had been raining, or raining "very heavy" as plaintiff said, or "pretty hard" as defendant Lewis said. It was established that it was "drizzling" when plaintiff entered the theater about three hours before the accident. There are many different circumstances which might have caused the water to be so recently introduced upon the floor through the lobby entrance that there was not sufficient opportunity to remove or guard against it. It may have been an unprecedented rain, a rain accompanied by unusually strong wind, or several persons entering from the wet sidewalk. The burden was upon plaintiffs to prove that defendants had had a reasonable opportunity to correct the condition or warn the patrons and plaintiffs failed to meet such burden of proof.

[4] In any event the water was inside the lobby to the extent of approximately one foot from the inside line of the sidewalk. Plaintiff said the sidewalk was wet when she went into the theater, that she saw the sidewalk was wet when she came out and it was raining "very heavy." She was required to use ordinary care for her own safety. Plaintiff was required in the exercise of ordinary care, having such knowledge of the heavy rain and wet condition of the sidewalk, in approaching the sidewalk to have in mind the probability that in the ordinary course of events under such weather conditions there might be some water in the immediate proximity of the sidewalk line on the lobby side.

[5, 6] If a danger is so apparent that the invitee can reasonably be expected to notice it and protect against it, the condition itself constitutes adequate warning. Shanley v. American Olive Co., 1921, 185 Cal. 552, 555, 197 P. 793; Dingman v. A. F. Mattock, 1940, 15 Cal.2d 622, 624, 104 P.2d 26. It was stated in Crawford v. Pacific States S. & L. Co., 1937, 22 Cal. App.2d 448, at page 449, 71 P.2d 333, in quoting another case, Touhy v. Owl Drug Co., 6 Cal.App.2d 64, 44 P.2d 405, "'The true ground of liability rests on the proprietor's superior knowledge of the perilous instrumentality and the danger therefrom to invitees, over that of the invitee.'"

[7] In the case of Blodgett v. B. H. Dyas Co., 1935, 4 Cal.2d 511, at page 512, 50 P.2d 801, at page 802, the court said: "The owner of property, in so far as an invitee is concerned, is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care." The duty of the owner of the theater was to use ordinary care to keep the premises in a reasonably safe condi-

tion. Brown v. Holzwasser, Inc., 1930, 108 Cal.App. 483, 291 P. 661; Corbett v. Spanos, 1918, 37 Cal.App. 200, 173 P. 769.

It does not appear that defendants failed in any duty owed to plaintiff.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concur.

53 Cal.App.2d 541

PHELPS v. LOOP et al.

Civ. 13486.

District Court of Appeal, Second District, Division 1, California.

July 24, 1942.

1. Action 🔑6

Where writ of execution had been returned unsatisfied because of service on sheriff of copy of declaration of homestead on property levied upon, judgment creditor could maintain action for declaration as to validity of homestead claim, notwithstanding availability of other remedies. Civ.Code, § 1245; Code Civ.Proc. § 1060.

2. Action 🔑6

In judgment creditor's action for declaration as to validity of homestead claim which had caused writ of execution to be returned unsatisfied, wherein, following necessary formal proof, judgment creditor called judgment debtor and proved character of property in question, which, according to creditor's contention, could not be impressed with a homestead, granting of nonsuit was erroneous. Code Civ.Proc. § 581, subd. 5; §§ 582, 1060, 2055.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action for declaratory judgment by Mary E. Bryan Phelps against C. V. Loop and others. From a judgment for defendants, plaintiff appeals.

Reversed and remanded.

Irving E. Read, of Los Angeles, and Monroe & McInnis, of San Diego, for appellant.

Chandler & Wright, Morgan W. Lowery, and Oliver S. Northcote, all of Los Angeles, for respondents.

DORAN, Justice.

In the within action the complaint alleged in substance that plaintiff and appellant had obtained a judgment in the sum of $9,243.30 against defendants and respondents, which had become final; that a writ of execution duly issued was levied upon the property of defendants, who, within a few days, served the sheriff with a certified copy of a declaration of homestead on said property which had been recorded for some months, wherefore the writ was returned unsatisfied. Further appropriate allegations established the sufficiency of the complaint, the prayer of which was as follows: "Wherefore, plaintiff prays that defendants may be required to answer this amended complaint; that this cause shall be set for trial at the earliest possible date, as provided by section 1062a of the Code of Civil Procedure, and that upon a trial thereof the court determine the validity of said declaration of homestead and declare and adjudicate the rights of the respective parties in and to said property. *Plaintiff prays that upon said trial the court find and determine that said declaration of homestead is a nullity and void, and that said real estate owned as aforesaid by the defendants is subject to the levy of execution* in said cause No. 70254, and that plaintiff now holds a valid lien and judgment on said property to the extent of her judgment, interest and costs as herein alleged." (Italics added.)

At the trial of the action, following the necessary formal proof, plaintiff called defendant under section 2055 of the Code of Civil Procedure and proved the character of the property in question, which by reason thereof, according to plaintiff's contention, could not, under the law, be impressed with a homestead. At the conclusion of plaintiff's case a motion for nonsuit was granted. The appeal is from the judgment that followed.

Appellant submits the question on appeal as follows: "1. Where a property is constructed as an apartment house and is especially adapted to that purpose and is used for the primary purpose of carrying on the business of renting accommodations to the public, can it be declared the homestead of the owner? 2. Is an action for declaratory relief the proper remedy to determine the validity of the declaration of homestead and to determine if the property is subject to execution? 3. In such action is it proper to grant a non-suit?"

Respondents, on the other hand, offer the following: "Question Presented. The respondents do not agree with appellant's statement of the questions presented, and submit that the proper and only question presented by this appeal is the following: A husband and wife filed a declaration of homestead on a 125x50 ft. lot on which was a thirty-five year old, three story frame building. The building contained six double apartments, three single apartments, and nine light housekeeping rooms. The husband and wife, for approximately two and a half years prior to filing the declaration and since that date resided in the building as their bona fide home and residence, occupying one of the double apartments and one of the light housekeeping rooms. During this time the wife in order to assist her husband in maintaining the home leased out the other apartments. Is such a building and lot the subject of homestead?"

In disputing the remedy sought by appellant under section 1060 of the Code of Civil Procedure, respondents contend that appellant should have pursued any one of several different remedies. For example, it is argued that appellant could have proceeded under section 1245 of the Civil Code; or brought an action to set aside the homestead; or bought the property in question at a sheriff's sale and then commenced an action to quiet title, etc. Such suggestions have no bearing on the validity of the action relied on by appellant. That such action is proper there can be no question. The pertinent language of section 1060 of the Code of Civil Procedure is as follows: "Any person interested * * * who desires a declaration of his rights * * * in respect to * * * property * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, * * *."

[1, 2] Regardless of what other remedies may have been available it was plaintiff's right to make the selection. From the standpoint of plaintiff the other remedies may have presented serious objections. The action was proper under the law; the complaint was sufficient in form and substance and it was the trial court's plain duty to find the facts and determine the law as to the issues joined by the pleadings. It clearly was an abuse of discretion for the court to refuse so to do. Except in certain cases judgment must be on the merits. § 582, Code Civ. Proc. Plaintiff proved a "sufficient case", as contemplated by subdivision 5 of section 581 of the Code of Civil Procedure, and hence was entitled to findings, unless waived, and a judgment "on the merits".

As hereinbefore noted in substance and effect, not only were valid issues left undetermined, but a legitimate request for such a determination as recited in the prayer of the complaint was refused. In City and County of San Francisco v. Brown, 153 Cal. 644, 96 P. 281, the Supreme Court declared as follows: "The judgment, as rendered, was one of nonsuit only, the effect of which was simply to declare that the plaintiff had failed to make proof of material allegations necessary to sustain his cause of action. It decided nothing on the merits of the controversy, and necessarily could not, as its effect was to virtually put the plaintiff out of court. It operated simply as a dismissal of the case. * * * And a nonsuit suffered for any cause is not a bar to a suit subsequently brought on the same cause of action." Page 647 of 153 Cal., page 282 of 96 P.2d.

The foregoing disposes of the only issues revealed by the record to be duly raised by the action of the court below and relevant to the appeal herein. Respondents' contention that appellant seeks to "have the declaration of homestead set aside" is not supported by the record. Nor is it correct, as contended by respondents, that, "The ruling of the trial court in granting a nonsuit is a ruling that the homestead is valid" and that "the judgment of nonsuit is a final declaration under the facts as presented, that the homestead is valid".

Much of the brief is devoted to the question of whether the property involved is a proper subject of homestead. That question remains to be determined at the trial, and for reasons hereinbefore stated, is not now a proper subject for review. Moreover, the state of the law is such that helpful suggestions would be presumptuous. For example, no attempt has been made in any of the decisions to construe the term "dwelling-house" by the application of fundamental rules of construction. The statute in question reads as follows: "The homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." § 1237, Civ.Code, Stats.1872, as amended.

In that connection the Supreme Court has declared that: "'It is the principal use to which the property is put, and not quantity, which furnishes the test in determining the question whether or not property is subject to dedication as a homestead.'" In re Albert Allen, 78 Cal. 293, 20 P. 679, 680, quoting Maloney v. Hefer, 75 Cal. 422, 17 P. 539, 7 Am.St.Rep. 180. And in Re Estate of Levy, 141 Cal. 646, at page 649, 75 P. 301, at page 302, 99 Am.St.Rep. 92, may be found the following: "When the statute speaks of the 'dwelling house' it means the 'building' which is occupied as a dwelling house by the family, and not such portion of the building as may be actually used by the family for residence purposes. It is well settled, as was said by this court in Heathman v. Holmes, 94 Cal. 291, 29 P. 404, that 'using a building partly, or even chiefly, for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is, and continues to be, the bona fide residence of the family.'" Thus "bona fide residence" becomes the test in the determination of the question and by judicial legislation the term "building" is substituted for the term "dwelling-house". Just why the Legislature intended building instead of dwelling house is not explained by reference to any rules of construction nor are any reasons given for such assumption. That the term building is general, less certain and more comprehensive than the term "house", there can be no question and hence the effect and extent of section 1237 is broadened from the particular to the general almost without limitation. It is noteworthy in that regard that the same Legislature that adopted section 1237 (1872–1873), adopted sections 459 and 460 of the Penal Code defining burglary and the degrees thereof, which sections appear to recognize a definite distinction among the terms "house", "dwelling-house" and "building".

Later decisions return to the rule that it is the "principal use" to which the property is put, in addition to residence, that constitutes the test referred to.

On the asserted grounds of liberal construction, there is a definite tendency in the decisions to indulge the homestead to such an extent that a wide variety of business ventures appear to be well protected by the same shelter.

The foregoing brief reference to the law is included to emphasize the importance of the issue involved and the necessity for a trial on the merits.

For the reasons stated the judgment is reversed and the cause remanded for trial on the issues joined by the pleadings.

YORK, P. J., and WHITE, J., concurred.

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53 Cal.App.2d 583

ROSE v. AMES et al.

Civ. 13541.

District Court of Appeal, Second District, Division 2, California.

July 25, 1942.

1. Contracts 🔑332(2)

In action for breach of contract to pay plaintiff one-third of all moneys recovered either by sale or compromise in the enforcement of a judgment, complaint which lacked any allegations that defendants had recovered any money by sale or compromise failed to state a cause of action.

2. Specific performance 🔑114(1)

In action based upon an alleged contract under which plaintiff was to receive one-third of all moneys recovered either by sale or compromise in the enforcement of a judgment, but which contained no agreement that defendants would levy an execution upon judgment debtor's property and cause it to be sold, count stating that plaintiff had no speedy and adequate remedy at law and would be irreparably damaged unless defendants were compelled to sell judgment debtor's property, did not state a cause of action for specific performance.

3. Conspiracy 🔑18

In action based upon an alleged contract under which plaintiff was to receive one-third of all moneys recovered by defendant either by sale or compromise in the enforcement of a judgment, count alleging that defendants in order to defraud plaintiff had fraudulently and unlawfully conspired with judgment debtor to delay enforcement until the levy under writ of execution lapsed did not state a cause of action predicated upon theory of conspiracy, since there was no allegation of an unlawful act or injurious act by unlawful means.

4. Conspiracy 🔑1, 4

A conspiracy is not actionable unless the alleged combination results in perpetration of the unlawful act or some injurious act by unlawful means.

5. Money received 🔑17(1)

Where plaintiff relied for recovery under common count for money had and received on facts specifically pleaded in other counts which failed to state a cause of action, general demurrer was properly sustained to count for money had and received.

6. Money received 🔑17(1)

Where plaintiff is not entitled to recover under count in complaint in which all facts upon which his demand is based are specifically pleaded, common count seeking recovery on the same set of facts is demurrable.

7. Appeal and error 🔑1041(2)

Where proposed amended complaint was vulnerable to general demurrer on same ground upon which demurrer to original complaint had been sustained, denial of permission to file amended complaint did not constitute prejudicial error.

8. Appeal and error 🔑959(1)

An appellate court will sustain trial court's denial of application for leave to file an amended pleading unless it appears that there has been an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Maurice Rose against E. Neal Ames and another to recover damages for breach of an alleged contract. From a judgment in favor of the defendants after the sustaining of a demurrer to the complaint without leave to amend, and from an order denying plaintiff's motion for permission to file an amended complaint, the plaintiff appeals.

Judgment and order affirmed.

A. J. Weiss and William E. Balter, both of Los Angeles, for appellant.

E. Neal Ames, of Los Angeles, in pro. per. for respondents.

McCOMB, Justice.

This is an appeal by plaintiff from (1) a judgment in favor of defendants after the trial court sustained a demurrer to plaintiff's complaint without leave to amend in an action to recover damages for breach of an alleged contract, and (2) an order denying plaintiff's motion for permission to file an amended complaint. The complaint contained the following allegations in substance:

Count I

Count I is a common count for money had and received.

Count II

I

Prior to the institution of the present action Maurice Rose filed a certificate with the county clerk of Los Angeles County, showing that he was doing business under the fictitious name of Golden State Finance Company.

II

Waunetta G. Silverstein obtained a judgment against John A. Woodward for the sum of $18,992.66, which judgment was partially satisfied in the sum of $1,431.90, and there is still due and owing on said judgment the sum of $17,560.76.

III

Each of the defendants claim an interest in the aforementioned judgment.

IV

On December 19, 1938, defendants entered into a written agreement with plaintiff reading as follows:

"Golden State Finance Company
"Los Angeles, California
"Attention: Mr. H. L. Rose

"Dear Sir:

"In accordance with our conversation, you have informed me of the fact that you are in a position to give me information whereby I may levy upon property belonging to John A. Woodward, Jr., under an execution issued in the judgment secured by Mrs. Waunetta G. Silverstein against Mr. Woodward in Superior Court Case No. 409108.

"It is understood the information which you are to give me is of sufficient definite nature that it will enable me on Mrs. Silverstein's behalf to levy upon the property designated by you, said information being sufficiently definite both as to the nature of the property to be levied upon and its location.

"It is understood and agreed that there will be no expenses incurred or necessary in order to recover under an execution upon said property, other than the usual costs of levy and sale.

"It is further understood and agreed that for and in consideration of the giving of the information to E. Neal Ames on behalf of Mrs. Silverstein, you are to receive one-third (⅓) of all moneys recovered either by sale or compromise, after deducting all costs incurred by Mrs. Silverstein in connection with the levy upon the property from the information furnished by you.

"It is further understood and agreed that the property above referred to is not any interest which the said Woodward has under the terms of the trust created by his father's will or any real estate involved therein, nor shall it cover any property upon which you have already levied an execution.

"It is further understood that Mr. Ames is authorized and hereby instructed to pay the same to you out of the proceeds of any recovery made as hereinbefore set out.

"Very sincerely yours,
"E. Neal Ames.

"I hereby approve the same.

....

"Mrs. Waunetta G. Silverstein."

V

At all times mentioned in the complaint defendant E. Neal Ames was the attorney of record for defendant Waunetta G. Silverstein.

VI

On or about December 19, 1939, plaintiff furnished defendants information concerning said properties of John A. Woodward, and thereafter defendants caused writs of execution to be levied upon said properties and instructed the sheriff of Los Angeles County to sell the same, but prior to the date of sale defendants instructed the sheriff to discontinue any further action upon the writs of execution, and defendants have never continued with the sale, although requested to do so by plaintiff.

VII

Plaintiff has no knowledge or belief as to whether defendants have in truth and in fact received payment pursuant to or as a result of the aforementioned levy of execution.

VIII

Plaintiff has demanded from defendants the sum of $7,716.82, it being one-third of the amount due on the judgment obtained by defendant Silverstein against John A. Woodward, which sum defendants have refused to pay plaintiff.

Count III

I

Count III incorporates by reference most of the material allegations of Count II.

II

Plaintiff has performed all the conditions and covenants of the agreement set forth in Count II.

III

Plaintiff has no speedy and adequate remedy at law, and, unless defendants are compelled to sell the property of John A. Woodward, plaintiff will be irreparably damaged.

Count IV

I

Count IV incorporates by reference most of the material allegations of Count II.

II

"Plaintiff is informed and believes, and therefore alleges the fact to be true, that defendants and each of them in order to defraud plaintiff of his one-third share in and to any sale or compromise on account of" the aforementioned execution "on the property of" John Woodward, "in accordance with the terms of said agreement aforementioned, have fraudulently and unlawfully conspired together with said Woodward to delay or withhold enforcement until such time as said levy under the writ of execution above set forth lapses and said writ becomes of no force and effect.

"* * * in pursuance to said conspiracy to defraud plaintiff * * * defendants and each of them have delayed and refused to enforce said levy pursuant to the writ of execution aforementioned, despite plaintiff's insistent demands therefor."

Plaintiff asked judgment against defendants (1) for the sum of $7,716.82, (2) that defendants be compelled to satisfy the judgment obtained by defendant Silverstein against John Woodward out of the property upon which execution had been levied, (3) for costs of the suit, and (4) for general relief.

[1] There are two questions presented for our determination, which will be stated and answered hereunder seriatim.

First: Was the general demurrer of defendants to the complaint properly sustained on the ground that the pleading failed to state facts sufficient to constitute a cause of action?

This question must be answered in the affirmative. Assuming that the letter of December 19, 1938, signed by defendant Ames, which is alleged in the complaint, constituted a contract between plaintiff and defendants, an essential allegation for plaintiff to recover upon such alleged agreement would be that defendants had "recovered either by sale or compromise" money due on the judgment obtained against Mr. Woodward by defendant Silverstein.

The pertinent paragraph of the alleged agreement reads thus:

"It is further understood and agreed that for and in consideration of the giving of the information to E. Neal Ames on behalf of Mrs. Silverstein, you are to receive one-third (1/3) of all moneys recovered either by sale or compromise, after deducting all costs incurred by Mrs. Silverstein in connection with the levy upon the property from the information furnished by you."

There is a total absence of any allegation in the complaint that defendants or either of them recovered any money either by sale or compromise on the judgment which defendant Silverstein had obtained against Mr. Woodward. Hence, the general demurrer was properly sustained as to the second count in the complaint.

[2] In the purported contract there is no agreement upon the part of defendants to levy an execution upon the property of Mr. Woodward and thereafter to cause the same to be sold. Therefore, Count III did not state a cause of action for specific performance and the demurrer was properly sustained as to this count.

[3, 4] The fourth count did not state a cause of action predicated upon the theory of conspiracy, for the reason that the law is established in California that a conspiracy is not actionable, unless the alleged combination results in the perpetration of an unlawful act or some injurious act by unlawful means. (Harris v. Hirschfeld, 13 Cal.App.2d 204, 206, 56 P.2d 1252.) In the complaint before us there is a total absence of any allegation of either an unlawful act or an injurious act by unlawful means. Hence, the demurrer was properly sustained to the fourth count.

[5, 6] As to the first count, which was a common count for money had and received, the general demurrer was likewise properly sustained. It is the established law of California that, if plaintiff is not entitled to recover under one count in a complaint, where all the facts upon which his demand is based are specifically pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the recovery under which is obviously based on the set of facts specifically pleaded in the other count. (Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248.)

It is obvious from reading the complaint in the instant case that plaintiff relies for recovery under the first count, that is, the common count on the facts specifically pleaded in counts II, III, and IV. For the foregoing reasons the general demurrer was properly sustained as to all counts in the complaint.

Second: Did the trial court commit prejudicial error in denying plaintiff's application for permission to file an amended complaint?

[7, 8] This question must be answered in the negative. The law is established in California that an appellate court will sustain the action of the trial court in denying an application for leave to file an amended pleading, unless it be made to appear that there has been an abuse of discretion. In the instant case there is no showing that the trial court abused its discretion. The proposed amended complaint proffered by plaintiff did not supply the material allegations which were omitted from the original complaint, and such

proposed amended complaint was vulnerable to a general demurrer on each of the grounds upon which the demurrer to the original complaint was sustained.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., concurred.

HICKS et ux. v. REIS et al.

Civ. 13134.

District Court of Appeal, Second District, Division 3, California.

July 29, 1942.

Hearing Granted Sept. 24, 1942.

1. Automobiles ⇨242(6)

An inference that driver of automobile involved in collision was using automobile with owner's implied consent may be overcome by evidence so clear, positive, and uncontradicted that it cannot rationally be disbelieved.

2. Automobiles ⇨242(6)

Evidence that dealer's used automobiles were not insured, that his salesmen were required to obtain consent before using automobiles, that employee had been previously discharged for using automobile without permission, and that he was not given express permission to take dealer's automobile, which he allegedly kept overnight to demonstrate to himself as a prospective purchaser, and which was being driven by his brother when involved in collision on pleasure trip, was sufficient to overcome any inference that his brother was using automobile at time of collision with dealer's consent.

3. Automobiles ⇨243(12)

In action for damages arising out of collision with automobile dealer's automobile which was being driven by brother of dealer's employee, testimony of employee that before taking automobile he told dealer's auditor that he was going to take it was inadmissible to show dealer's knowledge of employee's taking of automobile, where auditor had no connection with business other than as bookkeeper.

4. Appeal and error ⇨931(6)

Where sole question involved in case was whether automobile dealer's employee had authority to take dealer's automobile which was involved in collision, reviewing court was required to presume that trial court gave some weight to incompetent testimony that employee before taking automobile informed dealer's auditor that he was going to do so.

5. Appeal and error ⇨1050(1)

In action for damages arising out of collision with automobile dealer's automobile which was being driven by brother of dealer's employee, where sole question involved authority of employee to take the automobile, error in admission of employee's testimony that before taking automobile he told dealer's auditor that he was going to do so was prejudicial.

6. Automobiles ⇨193(11)

Where automobile dealer's employee sought to justify his taking of dealer's automobile, which was later involved in collision while being driven by employee's brother, on ground that he wished to demonstrate automobile to himself as a prospective purchaser, brother's driving of automobile while he and employee were on pleasure trip was without dealer's consent, in absence of any claim that trip was a part of demonstration or that brother was a prospective purchaser.

7. Automobiles ⇨193(11)

Implied consent that one person may use automobile for a particular purpose is no consent at all that he may turn it over to whomsoever he pleases to be driven for any other purpose.

8. Automobiles ⇨242(6)

Where automobile dealer's employee kept dealer's automobile overnight without specific permission as required by dealer, and automobile was involved in collision on following evening while being driven by employee's brother on pleasure trip, the statutory presumption that a person is innocent of crime and the provision making it unlawful for anyone to drive a vehicle without owner's consent, considered together, did not give rise to presumption, on which dealer's liability could be based, that automobile was being driven with dealer's consent. Code Civ.Proc. § 1963, subd. 1; Vehicle Code, § 503, St.1939, p. 1481.

Appeal from Superior Court, Ventura County; Louis C. Drapeau, Judge.

Suit by Dorrance P. Hicks and wife against John Reis, Fred W. Gray, doing business under the fictitious firm name and style of Fred W. Gray Company, and others, to recover damages for injuries to the plaintiffs' persons and property sustained in a collision of their automobile with an automobile owned by the defendant Gray. Judgment for the plaintiffs and the defendant Gray appeals.

Judgment reversed.

Jennings & Belcher, of Los Angeles, for appellant.

James C. Hollingsworth, of Ventura, and Henderson & Churchill, of Santa Paula, for respondents.

SHINN, Judge.

Plaintiffs, husband and wife, recovered judgment against Stanley Reis, John Reis and Fred W. Gray as damages for injuries to their persons and property sustained in a collision of their automobile with another car owned by defendant Gray and driven by Stanley Reis at the request of John Reis, who was riding in the car at the time. Defendant Gray appeals.

The judgment against Gray can be sustained only in case the evidence was sufficient to support the finding of the trial court that the car was being driven at the time of the accident with the permission of Gray, in which case the latter would be responsible for the negligence of the driver. As we have concluded that the judgment must be reversed, our discussion will cover all phases of the case as they are presented in the briefs.

Defendant Gray was a dealer in second-hand cars, Frank P. Hume was his sales manager, and John Reis was employed as one of his salesmen working on a lot from which cars were sold. At about 9 p.m. June 13, 1940, John Reis, being the only person on the lot, left his own car there and took an Oldsmobile from the lot to his home, kept it there the rest of the night, did not go to work the following day (his birthday), but during the day drove the car some 37 miles. In the evening John and his brother Stanley and two young women took a ride in the car; Stanley, at John's suggestion, drove the car from Los Angeles on the coast highway to the outskirts of Oxnard, some 63 miles, where they turned around and came back to the point where the accident occurred. John rode in the rumble seat, part of the time with one of the girls and the rest of the time alone. The accident occurred some 23 hours after John had taken the car from the lot of defendant Gray. During this time John was not engaged at all in the business of his employer.

[1, 2] For the purpose of a discussion of the matter of implied consent from a viewpoint most favorable to respondent, we shall assume as a premise, without conceding its verity, that as Gray owned the car, John was his employee and Stanley drove the car at the suggestion of John, an inference could be drawn that Stanley was driving and using the car with the implied consent of Gray. Such inference would be sufficient to support an affirmative finding on that issue, unless the evidence contrary thereto was so clear, positive, uncontradicted and of such a nature that it could not rationally have been disbelieved. If there was such complete evidence opposed to the inference, the fact of implied consent was disproved as a matter of law. Blank v. Coffin, 1942, 20 Cal.2d 457, 126 P.2d 868. We think there was such evidence and that upon the undisputed facts of the case the inference of permissive use alone does not support the finding. Because of this conclusion it will be necessary to make a somewhat comprehensive statement of the evidence.

First we shall notice the testimony of John Reis, for if there is not to be found therein contradiction of the defendant Gray and certain of his witnesses whose testimony we shall mention later, the evidence that John Reis had no express or implied permission to take the car from the lot for personal use on a pleasure trip stands without contradiction. As we shall point out, there was no such contradiction. Before giving specific attention to the facts testified to by John, we might say that it was shown that he had been employed by Gray as a salesman upon a former occasion and had been discharged for taking a car off the sales lot without permission and retaining it overnight. A year and a half after this incident he was reemployed and had been working for two or three weeks before he took the Oldsmobile that was involved in the accident.

John testified that upon several occasions he had taken cars off the lot to demonstrate them to prospects; that on these occasions neither Gray nor his manager Hume was on the lot; that he had occasionally driven a car from the lot during the noon hour to a lunch room a few blocks away and that Mr. Hume had had knowledge of his making such use of cars. He testified that before he took the Oldsmobile on the night of June 13 he had not asked Gray or his manager for permission to use it, had not received such permission and that he took it without their knowledge. The only explanation he offered for his actions was that he had some thought of buying the Oldsmobile and wished to try it out. He testified that he had mentioned the matter to Gray, but the latter denied this. He had been selling cars for about five years, was familiar with motors, had run the motor of the Oldsmobile while it was standing on the lot and had listened to it; that on the night of June 13 he drove it six or seven miles to his home, was not entirely satisfied then with the extent of the demonstration but by the time he had driven it the next day for a total distance of some 37 miles he was more than satisfied with its condition. This was before the start of the trip to Oxnard. The price of the Oldsmobile was $295. The down payment would have been $100. John's own car was worth not more than $50 and in the time he had worked for Gray he had earned only $41 and he had no money but in fact had endeavored unsuccessfully to borrow $25 from Gray at the time he went to work and later had obtained a $10 advance on his commissions before they were due. The sum of this testimony is that John had demonstrated cars to customers a few times without the prior knowledge or consent of Gray or Hume; that he had used a car to go to lunch a few times, on which occasions he told Hume where he was going; that he took the Oldsmobile and kept it because he had in mind buying it and wished to see how it ran; that he was entirely satisfied with its condition before he started the ride to Oxnard.

There is one other fact testified to by John, namely, that he told a Mr. Daly, Gray's bookkeeper, that he intended to take the Oldsmobile from the lot. This testimony, received over defendant's objection, will be discussed later.

Defendant Gray testified to the previous employment of John and his discharge for taking a car without permission; of having told John that he was being discharged because of his violation of that rule; that he informed him at the time of his reemployment, which he had under consideration for two days before deciding on it, that their rule was very strict as to the removal of cars from the lot; that no car was to be taken without the permission of himself or Hume; that John had never mentioned to him a possible purchase of the Oldsmobile; that there had never been a time to his knowledge when John had taken a car off the lot at lunch time or on any occasion without obtaining permission; that he did not know that the Oldsmobile had been taken from the lot until the day after the accident; that Hume was in charge of the lot when Gray was away; that Daly had nothing to do with the sale of cars or the used-car end of the business; that the cars carried no collision insurance and when a demonstration was allowed it was confined to a drive of four or five blocks, and that no salesman ever took a car off the lot prior to the occasion in question without the consent of Gray or Hume.

The witness Hume testified that he was sales manager for Gray in charge of the cars and employees on the used-car lot; that he had never known of any occasion when John took a car off the lot prior to the occasion in question except for a demonstration around four or five blocks; that on the day John came to work Hume instructed him that no car was to be taken off the lot for a demonstration without notification to Gray or Hume; that John had never discussed a possible purchase of the Oldsmobile with him; that he did not discover the disappearance of the Oldsmobile for 48 hours after it had been taken; that he had given no one permission to take the car, and that he knew of no occasion when John had used a car for the purpose of going to lunch or that he had ever taken a car off the lot without express permission.

John Reis did not deny having been instructed that cars could be taken off the lot only for demonstration purposes and then only with the consent of Gray or Hume.

Stanley Reis testified that he had no intention of buying the car and did not drive it for the purpose of demonstrating it to himself.

Whatever evidence there was in support of or opposed to the inference that the car was being driven with the consent of Gray at the time of the accident must be found in the foregoing facts and the testimony of the witnesses.

It may be conceded that if full credence was given to the testimony of John Reis the conclusion was properly drawn that he had implied permission to demonstrate the car to himself in a usual manner. The use of the car for an extended pleasure trip was quite another matter.

We therefore do not question the sufficiency of the evidence to show that John had implied permission to take the car in order to try it out as a prospective purchaser. When we speak of the inference of consent, we refer to consent to the use of the car by Stanley as distinguished from its use for limited purposes by John.

Each case where the question of an owner's consent is involved necessarily rests upon its own peculiar facts. A case such as the one before us, where all of the direct evidence and strong circumstantial evidence was opposed to the inference that the use of the car at the time of the accident was permissive and in which the finding of the trial court was in accordance with the inference, calls for an examination of the entire record to ascertain whether there was reason to reject the direct and circumstantial evidence and follow the inference, or whether the evidence opposed to the court's finding was reasonable, uncontradicted, unimpeached, and in all respects so satisfactory as to compel its acceptance. Circumstantial evidence is frequently of great importance, for it may tend strongly to show that the claim that the driver was using the car with the owner's permission is highly unreasonable, which we think is true in the present case, or not unreasonable at all under facts such as those involved in Blank v. Coffin, supra, 1942, where it was held error to direct a verdict for the defendant. In that case an employee had been given the exclusive use and possession of his company's car and he used it continually in his business, even in the evenings, but also frequently on his own pleasure jaunts and under circumstances which would readily have brought to the employer's attention his personal use of the car. The case was held to be one in which the jury could have believed that the employee's superiors probably knew of such personal use and winked at it and for that reason it was held that the inference that the employer did consent might reasonably have been followed by the jury in preference to the testimony of witnesses that there was no such consent. A comparison of the facts of that case with those of the case before us is appropriate because the one case involved a not unusual situation where the inference of implied consent could properly be drawn from the entire evidence, whereas our own case presents a situation, also not unusual, where evidence of a positive and satisfactory character, both direct and circumstantial, reasonably and logically dissolves the supposed inference.

Gray's secondhand cars were not insured against collision damage; his sales lot was kept open until 10 p. m. for the accommodation of customers; he permitted short demonstrations to be made by his salesmen with the consent of himself or his manager; he had discharged John Reis from a former employment for using a car without his permission, and when he reemployed him he gave him strict instructions not to repeat his escapade. It would have been an unbusinesslike and foolish policy to allow his salesmen to use his uninsured automobiles for their own business or pleasure, to say nothing of allowing their retention overnight. These circumstances of the case and the reasonableness of Gray's rules for his employees would have been sufficient to warrant the trial court in making a finding contrary to the inference of permissive use. And if we turn to the testimony of John Reis and accord it the greatest possible weight we find that under a pretext that he wished to buy the car he took it home, kept it all night and the following day for the alleged purpose of demonstration, and after he was entirely satisfied with it, took his brother and a couple of girls on a 125-mile pleasure trip. If an inference of permission to keep the car for 23 hours is consistent with the undisputed facts of the case, when would the permission have run out? And would it have lasted until the owner discovered the loss of the car and demanded its return? These questions bring us back to the realities of the situation. When we look not only to the facts of Gray's ownership and John's status as an employee, but also to the entire, firmly established and indisputable facts of the case, which must be considered as a whole, we have to say that an inference that the driver of the car was using it at the time of the accident with the owner's consent cannot be drawn, or, stating it in another way, that the inference which might be drawn from certain of the facts is dispelled, if it is recognized at all, by the overwhelming weight of the evidence, which satisfies our minds that the inference can no longer reasonably survive. Whichever way the proposition is stated, the result is that whenever it becomes necessary to determine whether the evidence opposed to the inference is so strong and satisfactory that the inference ceases to furnish substantial conflict in the evidence upon the point, the question on appeal becomes purely one of law.

The instant case is governed by the principles stated in Engstrom v. Auburn Auto. Sales Corp., 1938, 11 Cal.2d 64, 77 P.2d 1059; Crouch v. Gilmore Oil Co., Ltd., 1936, 5 Cal.2d 330, 54 P.2d 709; and Maupin v. Solomon, 1919, 41 Cal.App. 323, 183 P. 198. In the Engstrom case the inference of permissive use was held to be overcome by uncontradicted testimony that the driver, who had borrowed the car, had promised to return it a day prior to the accident and had retained it longer without the owner's consent. And so in our case, if John Reis had implied authority to demonstrate the car to himself, his right to use it was only a right to demonstrate it and the retention of the car thereafter and Stanley's driving it on a pleasure trip were wholly unauthorized in any view of the facts. Under the circumstances there was the same duty to return the car promptly that there would have been had Gray given his express consent that the car be tried out and John Reis had expressly promised to return it when the demonstration was over. The finding that the automobile was being driven at the time of the accident with the implied consent of the defendant Gray is unsupported by the evidence.

[3] We think the trial court was probably influenced to make the finding as to permissive use by certain testimony that was admitted upon the promise of counsel for plaintiffs to lay a foundation for it, which they failed to do. The court permitted John Reis to testify that either on the night that he took the car or the night before, he told a Mr. Daly he was going to take it and try it out. It appears without dispute that Daly was an auditor and clerk in the employ of appellant, that he took care of the books and had no other connection with the business. No authority was shown on the part of Daly to permit cars to be taken from the lot. Appellant objected to the introduction of this evidence and it was admitted only upon the promise that it would be connected up by a showing of authority on the part of Daly. No such showing was made. Appellant moved to strike out the testimony on the ground that it related to matters entirely outside the scope of Daly's employment and was incompetent to show knowledge on the part of appellant that Reis intended to take or had taken the car. This motion was denied. The evidence was clearly inadmissible upon that issue. "An agent's knowledge of matter which is outside the scope of the agency or not related to its purpose is not imputed to the principal." 3 C.J.S., Agency, § 264, p. 197; Foorman v. Myers, 1934, 1 Cal.App.2d 719, 722, 37 P.2d 469.

[4, 5] It is urged by respondents in justification of the ruling that the conduct of Reis was material to show that he acted "in accordance with customary routine" and not surreptitiously and that he believed he had permission to use the car. No such contention was made in the court below. We have carefully read the record pertaining to the rulings upon the objection and the motion to strike out this testimony, and it appears therefrom that the sole question upon which the court ruled was one relating to the authority of Reis to take the car and to the related question of the knowledge, if any, that was possessed by appellant or his employees of Reis' intention to take it. The state of the record is such that we must presume that the court gave some weight to this incompetent testimony, and for that reason we believe that the error was prejudicial.

[6, 7] Furthermore, despite the inference which we assumed in the beginning for the purposes of discussion of the first point considered, we believe that under the undisputed facts Stanley Reis could not on any theory be deemed to have been using the car with Gray's implied consent. His driving it was no part of the demonstration of the car either for his benefit or for John's. Implied consent that one person may use a car for a particular purpose is no consent at all that he may turn it over to whomsoever he pleases to be driven for any other purpose. This rule is stated in Howland v. Doyle, 1935, 6 Cal. App.2d 311, 314, 315, 44 P.2d 453, and has been followed in Sommers v. Van Der Linden, 1938, 24 Cal.App.2d 375, 381, 75 P.2d 83; Garrison v. Booth, 1935, 10 Cal.App. 2d 738, 742, 52 P.2d 535; and Engstrom v. Auburn Auto. Sales Corp. supra, 1938, 11 Cal.2d 64, 68, 77 P.2d 1059. The rule of these cases is to be distinguished from the one followed in Haggard v. Frick, 1935, 6

Cal.App.2d 392, 44 P.2d 447, and cases therein cited, holding that an owner invests the borrower of his car with authority to select an operator for it where he loans it without definite direction or reservation as to its use.

[8] Finally, it is contended by respondent that it is to be presumed under section 1963, subd. 1, of the Code of Civil Procedure that a person is innocent of crime or wrong; that under section 503 of the Vehicle Code, St.1939, p. 1481, it is unlawful for any person to drive or take a vehicle not his own without the consent of the owner thereof and in the absence of the owner and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, and that when effect is given to said section 1963 there arises a presumption that the car was being driven with the consent of the owner.

We may assume, without so deciding, that the presumption of innocence sought to be invoked should be given effect to the full extent which the proven facts will allow, as to the conduct of both Stanley and John, but when this is done the conclusions we have heretofore stated are not affected in any degree. So far as Stanley's conduct is concerned there was no evidence whatever that he was implicated with John in the taking of the car or had reason to believe that John's permission to use it was limited to a demonstration of it. He was driving the car at John's suggestion, he was under no active duty to return it to Gray and committed no wrong in failing to do so. His innocence of crime or wrong did not depend upon his having Gray's permission to use the car but upon his good faith in acting upon John's permission to drive it, and the presumption on this point is in his favor. 31 C.J.S., Evidence, § 126, p. 745; Hedden v. Waldeck, 1937, 9 Cal.2d 631, 636, 72 P.2d 114; Arakelian v. Sears, 1921, 53 Cal.App. 646, 653, 200 P. 757. Not only would it be wholly unreasonable to believe from the evidence that Stanley, himself, had Gray's permission to use the car, but such consent would be irrelevant, upon any factual basis derivable from the record, to the question of his innocence, and for both of these reasons the presumption as related to his conduct, can have no application. No more can the presumption of innocence be applied to the conduct of John in the decision of any material issue. In the first place it is not John's negligence that is sought to be imputed to Gray—only Stanley's. Granted that the presumption of innocence if extended in John's favor would be evidence that he had Gray's consent to use the car even up to and at the time of the accident, that fact would still be irrelevant to the question of Gray's responsibility, since John's limited authority to use the car would have given him no right to turn it over to Stanley to use and his act in so doing would have imposed no liability upon Gray for Stanley's negligence. In addition to this, the undisputed testimony that John at most had a limited authority to use the car and that he exceeded that authority, and the absence of all evidence, direct or circumstantial, that he had a right to possession of the car at the time of the accident, establish the fact of nonconsent so firmly and satisfactorily as to completely overcome any presumption of consent derivable from the presumption of John's innocence. If the inference of permissive use is overcome by the weight of the undisputed evidence, it cannot be restored by resort to the disputable presumption of innocence. The presumption as well as the inference is overcome as a matter of law where it ceases to furnish a substantial conflict with the evidence opposed to it. A conclusion of fact, whether resulting from a process of inference or from a declared disputable presumption, can have probative force only so long as it is sustainable in reason. But as we have said, presumptive evidence that John had the right to the use of the car at the time of the accident is wholly irrelevant to the question of Gray's liability, which is nonexistent unless Stanley's negligence can be imputed to him, and we have shown that this cannot be done.

The judgment is reversed.

I concur: SCHAUER, P. J.

SHAW, Justice pro tem.

I concur except in the discussion of the presumption of innocence. As to that matter I express no opinion. Even if the presumption is applicable here, the evidence opposing it is so strong that the error in admitting evidence of the conversations with Daly must be regarded as prejudicial.

53 Cal.App.2d 391

FIRST FEDERAL SAVINGS & LOAN ASS'N OF HOLLYWOOD v. STATE BOARD OF CONTROL et al.

Civ. 13487.

District Court of Appeal, Second District, Division 1, California.

July 14, 1942.

Hearing Denied Sept. 10, 1942.

1. Taxation 🔑535

While word "approve", used in statute prohibiting allowance of corporation franchise tax refund until approved by State Board of Control, does not ex vi termini necessarily import exercise of discretion, legislature is presumed to have intended that officer, whose approval is required by statute to validate or consummate another's act, is invested with option to sanction officially or disapprove such act, but such presumption is not conclusive, and if it clearly appears that word is used in more limited sense and imposes mere ministerial or clerical duty, courts will so hold. Gen.Laws Supp.1939, Act 8488, § 27.

See Words and Phrases, Permanent Edition, for all other definitions of "Approve".

2. Taxation 🔑535

The provision of Corporation Franchise Tax Act that determination of State Board of Equalization on appeal from franchise tax commissioner's disallowance of claim for refund of tax overpayment shall be final after specified times is merely time limitation on such board's power to act and hence not in conflict with provision that no refund shall be allowed until approved by State Board of Control, in view of taxpayer's statutory right to bring action after such determination to recover amount claimed, so that Board of Control has power to determine questions of law and fact for itself. Gen. Laws Supp.1939, Act 8488, §§ 27, 30.

3. Taxation 🔑535

The failure of State Board of Control to give notice of hearing on review of State Board of Equalization's decision allowing claim for refund of corporation franchise tax overpayment should not be considered in determining whether statute requiring approval of claim by Board of Control authorizes such board to pass on merits of claim and consider questions of law and fact for himself, especially in absence of statutory provisions precluding or denying such hearing, if requested, and petition by taxpayer for reconsideration of board's action, accompanied by request for hearing. Gen. Laws Supp.1939, Act 8488, § 27.

4. Mandamus 🔑187(9)

On appeal from judgment granting writ of mandate, requiring State Board of Control to approve petitioner's claim for refund of franchise tax overpayment, after overruling demurrer to petition without leave to answer, question whether petitioner is without other remedy because statute makes no provision for bringing of action for refund after such board's ruling is not relevant to issue whether petition stated sufficient facts to warrant issuance of writ and hence will not be considered. Gen.Laws Supp.1939, Act 8488, § 27.

5. Statutes 🔑220

Failure of Corporation Franchise Tax Act to provide for action for refund of tax overpayment after decision of State Board of Control disapproving claim for refund does not show intent to limit such board's power to ministerial act of auditing claim. Gen.Laws Supp.1939, Act 8488, § 27.

6. Taxation 🔑535

The provision of Corporation Franchise Tax Act that no refund of tax overpayment shall be allowed until approved by State Board of Control presumptively invests such board with discretionary power and option to sanction or disapprove State Board of Equalization's allowance of claim for refund. Gen.Laws Supp.1939, Act 8488, § 27.

7. Taxation 🔑535

The word "approve", used in act prohibiting allowance of corporation franchise tax refund until approved by State Board of Control, has no technical meaning, and court is without power to extend its meaning beyond that contemplated by approved usage of language, unless contrary or more limited construction according to context is obviously intended. Civ.Code, § 13; Gen. Laws Supp.1939, Act 8488, § 27.

8. Mandamus 🔑154(4)

A petition for writ of mandate, requiring State Board of Control to approve claim for refund of franchise tax overpayment on theory that Board of Control was without discretion in matter, was insufficient on demurrer, in absence of allegations of facts tending to show abuse of discretion by board. Gen.Laws Supp.1939, Act 8488, § 27.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by the First Federal Savings and Loan Association of Hollywood, a corporation, for a writ of mandate requiring the State Board of Control to approve and the State Comptroller to pay a refund of excessive franchise taxes paid by petitioner. Judgment for petitioner, and respondents appeal.

Reversed with directions.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Robert Clifton, of Los Angeles, for appellants.

Richard FitzPatrick and J. Rex Dibble, both of Los Angeles, for respondent.

DORAN, Justice.

Respondent, a corporation doing business in the State of California and subject to payment of franchise taxes pursuant to the provisions of the Bank and Corporation Franchise Tax Act (Stats.1929, page 19, as amended; Deering's Gen.Laws, 1937, Act 8488), made returns for said taxes for the years 1934 to 1937 inclusive, and paid taxes in accordance with said returns. Later, on or about April 13, 1938, having discovered an alleged error in computation of the taxes, respondent filed its claim for refund of the amounts which it asserted had been overpaid by reason of such error. The Franchise Tax Commissioner disallowed the claim for refund and respondent appealed to the State Board of Equalization. The latter board determined that the Franchise Tax Commissioner was in error in disallowing the claim for refund and allowed a refund. The board notified the commissioner of its decision and the commissioner notified the State Board of Control. The State Board of Control, at a meeting held by it, of which respondent had no notice, disapproved the refund and advised respondent of its action. In the meantime any right respondent may have had under the Bank and Corporation Franchise Tax Act to bring suit against the state for the refund had expired. Respondent then filed its petition for writ of mandate in the Superior Court of Los Angeles County against the State Board of Control and the controller praying that the court order that board to approve the claim and the controller to pay it. The attorney general, on behalf of the board and the controller, filed a demurrer to the petition for writ of mandate and after hearing thereon the court overruled the demurrer without leave to answer and ordered judgment for petitioner as prayed. From that judgment this appeal is taken.

The instant case involves the interpretation of section 27 of the Bank and Corporation Franchise Tax Act, supra, which, so far as here material, at the time this claim for refund was allowed by the State Board of Equalization and disallowed by the State Board of Control, read as follows:

"If, in the opinion of the commissioner, or the State Board of Equalization, as the case may be, there has been an overpayment of tax, penalty or interest by a taxpayer for any year for any reason, the amount of such overpayment shall be credited against any taxes then due from the taxpayer under this act, and the balance shall be refunded to the taxpayer or its successor through reorganization, merger, or consolidation, or to stockholders upon dissolution. *No such credit or refund shall be allowed or made until approved by the State Board of Control.* No such credit or refund shall be allowed or made after four years from the last day prescribed for filing the return or after one year from the date of the overpayment, whichever period expires the later, unless before the expiration of such period a claim therefor is filed by the taxpayer. A refund claim upon which action has become final shall not thereafter be considered a refund claim within the meaning of the foregoing provision except to the extent allowed. Every claim for refund must be in writing under oath and must state the specific grounds upon which the claim is founded.

"If the commissioner disallows any claim for refund, he shall notify the taxpayer accordingly. At the expiration of ninety days from the mailing of such notice, the commissioner's action upon the claim shall be final unless within such ninety-day period, the taxpayer appeals in writing from the action of the commissioner to the State Board of Equalization. If the commissioner fails to mail notice of action on any refund claim within six months after the claim was filed, the taxpayer may, prior to mailing of notice of action on the refund claim, consider the claim disallowed and appeal to said board. Appeals must be addressed and mailed to the State Board of Equalization at Sacramento, and a copy of the appeal addressed and mailed at the same time to the commissioner at Sacramento. Said board shall hear and determine the same and thereafter shall forthwith notify the taxpayer and the commissioner of its determination. *Such determination shall be final* upon the expiration of sixty days from the time of such determination unless within such sixty-day period the determination is modified, *in which event it shall become final* upon the expiration of sixty days from the time it is modified. * * *

"Any refund or any portion thereof which is erroneously made, and any credit or any portion thereof which is erroneously allowed, may be recovered * * * in an action brought by the commissioner in a court of competent jurisdiction in the county of Sacramento in the name of the people of the State of California, and such actions shall be tried in the county of Sacramento, unless the court, with the consent of the Attorney General or the counsel for the commissioner, orders a change of place of trial. The Attorney General or the counsel for the commissioner must prosecute such action, and the provisions of the Code of Civil Procedure, relating to service of summons, pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for." Stats.1939, ch. 1050, p. 2965, § 16, Gen.Laws Supp.1939, Act 8488, § 27. (Italics added.)

The petition for writ of mandate herein set forth the facts regarding petitioner's claim for refund, the decision of the State Board of Equalization with regard thereto and the disapproval of the State Board of Control, and alleged that after petitioner had been advised by the latter board that it had disapproved the refund "petitioner reminded said State Board of Control that its claim for refund had been approved by the State Board of Equalization and demanded that said State Board of Control approve said refund"; that: "Notwithstanding said demand by petitioner, the State Board of Control has refused, and continues to refuse, to approve said refund." The petition did not state any facts from which it might be concluded that the action of the board, in the circumstances, amounted to an abuse of discretion. As appears from the contentions of respondent upon this appeal, as well as from the petition itself in the court below, the petition for the writ of mandate was predicated upon the theory that since the claim for refund had been allowed by the State Board of Equalization, it was mandatory upon the State Board of Control to approve it. It is true that in the petition it was alleged that petitioner was not given any notice of the meeting of the Board of Control at which said refund was disapproved, and that petitioner was not given any opportunity to be heard by said board prior to said disapproval; that petitioner has not since been given any opportunity to be heard regarding the validity of the action of the board in disapproving said refund. But it is not urged by respondent that such allegations were sufficient to show an abuse of discretion on the part of the Board of Control. Respondent apparently relies solely upon its contention that the Board of Control was without power of discretion under the statute. As appears more particularly hereinafter, the procedure adopted by the board does not necessarily bear a relation to the power of the board to act, or of itself reveal an abuse of discretion under the provisions of the statute in question.

From the written opinion given upon the ruling on appellants' demurrer, the court below appears to have taken the position that the approval required of the State Board of Control by the provisions of the statute above quoted was merely a ministerial act, not permitting the exercise of any judgment on the part of said board regarding the merits of the claim; that the action of the State Board of Control under the statute was limited to "auditing," in the sense of checking and correcting computations and similar ministerial acts. Appellants contend that section 27 of the act in question does not limit the power of the Board of Control to mere audit of claims; that in actions in mandate involving payment of public funds in refund of tax claims the merits of the claim must be judicially established as a condition precedent to issuance of the writ. Stated in its simplest terms, the question here to be answered is whether in passing upon claims for refund of taxes, under the provisions of section 27 of the act above quoted, the Board of Control exercises discretionary powers or acts only in a ministerial capacity. Under the long settled rules governing actions in mandate, if the approval of the board, required by the foregoing provisions, called for the exercise of discretionary powers, then a petition for a writ of mandate, which merely recited that the Board of Control had refused to approve a refund after the same had been approved by the State Board of Equalization, would not state sufficient grounds for the issuance of a writ. Further allegations to show an abuse of discretion on the part of the board would be required.

[1] As pointed out by appellant, the word "audit" is not used in section 27, supra, and it is therefore unnecessary to consider the particular meaning which should be ascribed to that word. As to the meaning of the word "approve," it was said in Cosner v. Board of Supervisors of Colusa County, 58 Cal. 274, at page 277, "The word 'approve' is to be considered in connection with the action to which it relates. It does not ex vi termini necessarily import the exercise of discretion. Presumptively, however, when the 'approval' of a distinct officer is made necessary to validate or consummate the act of another, it is the intention of the Legislature that he should be invested with the option to sanction officially or to disapprove the act submitted to him. It involves the idea of discretion and adjudication. Yet such presumed intention is not conclusive, and if it clearly appears from the nature of the act, or the express language of the context, that the word 'approved' is used in a more limited sense, and imposes a mere ministerial or clerical duty, the Courts will so hold."

[2] The trial court, in passing upon the question here presented, held that if it be construed that the Board of Control has jurisdiction to determine for itself questions of law or of fact, or to do more than to audit a claim, then the provision of section 27 of the act, above quoted, that the determination of the Board of Equalization shall be final, is in conflict with that providing that no refund shall be allowed until approved by the Board of Control, because, if the decision of the Board of Equalization approving a refund is final the Board of Control is without power to refuse approval of the claim. In arriving at such a conclusion the trial court apparently overlooked the provisions of section 30 of the same act, which read, so far as here material: "Within ninety days after the mailing of the notice of the commissioner's action upon any refund claim, or in case of an appeal to the State Board of Equalization from the disallowance of any refund claim, within ninety days after the mailing of the notice of the board's determination of the appeal, the taxpayer may bring an action against the commissioner on the grounds set forth in such claim for the recovery of the whole or any part of the amount claimed as an overpayment." Stats.1939, ch. 1050, p. 2968, § 18, Gen.Laws Supp.1939, Act 8488, § 30.

It appears from the portion of section 30 above quoted that the decision of the State Board of Equalization upon a claim for refund is not final as against the taxpayer, since the taxpayer may thereafter bring an action for recovery of the amount claimed as overpayment. Reading the provisions of section 27, supra, in the light of those just quoted from section 30 of the same act, it becomes reasonably plain that when it is therein provided that the determination of the Board of Equalization shall be final upon the expiration of sixty days from the time of such determination, or upon the expiration of sixty days from the modification of such determination, such provision was merely enacted as a limitation of time upon the power of the Board of Equalization to act in the matter. In other words, sixty days after the determination of the board, or a modification of such determination, no further modification of the decision may be made and the board's determination shall then become final, *as far as the Board of Equalization is concerned.* This construction of the act becomes even plainer when it is considered that section 27 thereof clearly allows the Board of Equalization to modify its decisions upon tax refunds. Obviously, a limitation of time must be placed upon any such power of modification. It may be seen therefore that even if the Board of Control is held to have the power to determine for itself questions of law or of fact, the provision for "approval" of the claim by that board is not in conflict with that governing the time within which decisions of the State Board of Equalization become "final."

[3] The trial court also stated that there is no provision in the statute for an appeal to the Board of Control; that if the Legislature had intended said board to have appellate jurisdiction over the decisions of the Board of Equalization appropriate procedure would have been specified; that no hearing was given and none is provided for by law; that if the Board of Control is authorized to pass on the merits of claims for refunds and to consider questions of law or of fact the claimant would be entitled to a hearing before said board in order to satisfy the requirement of due process. It must be pointed out that the method of procedure adopted by the Board of Control bears no relation to the rules of statutory construction here being applied to section 27, supra, and is not decisive of the question here

presented. The failure of said board to give notice of a hearing should not be considered in determining the legal effect of the language used in the statute. Moreover, there is nothing in the statute which precludes or denies such a hearing if requested. Apparently there was no petition for a reconsideration of the action by the Board of Control, accompanied by a request to be heard on the matter. The only action by respondent appears to have been the demand for approval of the refund, referred to in respondent's petition herein. Such a demand is not necessarily the equivalent of a petition for a reconsideration. A fact of significance, and one apparently overlooked by the trial court, is that provision for the power of the Board of Control here in question was added to section 27 by a later amendment. Stats.1939, ch. 1050, p. 2934, at p. 2965.

[4, 5] The trial court also pointed out that the statute makes no provision for the bringing of an action after the ruling by the Board of Control, and petitioner is without any remedy whatsoever unless a writ of mandate is granted in this proceeding. This is not relevant to the issue here presented, which is, in the final analysis, whether the petition stated sufficient facts to warrant the issuance of a writ of mandate. Moreover, the trial court's conclusion, that the failure to make provision for such an action after a decision by the board was no doubt due to the fact that it was intended that the powers of said board should be limited to the ministerial act of auditing the claim, is an assumption unwarranted by the circumstances and constitutes a non sequitur.

[6-8] The provisions of section 27 of the Bank and Corporation Franchise Tax Act, as above quoted, clearly indicate that the approval of the Board of Control is made necessary to validate the act of the State Board of Equalization in allowing a claim for tax refund. Presumptively, therefore, it was the legislative intent to invest the Board of Control with a power of discretion in the matter; nor does it clearly appear either from the nature of the act or the express language of the context that the word "approve" is used in a more limited sense. Therefore, in accordance with the rule enunciated in Cosner v. Board of Supervisors of Colusa County, supra, the presumption must stand that it was the intent of the Legislature to invest the Board of Control with the option to sanction or to disapprove the act submitted to it. The word "approve" has no technical meaning and the court is without power to extend its meaning beyond that which the "approved usage of the language" contemplates, unless a contrary or more limited construction "according to the context" obviously is intended. Civ.Code, § 13. It follows that unless respondent's petition set forth facts which tended to show an abuse of discretion on the part of the board, the petition failed to state sufficient facts to justify the issuance of a writ of mandate; and appellant's demurrer thereto was properly taken and should have been sustained. Predicated as it was, upon a theory that the Board of Control was without discretion in the matter, respondent's petition for a writ of mandate was insufficient.

The judgment is accordingly reversed, with directions to the trial court to sustain appellants' demurrer to respondent's petition, with leave to respondent to amend its petition if it is so advised.

YORK, P. J., and WHITE, J., concurred.

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53 Cal.App.2d 680

BICKFORD v. MAUSER et al.

Civ. 11830.

District Court of Appeal, First District, Division 1, California.

July 30, 1942.

As Corrected Aug. 28, 1942.

Hearing Denied Sept. 24, 1942.

1. Witnesses 🔑395

Where plaintiff attempted to show that defense witness had told police immediately after automobile accident that he had been resting and had not seen accident and that because of friendship with defendant he had fabricated his testimony concerning the collision, defendant was entitled to rehabilitate such testimony, and admission for such purpose over plaintiff's objection of a written statement made by witness the day after the accident to an investigator was not error.

2. Witnesses ⚷395

Evidence of prior statements consistent with testimony at former hearing is not rendered competent to rehabilitate witness' testimony at trial merely because effort has been made to impeach witness' general reputation or because of evidence of former statements inconsistent with present testimony.

3. Witnesses ⚷395

Where there is an effort to show that witness changed his testimony from ulterior motives or that his testimony is fabrication of recent date, his previous statements, corresponding to testimony at trial, are competent to rehabilitate his evidence and refute inference of recent fabrication or improper influence, particularly if such statements were made prior to impeaching statements, and a direct charge of fabrication or improper influence is not necessary to render such evidence competent.

4. Appeal and error ⚷1050(1)
Witnesses ⚷395

Where the only issue in action for injuries sustained in automobile collision was contributory negligence and written statement made by defense witness the day following collision was rendered competent to rehabilitate witness' testimony by plaintiff's efforts to show that such testimony was fabrication of recent date, admission over plaintiff's objection of portion of statement that defendant was a careful driver and of other portions relating to irrelevant matters was not prejudicial error.

5. Appeal and error ⚷1050(1)

In action for injuries sustained in automobile collision, wherein it was admitted that defendant was operating automobile negligently so that the only issue was that of contributory negligence of plaintiff, admission over plaintiff's objection of testimony of defendant that because of his unfamiliarity with the city where accident occurred and vehicle laws of the state he did not know he was exceeding the speed limit, was not prejudicial.

6. Appeal and error ⚷1064(1)

Where instruction correctly stated the law relative to contributory negligence, mere repetition or similarity of expression used in the several instructions given did not warrant reversal of judgment on the ground that the matter of contributory negligence had been thereby over-emphasized.

7. Trial ⚷130

In action for injuries sustained in automobile collision where plaintiff's counsel repeatedly referred to the fact that defendant had been taken into custody because of death of plaintiff's companion until admonished by trial court for persisting in pressing the point, defense counsel's inquiry of defendant whether the criminal charges had been dropped did not constitute "misconduct".

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

8. Trial ⚷255(6)

In action for injuries sustained in automobile collision where plaintiff's objection to defense counsel's inquiry of defendant whether criminal charges against defendant growing out of the death of plaintiff's companion had been dropped was sustained, court's failure in the absence of request to instruct jury to disregard such inquiry was not error.

PETERS, P. J., dissenting.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Harold Fremont Bickford, an incompetent person, etc., against Roy Kent Mauser, a minor, etc., and others for injuries sustained in an automobile collision. From a judgment in favor of defendants, plaintiff appeals.

Judgment affirmed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Keyes & Erskine and J. Benton Tulley, all of San Francisco, for appellant.

Francis W. Murphy, of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiff appeals from a judgment in favor of defendants based on the verdict of a jury in an action to recover damages for injuries sustained in an automobile collision between a Plymouth coupe driven by plaintiff, Harold Fremont Bickford, 23 years old, and a Pontiac sedan driven by the defendant Roy Kent Mauser, 18 years old, whose father was joined as a party defendant pursuant to the provisions of the California Vehicle Code, St.1935, p. 93.

The pleadings raised the issues of the negligent operation of both cars, but at the commencement of the trial counsel for defendants, in his opening statement to the jury, admitted that the Mauser car had been negligently operated, and took the position that the collision was brought about by the negligence of both drivers. Thus as to the question of liability the cause was submitted to the jury on the single issue of the contributory negligence of the plaintiff; and after hearing the evidence the jury returned a verdict in favor of defendants. The evidence clearly supports the conclusion reached by the jury; and plaintiff makes no contention to the contrary; but as grounds of appeal plaintiff urges that the trial court committed prejudicial error in ruling on the admissibility of evidence, that it over-emphasized the question of contributory negligence by giving repeated instructions, and that counsel for defendants was guilty of misconduct.

The important facts of the case necessary to be considered in the determination of the foregoing points may be stated as follows: The accident occurred shortly before 2 a. m. September 12, 1940, at the intersection of Sixth and Bryant Streets in San Francisco. Plaintiff was driving south on Sixth Street, and Mauser east on Bryant. The night was clear and dry, and the intersection well lighted by a street light on each of the four corners. Automatic signals were installed at the intersection, but at that hour of the night they were not operating. A service station occupied the northwest corner of the intersection, and other than the pumps and the little glass building itself, there were no obstructions which would obscure the view of a driver travelling south on Sixth Street or a driver travelling east on Bryant Street from each other for a considerable distance. It was demonstrated that a person driving south on Sixth Street, when 123 feet north of the center of the intersection, had a clear and practically uninterrupted view of a car approaching from the right on Bryant Street continuously from the time the car on Bryant Street reached a point 187 feet west of the center of the intersection. Both cars were equipped with good brakes and were otherwise in good condition, except the plaintiff's car had a "shimmy" in the front wheels when driven much over 35 miles an hour. The evidence shows that at the time of the collision the estimated speed of the Mauser car was 35 or 40 miles an hour, and that the speed of plaintiff's car was about the same. After the collision the Pontiac swung around and stopped when the rear end struck and damaged the automatic signal on the southeast corner; the Plymouth, driven by plaintiff, jumped the southeast curb, struck and broke off a fire hydrant, and came to rest against a building on Bryant Street some 80 feet east of Sixth Street.

Mauser was accompanied by three boy companions about his age. All four resided in Seaside, Oregon, and were students at Oregon State College. They arrived in San Francisco two days before to visit the fair, and were staying across the bay in Albany. The car they were using belonged to the father of one of the boys, named Jackson. On the night of the accident the boys went to a dance at the fair, after which they drove their girl companions to their respective homes in San Francisco, and then started to go back to Albany. After they had taken the girls home young Jackson asked Mauser to drive; and Jackson and a boy named Berg took the back seat. In the front seat with Mauser was the other boy, named Hampton. The boys had directions as to how to get back, but missed the street leading to the bay bridge, and drove out the Bayshore Highway a ways, then stopped at a lunch room and inquired of a police officer how to get back. Upon reaching Bryant Street they saw the signs to the bridge, and proceeded easterly on the street for about four blocks when the collision occurred. None of the boys in the Pontiac was seriously injured. Plaintiff had been a student at the University of California up to a short time before the accident, when he was called into active service in the National Guard. At the time of the accident he was accompanied by a young lady who was killed as a result of the collision; and plaintiff suffered severe brain injuries, which have rendered him incompetent, and he has no recollection whatever of the accident or of the circumstances of his being in San Francisco that night. The evidence affirmatively shows that none of the occupants of either car had been drinking. Police officers attached to the Accident Prevention Bureau, arrived at the scene of the accident soon after it happened. One of the first to arrive was Officer Murray, who interrogated the four boys concerning the accident; and admittedly the two boys who were riding in the back seat were half asleep at the time of the collision and had no knowledge as to how it happened. Officer Badagliacco arrived soon after the other officers, and all four boys were taken by him to the Hall of Justice. There a written statement was obtained from Mauser, whereupon he was detained in custody and the other three released.

The testimony relating to the actual happening of the accident was given by Mauser and Hampton, the occupants of the front seat; and their versions were substantially the same. Hampton testified that when they finally reached Bryant Street, after first losing their way, they travelled along the eastbound street car track of Bryant Street (the inner lane) at 35 or 40 miles an hour; that he saw the other car involved in the accident "a split second" before the collision occurred; that it was going at about the same speed as the car in which he was riding, but he did not know exactly how far back of the north property line of Bryant Street it was when he first saw it, but placed it approximately 10 feet north, and the car in which he was riding was then about 10 feet west of the property line of Sixth Street. He also testified that as soon as the police arrived they took Mauser into custody, and afterwards took all four boys to the Accident Prevention Bureau; that there the police questioned Mauser but did not ask him, Hampton, any questions and said nothing to him at all.

[1] As part of defendants' surrebuttal evidence there was received, over the objection of plaintiff, a written statement made by Hampton the day after the accident to an investigator for defendants' counsel. The document was offered in evidence in rehabilitation of Hampton's testimony given at the trial and plaintiff contends that the admission thereof calls for a reversal of the judgment. We cannot agree with this contention. The following were the circumstances leading up to the admission of the document: On cross-examination of Hampton there was an evident attempt made to show that the story then being told by him at the trial as to the circumstances of the accident was a pure fabrication. To this end he was asked if at the scene of the accident he did not tell the police that he "had been resting in the car" and "had not seen the accident," and consequently "could not tell them how it had happened." He positively denied having made such statement, or having stated "anything like that." He denied also having made any such statement later at the police headquarters. In this regard he stated that Mauser was there interrogated about the accident but that he, Hampton, was asked no questions at all. Also in furtherance of the attempt to show that his story was fabricated, it was brought out that he and Mauser were close friends; that they were schoolmates in college; that they had come to San Francisco prior to the trial, visited the scene of the accident with Mauser's counsel, discussed the facts with him, went over a diagram of the place in question, and that Hampton knew that Mauser had been taken into custody by the police as soon as they arrived. Furthermore, in attacking the truth of Hampton's entire story, plaintiff called as rebuttal witnesses the two police officers, Badagliacco and Murray. The former testified that all three of the boys who were riding with Mauser told him "the same thing,"—that they were resting and did not see the accident. And Murray testified that at the scene of the accident and also at police headquarters Hampton stated he was resting and did not see the accident. The trial took place six months after the accident, and both officers admitted that they had made no notes of the conversations with Hampton, that no record was made thereof in the police department, and that they were testifying from mere recollection. They also admitted that since the accident they had investigated many others (estimated by Murray to be 360) and interviewed hundreds of persons concerning them (estimated by Murray to be at least 1,000); but each officer stated that his recollection was quite clear as to this particular conversation with Hampton concerning this particular accident.

On account of the attack thus made by plaintiff upon the truth of Hampton's entire story, defendants, in surrebuttal and for the purpose of rehabilitating his testimony, offered in evidence and the court admitted over plaintiff's objection the written statement made by Hampton the day after the accident to an investigator for defendants' counsel. For the same purpose the court admitted over objection oral conversations had between Hampton and the Mausers, but plaintiff's attack is directed mainly against the written statement. It was written by the investigator and signed by Hampton, and starts out by giving a brief resume of their trip from Oregon to California. He then recited what transpired on the night of the accident prior to the happening thereof; and continuing he goes on to say that he had ridden with Mauser many times and always found him to be a careful driver, that never at any time had he had occasion to warn him about his driving; that on the night of the accident Mauser was not driving at a high rate of speed—not in excess of 40 miles an hour; and as to the circumstances of the happening of the accident the statement reads: "When the front of our car was just about on or near the west curb line of Sixth Street I saw a car travelling south on Sixth Street. This southbound car was about ten feet north of the north intersecting line of Bryant. This southbound car was travelling about forty to forty-five miles per hour, possibly faster. When I saw car No. 2 I yelled, and then the two cars collided near the center of the intersection." He then related what happened to the cars after the collision, as set forth above.

[2, 3] The law governing the admissibility of evidence of this character is well stated in the case of Davis v. Tanner, 88 Cal.App. 67, 262 P. 1106, 1110, wherein the court says: "It is now a well-settled rule in California and in most of the states of this nation that evidence of prior statements consistent with, or corresponding testimony given at a former hearing, are incompetent to rehabilitate the testimony of a witness given at the trial, merely because an effort has been made to impeach her general reputation, or because evidence has been adduced of former statements inconsistent with her present testimony. [Citing cases.] But there is an equally uniform exception to this rule recognized by all the authorities to the effect that, where the witness is charged with changing or coloring his testimony from ulterior motives or that his evidence is a fabrication of recent date, his previous statements corresponding to the testimony given at the trial are competent, particularly if they are made prior to the impeaching statement for the purpose of rehabilitating his evidence and refuting the inference of recent fabrication, or that the testimony was given as a result of improper influence or because of undue interest. [Citing cases.] * * * It is not necessary that the party seeking to impeach the witness shall expressly state that his evidence is offered to prove a fabrication of recent date, nor to charge that the recent evidence was given under improper inducements in order to authorize the admission of corresponding statements made upon a prior occasion. It is sufficient if the evident purpose of the impeaching party, as disclosed by the record, indicates this to have been his purpose. * * * 'In order to come within the above exceptions to the rule, it is not necessary * * * that there be a direct charge of fabrication.'"

It is quite obvious from an examination of the record in the present case that the evident purpose of the above cross-examination of Hampton was to show that immediately after the accident he had made statements to the police officers that he had not seen the other car involved in the accident prior thereto because he had been resting; but that after he talked with defendants' counsel and visited the scene of the accident he changed his story and testified that he was not asleep and that he had seen the other car before the collision. That counsel for plaintiff was in effect seeking to show that the witness was fabricating his testimony is borne out by counsel's later remark that "My position is that his testimony is not true." Plaintiff argues, however, that to warrant the application of the exception there must be a charge of *recent* fabrication, or the statement must have been made by the witness at a time when he had no motive to fabricate; and that here there was no charge of recent fabrication; that the evidence shows that the witness had an even stronger motive to fabricate at the time he made the statement to the investigaor than he did in giving his testimony at the trial—that at the time he made the statement to the investigator, his friend Mauser was under arrest on criminal charges growing out of the accident, whereas at the time of trial these charges had been dismissed. However, it is apparent that the charge of fabrication was based on the testimony given at the trial, and as held in People v. Kynette, 15 Cal.2d 731, 753, 754, 104 P.2d 794, 806: "When a witness has been charged with improper motives of interest, or improper influences, or with recent fabrication, the law allows hearsay statements to be introduced for the purpose of showing that the same and consistent statements had been made *at a time prior to the fabrication* or prior to the time the motive of interest existed." (Italics added.) Applying the foregoing rules to the present situation it would seem clear that defendants were entitled to rehabilitate the testimony given by Hampton at the trial.

[4] Appellant argues that in any event the entire statement should not have been admitted. In this regard plaintiff objects to those portions wherein Hampton stated that Mauser was a careful driver; that he was driving carefully and not at a "high rate of speed"; that the impact occurred near the center of the intersection; and that he had yelled when he saw the other car. Plaintiff contends that there was no such testimony given at the trial by Hampton, and therefore those portions of the statement had nothing to do with the rehabilitation of his testimony. If the cause had been submitted to the jury on the contested issue of whether on this occasion Mauser was driving in a negligent manner, there would be much force in plaintiff's objection to those portions of the statement that he was a careful driver. But as pointed out, that issue was eliminated by the concession of counsel for defendants at the opening of the trial that the Mauser car was being negligently operated. The other extraneous portions of the statement to which objection has been made related either to irrelevant matters which could in no way operate to plaintiff's prejudice, or to circumstances concerning which Hampton's testimony was confirmatory. In such situation it would appear that no prejudice resulted from allowing in evidence the entire statement.

[5] Plaintiff complains also of the trial court's ruling allowing Mauser to testify that on account of being a stranger in San Francisco and not knowing where he was, and not being aware of the vehicle laws of this state, he did not know he was driving in town and did not know the speed limit. But in view of the admission by counsel for defendants at the opening of the trial that Mauser was negligent in driving his car, it cannot be said that the jury could have been led to believe, by the admission of the above evidence, that Mauser was not guilty of negligence.

[6] Nor is there any merit in plaintiff's contention that the court erred in giving the instructions. It is not claimed that the form or substance of the instructions which plaintiff claims were "over-emphasized" did not correctly state the law; and that being so, the mere repetition or similarity of expression used in the several instructions does not serve as ground for reversal. Wagy v. Brave, 133 Cal.App. 413, 24 P.2d 209; Barckdall v. Simons Brick Co., 21 Cal. App. 685, 132 P. 846. In Muskin v. Gerun, 46 Cal.App.2d 404, 116 P.2d 105, relied on by plaintiff, the reversal was based upon the refusal to give certain instructions which were proper, rather than the overemphasis of those given.

[7, 8] Plaintiff's final contention is that defendants' counsel was guilty of prejudicial misconduct in asking Mauser if it were not the fact that the criminal charges placed against him were dismissed and he was never brought to trial, and that the court erred in failing to instruct the jury to disregard the statement. It appears, however, that repeatedly throughout the trial counsel for plaintiff referred to the fact that Mauser had been taken into custody because of the death of plaintiff's companion, and that finally the trial court found it necessary to admonish counsel for persisting in pressing the point; therefore on recross-examination defendants' counsel asked Mauser if those charges had been dropped. An objection to the question was sustained; and contrary to plaintiff's assertion, the transcript shows that no request was made that the jury be instructed to disregard the question. In this state of the record no error appears. In Carlston v. Shenson, 47 Cal.App.2d 52, 117 P.2d 408, cited by appellant, the attorney persisted in asking the objectionable question in different forms after a ruling against its admissibility.

The judgment is affirmed.

WARD, J., concurred.

PETERS, Presiding Judge.

I dissent. As pointed out in the majority opinion, the defendants admitted that defendant Roy Kent Mauser was negligent, and that such negligence proximately contributed to the accident. The sole issue was whether plaintiff was guilty of contributory negligence. On that issue the plaintiff concedes the evidence was conflicting, and concedes that there is evidence to support the implied finding of the jury that he was guilty of contributory negligence. But the issue was a close one. A contrary finding likewise would have been supported. Moreover, it must be remembered that, as a result of the accident, plaintiff's companion was killed, and plaintiff suffered a severe brain injury and had no memory of the collision. There were no eyewitnesses to the accident capable of testifying except defendant Roy Kent Mauser and his companion and close friend

Hampton. Under such circumstances, any substantial error in the admission of the evidence of either of these witnesses could not help but be prejudicial.

In my opinion, it was error of a most serious and prejudicial nature to have admitted the hearsay, self-serving statement made by Hampton to the investigator of defendants, under the guise of rehabilitation. Hampton, called as a witness for defendants, testified that he saw the accident, and testified to facts which, if believed, showed plaintiff was guilty of contributory negligence. On cross-examination an attempt was made to impeach him by asking him if, at the scene of the accident and at the police station, he had not told the investigating police officers that he had not seen the accident. He denied making such statements. Officers Badagliacco and Murray were then called, and they testified that Hampton had told them at the scene of the accident and at the police station that at the time of the collision (about 2 a.m.) he was resting and did not see the accident. There was no charge made of recent fabrication, or that Hampton had been induced to change his testimony because of any improper inducement of defendants. All that plaintiff attempted to and did do was to impeach the witness by the usual method of showing prior inconsistent statements. It was simply a situation that develops in every case where a witness has made prior inconsistent statements. The charge that the testimony given by Hampton on the trial was "false" cannot be distorted into a charge of recent fabrication within the meaning of that limited exception to the general rule. That charge is expressly or impliedly made in every case of impeachment.

It must not be forgotten that the usual and general rule is that a witness cannot be rehabilitated by the introduction of prior consistent statements. It is well settled, in this and other states, that, when a witness has been impeached, the opposing party cannot rehabilitate that witness by showing that at other and different times the witness made statements out of court and out of the presence of the other party in harmony with his present testimony. See cases collected 27 Cal.Jur., p. 178, § 153. To that rule there is limited exception. That exception is that where the witness is charged with testifying under the influence of some motive prompting him to make a false statement, or that his evidence is a fabrication of recent date, such rehabilitating evidence is admissible. The exception is well illustrated by the two cases relied upon in the majority opinion. In Davis v. Tanner, 88 Cal.App. 67, 262 P. 1106, a witness was impeached by the introduction of a prior inconsistent statement. Prior consistent statements were allowed to be introduced to rehabilitate her. The theory upon which this was held proper is clearly stated at page 75 of 88 Cal.App., at page 1109 of 262 P. as follows: "It is apparent from the record that appellants offered the former statement of the witness Hogg to impeach her, on the theory that she had fabricated or colored her testimony given at the trial *through the urgent inducement of respondent's attorneys,* with whom a recent conference was developed by appellants, with the manifest inference that this interview was the cause of whatever conflict exists between her testimony at the trial and her former statement made to appellants." (Italics added.) In People v. Kynette, 15 Cal.2d 731, 104 P.2d 794, rehabilitating evidence was admitted because an attempt had been made to show that the district attorney's office had brought improper influences to bear upon the witness. In the instant case there was no express or implied charge that defendants or their counsel had brought improper pressure to bear on Hampton. They simply charged that he had told the police officers he did not see the accident, and that he was friendly with one of the defendants. Certainly, it cannot be contended, because a witness is impeached by showing friendship with one of the parties, that the door is thrown open to the introduction of hearsay, self-serving prior consistent declarations in violation of the general rule above discussed. If the credibility of a witness can be propped up in this fashion the limited exception to the general rule would soon abolish that rule.

For these reasons I believe the judgment should be reversed.

53 Cal.App.2d 549

PACIFIC SOUTHWEST REALTY CO. v. McCOLGAN.

Civ. 13585.

District Court of Appeal. Second District. Division 2, California.

July 24, 1942.

Hearing Denied Sept. 21, 1942.

1. Taxation ⚷376(2)

Securities designated as cumulative preferred stock drawn in usual form, and providing for the acquisition of voting rights by holders thereof if dividends were not paid constituted "preferred stock" and not "evidences of indebtedness" and payments made thereunder were "dividends" and not payments of "interest" on indebtedness for which a deduction could be made in computing franchise tax notwithstanding such securities were redeemable at end of fixed period at par plus any unpaid accumulated dividends and in the event of failure to redeem, holders would have the rights of a general creditor to sue for the principal value of securities and any accumulated unpaid dividends.

See Words and Phrases, Permanent Edition, for all other definitions of "Dividend", "Evidence of Indebtedness", "Interest" and "Preferred Stock".

2. Taxation ⚷376(1)

Discount at which securities were sold and expense of issuance of securities were not "deductible expenses" in computation of franchise tax of issuing corporation where securities were in fact preferred stock and not mere evidence of indebtedness.

See Words and Phrases, Permanent Edition, for all other definitions of "Deductible Expense".

3. Taxation ⚷376(1)

Where bonds are issued by a corporation at a discount, the net amount of such discount, together with the expense incurred in the issuance of the bonds, is deductible in computing the corporation franchise tax.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Pacific Southwest Realty Company against Charles J. McColgan, as Franchise Tax Commissioner, etc., for the recovery of corporation franchise taxes paid. From a judgment for defendant, plaintiff appeals.

Modified and as modified affirmed.

Claude I. Parker and Bayley Kohlmeier, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before the court without a jury in consolidated actions for the recovery of corporation franchise taxes paid for the taxable years 1935 and 1936 upon the basis of its net income for the years 1934 and 1935, plaintiff appeals.

The undisputed facts are:

In the years 1923, 1924, and 1925 plaintiff issued securities which were designated as 6½ per cent cumulative preferred serial stock. These securities were drawn in the usual form establishing a relationship between a stockholder and a corporation. They were required to be redeemed at the end of a fixed period of years for the par value of $100 and any unpaid accumulated dividends. They provided for a quarterly dividend payable out of profits in the aggregate annual amount of 6½ per cent for one serial issue and 5½ per cent for another. In the event profit was not made and the quarterly dividend not paid, the holders of the preferred shares who otherwise had no voting rights acquired all of the voting rights of the stockholders and could assume control of the corporation and through ordinary corporate processes compel declaration and payment of a dividend. The preferred stockholders had no power to pay the quarterly dividends otherwise than by the corporate process of declaration of dividends from profits then existing. This power was never invoked and all dividends paid in the years in question were declared paid by usual corporate procedure by action of the board of directors.

[1, 2] These are the questions presented for our determination:

First: Was the so-called preferred stock in fact not preferred stock but a mere evidence of indebtedness?

Second: Were the so-called dividends which had been paid on the preferred serial stock in fact not dividends but payments of interest on indebtedness?

Third: Was the discount at which the securities were sold a deductible expense?

Fourth: Was the expense of issuance of the securities a deductible expense?

Fifth: Was the expense of issuing appellant's bonds and the discount at which said bonds were sold a deductible expense?

The first four questions must be answered in the negative. An examination of the facts surrounding the issuance of the cumulative preferred serial stock in the instant case presents a very close question as to whether the cumulative preferred serial stock was in fact stock or merely evidence of an indebtedness of the plaintiff to the holders of the securities. However, since the appeal in the present case was filed, the United States Circuit Court of Appeals for the Ninth Circuit has had the first four questions above stated presented to it on the identical facts involved in this case in reviewing a decision of the Board of Tax Appeals. The title of this case is Pacific Southwest Realty Co. v. Commissioner of Internal Revenue, 9 Cir., 128 F.2d 815, filed June 8, 1942. We have examined this decision, which holds that the cumulative preferred serial stock is in fact stock and not a mere evidence of indebtedness, and we are of the opinion that the conclusions reached in such case are sound as applied to the facts of the present case. Therefore, we follow such decision in holding that the cumulative preferred serial stock was stock and not evidence of indebtedness. The same reasoning applies to the second, third, and fourth questions.

[3] The fifth question must be answered in the affirmative. If bonds are issued by a corporation at a discount, the net amount of such discount, together with the expense incurred in the issuance of the bonds, is deductible under federal regulations (see Federal Regulations 86, art. 22(a) 18, Regulations 103, § 19.22(a) (18), Chicago, Rock Island & Pac. Railway Co. v. Commissioner, 13 B.T.A. 988).

It is our opinion that the same rule should be applied in fixing the amount of a corporation franchise tax. In the present case it was stipulated that plaintiff had outstanding certain bonds which had been issued at a discount and that plaintiff had incurred expenses in connection with the issuance of such bonds. It was further stipulated that $2,220.24 of the discount was properly allocable to the year 1934 and that $16,849.98 of the discount was properly allocable to the year 1935, also that $472.45 of the expense of issuance of plaintiff's bonds was properly allocable to the year 1934, and $3,740.46 of such expense was properly allocable to the year 1935.

For the foregoing reasons the trial court is directed to modify the judgment by allowing plaintiff as a deduction the stipulated amount of the discount and expense incurred in the issuance of its bonds. As thus modified the judgment is affirmed.

MOORE, P. J., concurred.

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53 Cal.App.2d 427

NEWMAN v. SUNSET-McKEE SALES-BOOK CO.

Civ. 12061.

District Court of Appeal, First District, Division 2, California.

July 15, 1942.

1. Sales 🔑383

In seller's action for breach of contract to purchase machines known as "registers", evidence of conduct of parties established either that parties at no time intended that contract should call for more than 400 machines, which number defendant accepted and paid for, or that, if such intention had been expressed, it was abandoned by mutual consent.

2. Sales 🔑383

In seller's action for breach of contract to purchase machines known as "registers", evidence of conduct of parties at inception of contract and at time of its modification required a finding that, if any damage resulted from modification of the contract, or from defendant's failure to comply therewith, such damage was invited by seller and hence was not subject to recovery.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge Assigned.

Action by L. Newman against Sunset-McKee Sales-Book Company for damages for alleged failure of defendant to perform a contract for purchase of machines equipped with a continuous form sales tag, adaptable for use on the sales counter, and known to the trade as "registers". From a judgment for the plaintiff, the defendant appeals.

Reversed.

Clark & Heafey, of Oakland, for appellant.

Edward J. Silver and Louis B. DeAvila, both of Oakland, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for damages for the alleged failure of defendant to perform a contract for the purchase of machines equipped with a continuous form sales tag, adaptable for use on the sales counter, and known to the trade as "registers." The plaintiff had judgment for the full sum prayed for and defendant's appeal attacks the findings as not supported by substantial evidence.

On August 19, 1936, defendant delivered to plaintiff its written order to manufacture two hundred model "A" registers at $10 each, and two hundred model "C" registers, at $11 each. Plaintiff proceeded to manufacture the required number, delivery was made from time to time, payments were promptly made, and on July 22, 1937, the last of the four hundred registers were delivered and defendant was billed for the balance due under the contract. This sum was paid in full, together with miscellaneous charges for dies and other outlays, and nothing further was done under the contract until September, 1939, when plaintiff notified defendant that he was ready to complete the order. This notice was based upon a modification of the order, or contract, of August 19, 1936, whereby a figure "1" was inserted before the figure "2" so that, as to both models the order was changed to read "1200" instead of "200." The litigation rests upon this modification and the reasons for it.

The complaint alleged that "on August 19, 1936, * * * defendant * * * delivered to plaintiff its written order to manufacture 1200 model 'A' registers. * * *" The plaintiff was forced to admit that the allegation was untrue. The trial court found, in accordance with the only credible evidence, that the order pleaded was for two hundred registers of each model. It also found, upon undisputed evidence, that "several months thereafter" the order was changed to call for twelve hundred of each model. It was also found that the four hundred registers were duly manufactured, delivered, and paid for, and that defendant also paid the additional charges for extra dies and material as billed by the plaintiff. Defendant's explanation of the modification of the figures in the contract is that it was done by mutual agreement of the parties to enable plaintiff to exhibit the contract to an eastern manufacturer and thus enable him to establish his credit and build up his trade with that concern. Plaintiff does not directly deny this, but testified that he found that additional dies would be needed and the contract was increased to cover that expenditure. He does not deny, however, that after the modification he billed defendant for his expenditures for extra dies and that these were fully paid for. The plaintiff also testified that throughout his operations under the contract he carried the account upon his books under the heading "Sunset-McKee Sales Job 2169—400 Registers."

[1, 2] There is one question of law which calls for discussion and, since that requires a reversal of the judgment, it would serve no purpose to consider other points raised by appellant. The appellant contends that all the evidence supports the defense that the contract was abandoned by mutual consent, and that the trial court erred in failing to find upon this special defense. We are satisfied that the undisputed evidence of the conduct of the parties at the inception of the contract, at the time of its modification some months later, and during all the period of manufacture and sale of the original number of registers, together with the entries in respondent's books of account, all compel a finding that either the parties at no time intended that the contract should call for the manufacture of more than four hundred registers, or that, if such intention had been expressed at any time, it was abandoned by mutual consent. This evidence of the conduct of the parties together with the evidence that respondent for a period of two years, made no effort to manufacture, deliver, or tender any portion of the goods in excess of the original number ordered also compel a finding that respondent did not suffer the damages awarded in the judgment, but that, if any

damage resulted from the modification of the contract, or from appellant's failure to comply with such modification, such damage was invited by respondent and hence not subject to recovery.

The judgment is reversed.

STURTEVANT and SPENCE, JJ., concurred.

53 Cal.App.2d 750

MILES v. VAN HAGEN et al.

VAN HAGEN v. ACKER et al.

Civ. 13475.

District Court of Appeal, Second District, Division 3, California.

July 31, 1942.

1. Automobiles ⚷244(44)

Where driver of truck traveling in right-hand traffic lane and not in lane nearest center of highway started to make U-turn at intersection and overtaking motorist, to avoid colliding with truck, accelerated speed to 35 miles per hour, swung automobile to left across center line of highway and collided with on-coming motorist 109 feet from center of intersection, evidence sustained finding that overtaking motorist was not guilty of any breach of ordinary care which contributed proximately to cause collision. Vehicle Code, § 540(b), St.1935, p. 184.

2. Automobiles ⚷244(37)

Where driver of truck traveling in right-hand traffic lane and not in lane nearest center of highway started to make U-turn at intersection and overtaking motorist, to avoid colliding with truck, accelerated speed to 35 miles per hour, swung automobile to left across center line of highway and collided with on-coming motorist 109 feet from center of intersection, evidence sustained verdict that negligence of truck driver was the "proximate cause" of the collision and justified judgment against owners and driver of truck in favor of the two motorists. Vehicle Code, §§ 540(b), 544, St.1935, pp. 184, 185.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

3. Negligence ⚷56(2)

A defendant's negligence need not be both a direct and proximate cause of injuries in order to render defendant liable for the injuries, but it is sufficient if such negligence is a proximate cause of the injury and a "proximate cause" may be either a direct or an indirect cause.

4. Negligence ⚷136(2, 25)

Questions of negligence and proximate cause are normally "questions of fact" for the jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Questions of Fact".

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by F. W. Miles for injuries sustained in an automobile accident against H. W. Van Hagen and K. L. Acker and others, doing business under the fictitious firm name and style of Imperial Ice Cream Company, wherein Henry W. Van Hagen filed a cross-complaint. From judgments for the plaintiff and the cross-complainant, K. L. Acker and others appeal.

Affirmed.

Sigurd E. Murphy, of Hollywood, and George Finucane, Jr., of Los Angeles, for appellants.

Thomas P. Walker and Alfred R. Meyers, both of Los Angeles, for respondent Miles.

Philip W. Erbsen, of Los Angeles, for respondent Van Hagen.

SCHAUER, Presiding Justice.

Appellants (defendant Acker and his employers) with commendable conciseness, state that "there is one and only one question before the court on this appeal and that is—Is the negligence of Van Hagen the proximate cause of the accident in which the plaintiff received his injuries?" Appellants urge that their question must be answered in the affirmative. They do not (and on the record they could not properly) contend that the evidence is insufficient to establish negligence of the defendant Acker but they zealously argue that his negligence is but a remote wellspring of plaintiff's injuries, separated causally by the independent intervening agency of defendant Van Hagen. The facts, however, provide a negative answer which the zeal of appellants' counsel cannot overcome.

The accident involved three motor vehicles and is novel to this extent: the vehicle held solely responsible did not come in physical contact with either of the other two. The collision was between an automobile being driven by plaintiff Miles in a westerly direction on Foothill Boulevard and a car traveling east which was being operated by defendant Van Hagen. The point of impact was stipulated to be on the north half of Foothill Boulevard 109 feet east of the center of its intersection with Magnolia Avenue in the city of Monrovia. Foothill Boulevard at the locale in question is a four-lane paved thoroughfare running east and west, with a roadway 62 feet in width. Magnolia Avenue runs north and south and its roadway is 34 feet wide.

Immediately preceding the collision defendant Acker was driving a truck, owned by the other defendants, excluding Van Hagen, in an easterly direction along the south side (most southerly traffic lane) of Foothill Boulevard just west of its intersection with Magnolia Avenue. Behind the truck, and overtaking it, defendant Van Hagen, in his car, was in the traffic lane just south of the center line of Foothill Boulevard and was traveling at a speed of approximately 25 miles per hour. About 50 to 75 feet back of the intersection Acker operated the mechanical arm of the truck to indicate a left turn but as the truck reached the intersection, traveling slowly, he dropped the mechanical arm (he said he needed both hands to steer) and turned to about a 40° angle toward the south in the Magnolia intersection. He proceeded to a point near the southerly limit of the intersection and then turned north in a circular pattern, intending to make a U turn. Prior to turning north in the intersection the truck had not been in the traffic lane nearest the center of the highway as required by subdivision (b) of section 540 of the Vehicle Code, St.1935, p. 184, and Van Hagen's car had been in a position where it could lawfully overtake and pass the truck. When the truck, in execution of the described maneuver, had reached a point in the intersection where it was headed northeasterly with its front end about five feet south of the center of Foothill Boulevard defendant Van Hagen's car, traveling about 25 miles per hour, was in the traffic lane immediately south of the center line and was just entering the intersection. The truck continued moving slowly in its unlawfully approached and attempted left turn and Van Hagen to avoid colliding with it, accelerated the speed of his car and swung it to his left to a point north of the center line of the boulevard. He said that the front of the truck had itself reached a position north of the center line as he passed it, and that his car cleared the truck by two or three feet. At this point he had attained a speed of about 35 miles per hour.

Having so passed the truck Van Hagen directed his attention to the highway ahead and to bringing his car back to the southerly side of the center line. He saw plaintiff's automobile coming but he did not attain his objective of getting his own car back onto the south half of the boulevard. The collision occurred at a point about 10 feet north of the center line and 109 feet east of the center of the intersection. It is to the handling of Van Hagen's car after it passed the truck that appellants direct the weight of their criticism. That he proceeded for approximately 100 feet at 35 miles per hour on the wrong (his left) side of the road before the collision is in itself conclusive evidence of negligence, say appellants. Not only was it negligence, they urge, but as a matter of law it was independent, intervening negligence which was the sole proximate cause of the collision. The jury returned verdicts for plaintiff Miles on his complaint and for defendant Van Hagen on his cross-complaint against Acker (the truck driver) and the latter's employers. We find the verdicts tenable.

An inspection of the map attached to the Reporter's Transcript (Plaintiff's Exhibit No. 1) discloses that the truck was near the easterly limit of the intersection when Van Hagen's car passed it. Magnolia Avenue, as previously mentioned, is 34 feet in width. Hence Van Hagen's machine traveled less than 100 feet after clearing the truck before it collided with plaintiff's car. At its speed of 35 miles per hour it was traversing 51.33 feet a second. Less than two seconds of time, therefore, was available to Van Hagen, after narrowly averting a crash with the truck, to survey the roadway to the east, to perceive plaintiff's oncoming automobile, to determine the seemingly best course to pursue, and to execute it. It must be recognized that in avoiding the truck Van Hagen had turned his car to head somewhat north of east and it had the momentum caused by acceleration to a speed of 35 miles per hour. It is reasonable to believe that the jury may have concluded that such heading and momentum carried the car somewhat farther north than was its position at the moment it cleared the truck. Certainly some substantial portion of the fleeting interval of less than two seconds before the impact must legitimately have been consumed in altering the heading from a direction north of east to a direction south of east. Van Hagen testified that he did not see plaintiff's automobile until it was within about 50 feet of his car. Because of the nature of the maneuver in which he was engaged, and the position of the truck, neither is this statement incredible nor is the fact unreasonable.

[1] By way of argument in their opening brief appellants assert, "Had the impact occurred immediately after Van Hagen had passed the truck or so close to the point of passing that no reasonable opportunity was presented to Van Hagen either to return to the proper side of the street or to stop his vehicle, then injury to Miles was reasonably to have been anticipated; but, to say the least, the present factual situation taken in retrospect shows the consequence of Acker's act to have been 'extraordinary rather than normal.'" The difficulty with this argument is that the jury may well have found that the impact did occur so close to the point of passing that no reasonable opportunity was presented to Van Hagen either to return to the right side of the highway or to stop his vehicle. In a situation of this kind closeness is a relative matter involving proximity of time as well as of space. And within the bounds of reason, which we cannot say have here been transcended, it is the exclusive province of the jury to determine, by classification of the act, where closeness ceases and remoteness commences. At least the jury did find that Van Hagen was not guilty of any breach of ordinary care which contributed proximately to cause the collision. We are definitely of the opinion that such finding is not unreasonable.

[2] If the truck under the circumstances related, had actually struck Van Hagen's automobile and impelled it purely as an inanimate and wholly uncontrolled object directly into plaintiff's car the proximate cause of the collision would be obvious beyond argument. Because the truck did not physically contact the car and because the human agency of Van Hagen still exercised control over such car, it is contended that the causal chain is broken. But it must be recognized that control of any moving vehicle is a matter of relativity. An automobile traveling 25 or 35 miles an hour may be said to be under control of its operator—but that operator cannot at any moment immediately and instantaneously change the status of that vehicle from a moving object to a stationary one. Both time and space are required for the transmission of the nerve impulse to sensory and motor centers and thence into muscular action and for the transition of the state of the object from momentum to rest. With the physical objects as they were, Van Hagen's control of his car was not complete in himself and exclusive of external factors. The movement of his car to *avoid contact* with the truck, if it was reasonable under the circumstances, was no less proximately caused by the truck because Van Hagen consciously turned the steering wheel and depressed the foot throttle than would its movement have been so caused if the truck had in fact contacted it and physically impelled it. The question, within reasonable limits, is one of fact. Was the pattern of its motion, to a controlling degree under the circumstances shown, shaped by the acts of Acker? The jury found that the sequence was natural, that the causal chain was unbroken. With that conclusion we are satisfied.

Appellants turn to the cases of De Vito v. Peterson (1933), 134 Cal.App. 100, 25 P.2d 19, and Petersen v. Lewis (1935), 2 Cal.2d 569, 42 P.2d 311, and urge that the factual circumstances of those cases are similar to the case before us and that in each of those cases the court held that as a matter of law the negligent act of the defendant was not a proximate cause of the accident. We fail to find that either of those cases is controlling here.

In the De Vito case the plaintiff's automobile was struck by a car which, at an intersection, had gone far to the left of the center of a highway to pass another machine which was making a left turn. Plaintiff endeavored to hold the driver and the owner of the latter machine responsible for the accident, on the theory that its driver had neglected to give a left turn signal. The opinion does not show that in that case (as the facts do establish in our case) the left turn was started from an improper approach or that the passing car was originally (and until forced over by the illegal turn) in a lawful position to pass the overtaken car; furthermore the court apparently was of the opinion in that case that the evidence did not show that the pattern of the course of the colliding machine was proximately caused by the turning car. In our case we have discussed the evidence sufficiently to show that the jury were warranted in coming to a contrary conclusion.

The case of Petersen v. Lewis, supra, is merely authority for the proposition that (2 Cal.2d at page 572, 42 P.2d at page 313), "By proving the negligence of the defendant without in some way fastening that negligence to the injury, a case is not made out." With that rule we are in full accord; but under the evidence in our case the jury impliedly and justifiably found that appellants' negligence was proximately fastened to the plaintiff's injury. In that case the plaintiff was following a car and trailer being operated by the defendant. The defendant, about 20 feet before he reached an intersection, signaled for a left turn and proceeded to execute it before reaching the center of such intersection. Another car coming at excessive speed in a direction opposite to that in which plaintiff was proceeding, instead of slowing down or stopping swung his car over to plaintiff's side of the highway, and the collision ensued. It appeared that the colliding car was about 150 feet north of the intersection when the defendant started his left turn and was being operated at a speed of 45 or more miles per hour. It appears that the court was of the opinion that the negligence of the turning driver in failing to signal for the required space (now Vehicle Code, sec. 544, St.1935, p. 185, then Calif. Vehicle Act, sec. 130) and in starting the left turn to the left of the center of the intersection (now Vehicle Code, sec. 540(b), St.1935, p. 184, then Calif.Vehicle Act, sec. 129) was not a proximate cause of the accident; that as a matter of law the sole proximate cause was the negligence of the driver of the colliding car in proceeding for so great a distance at such an excessive rate of speed and in directing his machine to the extreme (his) left side of the highway.

We do not need to suggest (as did the late Mr. Justice Seawell in his dissenting opinion, at page 573 of 2 Cal.2d, at page 313 of 42 P.2d) that the evidence in that case should have gone to the jury to determine the fact as to whether the defendant's negligence was a proximate cause of the accident. For the purposes of this opinion we may accept unqualifiedly the holding of the majority of the court in that case, and still find ample difference in their factual bases to warrant our conclusion. In that case the driver of the colliding car was clearly guilty of negligence. Had it not been for his excessive and negligent speed the accident need not have occurred. In our case Van Hagen was found not to be negligent. His conduct was found to be normal and natural under the circumstances. Only the negligence of the truck driver Acker proximately caused the collision and plaintiff's injuries.

[3, 4] "The law does not require that a defendant's negligence be both a direct and proximate cause of the injury in order to render him liable. It is sufficient if such negligence be a proximate cause of the injury, and a proximate cause may be either a direct or an indirect cause." (Goehring v. Rogers (1924), 67 Cal.App. 253, 259, 227 P. 687, 689). The acts of the defendant Van Hagen, influenced and to a substantial extent controlled as they were by the conduct of the defendant Acker, must be regarded in law under the circumstances depicted not as an independent cause but as conjoining incidents of the original negligence of Acker, which negligence operated long enough and extensively enough to efficiently produce the accident and the injuries to plaintiff and to Van Hagen (see Harmon v. M. H. Sherman Co. (1938), 29 Cal. App.2d 580, 587, 85 P.2d 205). That questions of negligence and proximate cause are normally questions of fact for the jury needs no citation of authority. We hold that the evidence legally supports the verdicts rendered.

The judgments, in favor of plaintiff on his complaint and in favor of defendant Van Hagen on his cross-complaint, are affirmed.

SHINN and PARKER WOOD, JJ., concur.

53 Cal.App.2d 448

PEOPLE v. McEVERS et al.

Cr. 3589.

District Court of Appeal, Second District, Division 2, California.

July 17, 1942.

Rehearing Denied July 28, 1942.

Hearing Denied by Supreme Court Aug. 13, 1942.

1. Criminal law ⚷1186(4)

Where defendant in robbery prosecution was positively identified by four witnesses and confessed in open court, he suffered no prejudice which would justify a reversal of his conviction by reason of alleged mistreatment by the police used to secure his original confession. Const. art. 6, § 4½.

2. Criminal law ⚷407(2)

Where trial court, after excusing the jury, heard testimony of defendants and officers concerning occurrences when defendants' confessions were made in the absence of a showing of abuse of discretion, admission of testimony as to statements and conduct of defendants when accused was not error.

3. Criminal law ⚷736(2)

Determination of whether a confession is voluntary is for the trial judge.

4. Criminal law ⚷532

In ruling upon the admissibility of statements purporting to constitute a confession, the court is governed largely by the circumstances surrounding the purported confession.

5. Criminal law ⚷519(4, 9)

The fact that a confession may have been made to an arresting officer or after many hours of interrogation does not make the confession "involuntary".

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Confession".

6. Constitutional law ⚷266

Where trial court after a voir dire session determined that facts were such as to warrant the admission of confessions and issue of voluntary character of confession was submitted to jury and both court and jury found against defendants on conflicting evidence of police brutalities, contention that defendants were denied "due process of law" by reason of alleged brutalities could not be sustained.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

7. Criminal law ⚷407(2), 781(7)

Where defendant had denied guilt in face of accusatory statements of third persons, denial rendered both statements and denial inadmissible, since only admissions of a litigant against his own interest may be given in evidence by a third party and instruction that jury could consider defendant's denial was properly refused.

8. Criminal law ⚷829(18)

The reading by the court to the jury of the statute defining reasonable doubt rendered unnecessary any further instruction on the subject. Pen.Code, §§ 1096, 1096a.

9. Criminal law ⚷780(1)

Where testimony of codefendant, which detailed defendant's participation in robbery, was given on behalf of defense, and codefendant, on cross-examination by district attorney, denied his direct testimony, defendant was not entitled to instruction which was directed at testimony of codefendant that conviction could not be had upon the testimony of an accomplice unless it were corroborated by such other evidence as tended to connect the defendant with the crime.

10. Criminal law ⚷1186(4)

Where defendant's confession of participation in robbery and the presence of money in his trunk, to which he led officers, together with other circumstances, would have supported his conviction without testimony of codefendant which connected defendant with robbery, defendant was not prejudiced by refusal of requested instruction regarding necessity for corroboration of testimony of accomplice. Const. art. 6, § 4½.

11. Criminal law ⚷781(4)

Where defendant had testified to the truth of codefendant's statement to police, instruction which imposed on jury, duty to determine whether defendant's statement to police, that if codefendant told whole story it was true as to what defendant did, was an admission or acquiescence in accusatory statements made by police was not objectionable as misleading.

12. Criminal law ⚷407(2), 519(4), 781(7)

Where defendant had been accused by police officers of robbery, either his silence or his spoken confession was admissible and testimony relating thereto justified instruction permitting jury to take defendant's silence against him if he stood silent in face of accusation and instruction, that accusatory statements are admissible solely that jury may know the attitude of defendant in the face of accusatory statements by third persons in his presence.

◆

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Gilbert McEvers and another were convicted of robbery, and they appeal.

Affirmed.

Hearing denied by Supreme Court; CURTIS and EDMONDS, JJ., dissenting.

Walter L. Gordon, Jr., of Los Angeles, for appellants.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., John F. Dockweiler, Dist. Atty., and Thomas F. O'Brien, Deputy Dist. Atty., both of Los Angeles, for respondent.

MOORE, Presiding Justice.

By information appellants were accused jointly with one Jack Jones of the robbery of one Gertrude Coffey by means of force used against said Gertrude Coffey and by putting her in fear. They were convicted by a jury of the crime charged. Their co-defendant Jones was acquitted. The appeal is from the judgment on the grounds that the court committed prejudicial error: (1) in admitting testimony concerning the asserted confessions; (2) in modifying a correct instruction offered by Davidson with reference to such alleged confessions which proposed instruction was peculiarly applicable and not covered by other instructions; (3) in refusing other instructions proposed by Davidson correctly stating the law as to the testimony of accomplices not covered by other instructions; (4) in giving instructions which covered an assumed issue.

On January 7, 1942, Mrs. Coffey was cashier in a market on East Olympic Boulevard in Los Angeles. McEvers approached her with a basket of groceries. As she was about to check them, he pointed a gun at her and stated: "Hurry, I don't want to kill any one; act as though nothing was happening; put the bills in a sack; put the half dollars in a bag and do not make too much noise." Thus the robber took about $1,183.68 and departed from the scene.

On the second day thereafter all three defendants were arrested and they were interviewed by the police in the robbery bureau of the city hall of Los Angeles.

At the interview McEvers stated that he had planned and committed the robbery; that he and Davidson drove from the latter's home on Hooper street to the market; that Davidson waited in his car on a side street while the robbery took place; that after the two had returned to Hooper street, they divided the money among themselves and Jones, giving each $380; that he had been with Jones and Davidson for a day and a half prior to the robbery.

At the same interview Davidson told the officers that he had driven the car and that upon their return to his home they divided the money three ways; that his unspent portion was in his trunk. Following the conference with defendants, the officers accompanied by Davidson, visited his home and recovered $190 from his designated depository.

[1] After the foregoing admissions had been given in evidence by the officers, defendants attempted to refute them with testimony of promises made, of floggings administered, of frights provoked and of fears inspired by threats of violence and by being deprived of sleep and food. Inasmuch as McEvers was positively identified by four witnesses as the bandit who committed the crime and since he confessed his guilt to the jury in open court, there could be no reversal of his conviction because he could have suffered no prejudice by the rulings with reference to the admission of the confessions. Const. Art. VI, § 4½.

[2-5] We proceed therefore to a consideration of the assignments on behalf of Davidson.

(1) When testimony as to the conduct and attitude of this defendant was offered in evidence, the jury was excused while the court heard their testimony as well as that of the officers concerning the occurrences at the interview in the robbery bureau. There is nothing in the recitals of such witnesses to suggest that the trial court did not exercise a reasonable discretion in considering and admitting testimony as to statements and behavior of defendants when accused. In the absence of a

showing of an abuse of discretion upon the part of the trial judge, we cannot say that his ruling was error. People v. Luzovich, 127 Cal.App. 465, 470, 16 P.2d 144. It was for the trial judge to determine whether the confession was voluntary. People v. Lehew, 209 Cal. 336, 341, 287 P. 337. In ruling upon the admissibility of statements purporting to constitute the confession of an accused, the court is governed largely by the circumstances surrounding the purported confession. Id. The fact that it may have been made to an arresting officer or that the accused had been interrogated many hours does not render his statements involuntary. People v. Siemsen, 153 Cal. 387, 394, 95 P. 863; People v. Dyer, 11 Cal. 2d 317, 319, 79 P.2d 1071. But after a voir dire session in the presence of the court alone, each of the parties present at the interview in the robbery bureau was examined before the jury; each repeated his own version of the incidents and the conversation between the officers and the accused and each was subjected to cross examination.

[6] Thereupon the issue as to whether the confessions were free and voluntary, along with other issues of fact, was submitted to the jury with an instruction that it was for them to determine whether the statements by defendants to the police "amounted to a confession and were made free and voluntary without influence of hope or fear"; that if they were not so freely made, they should be disregarded; that the slightest menace or threat, or any hope engendered in the mind of the accused that he will be more favorably dealt with if he will confess, should exclude the confession. Under such instruction the jury decided that the statements of the accused did constitute confessions and that they were freely and voluntarily made.

Counsel's eloquent portrayal of the savage mistreatment of appellants at the hands of the police is sufficient to arouse cold lethargy into heated action if the picture were true. But we are in no position to act upon his persuasions. The trial judge has determined that the facts were such as to warrant the admission in evidence of the statements. After their deliberations the jury impliedly found that such statements were confessions and that they were voluntarily made. In this connection it is contended that appellants were denied due process by reason of the brutalities they claimed to have suffered at the hands of the police. But after a jury and the court both determined there was no brutality we cannot say there was a want of due process. Had the alleged maltreatment of defendants been established we could not do otherwise than reverse the judgment. But upon that issue there was a conflict in the evidence resolved against appellants.

(2) It is contended on behalf of appellant Davidson that in view of the testimony that the brutality of the officers induced the alleged confessions, he was entitled to an instruction that "if the attitude of defendant in the face of the accusatory statements made by third parties in his presence, taken into conjunction with all the other facts and circumstances in the case creates a reasonable doubt as to his guilt, it was the duty of the jury to acquit him." Pursuant to such contention his counsel offered the following instruction which the court modified by striking the portion in brackets:

"The statements of third parties made in the presence of a defendant are admissible in evidence, not for the purpose of binding the defendant to the truth of such statements, nor as proof of his guilt, but they are receivable solely and alone that the jury may know the attitude of the defendant in the face of accusatory statements made against him by third persons in his presence. [If, therefore, in the face of such accusatory statements the defendant denied his guilt, the Jury has a right to take into consideration his denial of the truth of such accusatory statements, and if the attitude of the defendant in the face of the accusatory statements made by third parties in his presence, taken in conjunction with all the other facts and circumstances in the case creates a reasonable doubt as to the guilt of the defendant, then it is the duty of the jury to bring in a verdict of not guilty.]"

[7, 8] The court properly excluded from the proposed instruction the bracketed passage. At the time of the accusatory statements by the officers, Davidson denied his guilt. Such denial rendered the statements of the officers inadmissible. People v. Smith, 25 Cal.App.2d 241, 247, 77 P.2d 277. It is only the admissions of a litigant against his own interest that may be given in evidence by a third party. Since the accusatory statements were inadmissible, a denial of them was also inadmissible and it was therefore not proper to instruct the

jury to consider appellant's denial of them. Moreover, on behalf of appellants the court admonished the jury that in considering the asserted confessions, all of the circumstances attendant upon such confessions and the fears and hopes and state of mind of the accused should be considered. That portion of the deleted sentence which refers to the creation of a reasonable doubt by the behavior of Davidson at the time the officers accused him, was covered by the court's reading to the jury section 1096 of the Penal Code. The reading of that section renders unnecessary any further instruction on the subject of reasonable doubt. (Penal Code, § 1096a.)

[9, 10] (3) Davidson's next assignment is that the court refused to give his proposed instruction to the effect that "a conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect" the accused with the crime. Such instruction was not in order. It was aimed at the testimony of McEvers who detailed Davidson's participation in the crime. But that testimony was given on behalf of the defense. The fact that on his cross-examination by the district attorney he denied his direct testimony leaves the contention utterly baseless. Furthermore, no prejudice could have been suffered by Davidson by reason of the court's rejection of the offered instruction for the reason that after McEver's confession at the Robbery Bureau, Davidson himself told the officers of his part in the crime and of the unspent share of his portion of the booty which the officers recovered. His confession and the presence of the money in his trunk, to which he led the officers, together with other circumstances, would have supported his conviction without McEver's testimony. No judgment shall be set aside unless after an examination of the entire cause the court shall be of the opinion that the asserted error has resulted in a miscarriage of justice. Const. art. VI, § 4½.

(4) Davidson's final assignment is that the giving of the following instruction constituted prejudicial error: "You are instructed that when a defendant, under conditions which fairly afford him an opportunity to reply, stands mute in the face of an accusation of crime, the circumstance of his silence may be taken against him as evidence indicating an admission of guilt. The only purpose for which an accusatory statement is received in evidence is to show acquiescence or admission on the part of a defendant in the face of an accusatory charge and unless you are convinced beyond a reasonable doubt that the defendant did stand mute when the accusatory statements were made, such statements should be entirely disregarded by you."

Davidson contends that since his defense is the brutality of the police the last-quoted instruction places upon him a greater burden than the law exacts. He did not stand mute but, on the contrary, he said he had nothing to do with the robbery and told the officers "if McEvers told you the whole story, I expect that is what I did."

[11, 12] Under the instruction it was the duty of the jury to determine whether such response was an admission of or acquiescence in the accusatory statement. Since Davidson testified that he stated that McEver's inculpatory statement was true, he was in no better position than if he had stood mute. In view of that testimony, the jury could not have been mislead by the instruction criticized (People v. Swanson, 120 Cal.App. 173, 178, 7 P.2d 380) especially in view of the instruction given at appellant's request to the effect that accusatory statements are admissible in evidence "solely and alone that the jury may know the attitude of the defendant in the face of accusatory statements made against him by third persons in his presence." The fact sought to be established by proof of the attitude of Davidson when accused was that he participated in the robbery. Either his silence or his spoken confession was admissible in evidence and such testimony justified either the instruction criticized or that given at appellant's request.

Judgments affirmed.

McCOMB, J., and GOULD, J., pro tem., concurred.

MILLER v. JANSEN.

Civ. 12108.

District Court of Appeal, First District,
Division 2, California.

July 16, 1942.

Hearing Granted Sept. 11, 1942.

1. Deeds 🔑194(3)

In suit to quiet title, introduction of deed to defendant, bearing acknowledgment and notary's certification, made "prima facie" showing of due execution of deed, which invoked presumption that it was duly delivered on date of its execution. Civ.Code, § 1055; Code Civ.Proc. §§ 1948, 1951.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie".

2. Deeds 🔑44

The "execution" of an instrument is the subscribing and delivery of it.

See Words and Phrases, Permanent Edition, for all other definitions of "Execution".

3. Deeds 🔑194(1)

The presumption of due delivery arising from proof of execution and certification of instrument is disputable, but must prevail unless controverted by clear, satisfactory and convincing evidence. Civ.Code, § 1055; Code Civ.Proc. §§ 1948, 1951.

4. Evidence 🔑598(1)

"Preponderance of evidence", within statute providing that question of fact is to be determined according to preponderance of evidence in civil cases, means greater weight of credible evidence. Code Civ.Proc. § 2061.

See Words and Phrases, Permanent Edition, for all other definitions of "Preponderance of Evidence".

5. Evidence 🔑89

Where presumption is invoked and evidence is offered to contradict it, presumption is dispelled if contradictory evidence preponderates against presumption and party against whom presumption is invoked satisfactorily meets burden of proof imposed upon him by the presumption itself. Code Civ.Proc. § 2061.

6. Deeds 🔑194(1)

In suit to quiet title, wherein deed to defendant, bearing acknowledgment and notary's certification, was introduced, evidence consisting principally of documents which allegedly disclosed grantor's intention, a year or more prior to date borne by deed, to dispose of grantor's estate without probate did not overcome presumption of due execution and delivery of deed. Civ.Code, § 1055; Code Civ.Proc. §§ 1948, 1951.

7. Deeds 🔑194(1)

The retention of deed by grantor after its execution for purposes of safekeeping is not in itself evidence sufficient to overcome statutory presumption of delivery. Civ. Code, § 1055; Code Civ.Proc. §§ 1948, 1951.

8. Deeds 🔑194(1)

In suit to quiet title, wherein defendant relied on statutory presumption of delivery of deed to defendant found, properly acknowledged and certified, in safe deposit box in envelope bearing witnessed notation that contents of envelope belonged to defendant, such presumption was not overcome by general presumption that deed duly executed and subsequently found in grantor's possession is presumed not to have been delivered. Civ.Code, § 1055; Code Civ.Proc. §§ 1948, 1951.

9. Deeds 🔑194(1)

The statutory presumption of delivery of deed controls over presumption of nondelivery arising from grantor's possession of deed where burden of proof rests on party invoking presumption of nondelivery. Civ.Code, § 1055; Code Civ.Proc. §§ 1948, 1951.

10. Deeds 🔑208(2)

In suit to quiet title, evidence that deed to defendant, properly acknowledged and certified, was found in safe deposit box in envelope bearing witnessed notation that contents of envelope belonged to defendant, established grantor's delivery of deed to herself as "trustee" or "agent" for defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Trustee".

11. Quieting title 🔑44(1)

In suit to quiet title, plaintiff had burden of proving his title and could not prevail on the weakness of defendant's proof.

SPENCE, J., dissenting.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Suit to quiet title by David E. Miller against Robert N. Jansen. From a judgment for plaintiff, defendant appeals.

Reversed and remanded, with directions.

Hill & Hill, of Eureka, E. E. Grant, of San Francisco, and Busick & Busick, of Sacramento, for appellant.

Morrison & Morrison, of Eureka, for respondent.

NOURSE, Presiding Justice.

Plaintiff, as executor of the estate of Meta Rasmussen, deceased, sued to quiet title to real property. The defendant claims title to the property through a deed executed eight months prior to the death of deceased. The plaintiff had judgment upon findings that the deed had not been delivered by the grantor in her lifetime. The appeal is from this judgment.

On May 4, 1938, the grantor executed the deed conveying a life estate to her sister Maria Beck, the remainder to the defendant herein. Maria Beck died some time prior to the commencement of this action. The deed, offered in evidence by the plaintiff, was duly acknowledged before a notary and bears the endorsement: "Signed, Sealed and Delivered in the Presence of Beatrice Myers Winslow." The latter is the name of the notary who took the acknowledgment, and the above endorsement bears her signature. After the death of the grantor this deed was found in her safe deposit box in a sealed envelope bearing the inscription "5–4–38. This envelope and contents is the property of Maria Beck of Ferndale, and Robert N. Jansen, of Manteka, California. (Signed) Meta Rasmussen. Witness B. M. Winslow."

After offering the deed and this envelope in evidence, the plaintiff called two witnesses whose testimony had no bearing upon the case excepting as to the identification of other documents found in deceased's safe deposit box. The defendant rested wholly upon the presumptions hereinafter noted and offered no evidence. At the opening of the trial the plaintiff asked and was granted leave to amend the complaint to change the allegation from one that the deceased "executed" the deed in question to one that she "signed and acknowledged" it.

The appeal is grounded on the contention that the finding that "said instrument was not ever delivered to said Maria Beck, to defendant Robert N. Jansen, or to any other person or put out of the possession or beyond the control of the said Meta Rasmussen," as alleged in the complaint, is not supported by any evidence, and that the presumption of delivery found in section 1055 of the Civil Code, together with the provisions of sections 1948 and 1951 of the Code of Civil Procedure, require a reversal of the judgment.

Section 1055 of the Civil Code provides: "A grant duly executed is presumed to have been delivered at its date." Section 1948 of the Code of Civil Procedure reads in part: "Every private writing, except last wills and testaments, may be acknowledged or proved and certified * * *, and the certificate of such acknowledgment or proof is prima facie evidence of the execution of the writing * * *." Section 1951 of the Code of Civil Procedure reads: "Every instrument conveying or affecting real property, acknowledged or proved and certified, as provided in the Civil Code, may together with the certificate of acknowledgment or proof, be read in evidence in an action or proceeding, without further proof * * *."

[1, 2] In conformity with these Code sections, when the respondent voluntarily offered in evidence the deed with its acknowledgment and certification, he thereby completed a prima facie showing of the due execution of the instrument which invoked the presumption that it was duly delivered upon the date of its execution. This is so because the "execution of an instrument is the subscribing and delivery of it; and * * * a grant duly executed is presumed to have been delivered on its date." 1 Cal. Jur. p. 232. Thus, when the respondent offered as his evidence the acknowledged instrument "Signed, Sealed and Delivered in the Presence of" a witness, he made competent and substantial proof of a conveyance of the property to appellant by a duly executed and delivered deed as of the date subscribed. This proof was supplemented by the additional proof also offered by respondent, showing the grantor's endorsement on the sealed envelope that the deed was the property of the grantees, and by her letter addressed to the appellant in which she stated that she had given her sister Maria a life lease on the property "the house to be yours after her death." (This letter was dated May 2, 1938, whereas the deed was dated May 4th. The only reasonable explanation for the difference in dates is that the deceased made a mis-

take in her letter. From its contents it is apparent that the letter was written after the deed was executed, or at least upon the same day.)

[3-5] The presumption of due delivery arising from the respondent's proof of the execution and certification of the instrument is a disputable presumption, but it is one which must prevail unless controverted by clear and convincing evidence, or, as is frequently said in the decisions, "satisfactory" evidence. Lewis v. Burns, 122 Cal. 358, 362, 55 P. 132; Marple v. Jackson, 184 Cal. 411, 415, 193 P. 940. As to the legal effect, and evidentiary value of presumptions generally, see Westberg v. Willde, 14 Cal.2d 360, 365, 94 P.2d 590. From the cases there cited we understand the rule to be that, unless the presumption is dispelled by clear, satisfactory and convincing evidence, the court or jury is bound to find in accordance with it. But what is meant by "clear, satisfactory and convincing" evidence is a subject upon which there is a wide difference of opinion. See 20 Am. Jur., pages 1103, 1104. Our Code provides that a question of fact is to be determined "according to the preponderance of evidence" in civil cases. Section 2061, Code Civil Procedure. This we understand to mean the greater weight of the credible evidence, and hence when a presumption is invoked and evidence is offered to contradict it, the presumption is deemed to have been dispelled if the contradictory evidence "preponderates" against the presumption and the party against whom the presumption is invoked "satisfactorily" meets the burden of proof imposed upon him by the presumption itself.

With these principles in mind we may look at the evidence which respondent tendered to dispel the presumption of due execution and delivery of the deed. Exhibit No. 1 is a copy of decedent's will executed January 21, 1937. Exhibit No. 2 is a letter dated to two friends November 30, 1936, and apparently referring to an earlier will. Exhibit No. 3 is the letter of May 2, 1938, which the deceased addressed to appellant and in which she told him she had given him the property in suit and had assigned the "pink slip" to her auto which she wanted him to have. Exhibit No. 4 is the pink slip showing assignment by the legal and registered owner of the auto. Exhibit No. 5 is an assignment of shares of stock dated August 19, 1936. Exhibit No. 6 is an assignment or bill of sale of certain personal property to her sister dated August 19, 1936. Exhibit No. 7 is the deed hereinabove referred to dated May 4, 1938. Exhibit No. 8 is the envelope, and its endorsement, in which this deed was enclosed. Exhibit No. 9 is another assignment or bill of sale of certain shares of stock dated January 21, 1937. Exhibit No. 10 contains portions of a letter which have no bearing on the case. This is all the documentary evidence that was offered. No oral testimony relating to the issue of delivery was tendered. The appellant states in his brief that the notary who certified to the execution and delivery of the deed was present during the trial. The respondent correctly states that the record does not show that she was present. It is a fact, however, that she was not called to testify and respondent made no showing why her testimony of the surrounding circumstances was suppressed.

[6, 7] Returning to the exhibits it will be noted that most of the documents were executed a year or more prior to the execution of the deed. Respondent argues that they disclose an intent of the deceased to dispose of her estate without probate. If this were so it would have no bearing on the question here presented. An intention entertained and expressed in 1936 and 1937 is no proof that the same intention was entertained in May, 1938. Shaver v. Canfield, 21 Cal.App.2d 734, 739, 70 P.2d 507. Furthermore, the question of intent was not pleaded in the complaint and no finding was made covering it. The issue pleaded and found as the sole basis of the judgment was that the deed was not delivered. On this question the case is controlled by Thomas v. Fursman, 177 Cal. 550, 554, 171 P. 301; Stewart v. Silva, 192 Cal. 405, 409, 221 P. 191; Drummond v. Drummond, 39 Cal.App.2d 418, 423, 103 P.2d 217; and the subsequent retention of the deed by the grantor for purposes of safekeeping is not in itself evidence sufficient to overcome the statutory proof of delivery. Stone v. Daily, 181 Cal. 571, 581, 185 P. 665; Goodman v. Goodman, 212 Cal. 730, 300 P. 449; Longley v. Brooks, 13 Cal.2d 754, 762, 92 P.2d 394; Shaver v. Canfield, 21 Cal.App.2d 734, 739, 70 P.2d 507.

[8, 9] But the respondent suggests that this presumption should be deemed to have been overcome by the general presumption that a deed duly executed and subsequently found in the possession of the grantor is presumed not to have been delivered. 26 C.J.S., Deeds, § 184, p. 593. There are two answers to the argument, first, that

the proof here did not show exclusive possession, and second, that the presumption of delivery controls over the presumption of non-delivery where the burden of proof rests upon the party invoking the latter presumption.

The undisputed evidence is that the deed was found in the grantor's safe deposit box after her death enclosed in a sealed envelope upon which was endorsed, in the grantor's handwriting, the following: "5-4-38. This envelope and contents is the property of Maria Beck of Ferndale, and Robert N. Jansen, of Manteka, California. (Signed) Meta Rasmussen. Witness B. M. Winslow." This evidence discloses that the grantor did not retain exclusive possession of the deed, but that she openly, and in the presence of a witness, declared it to be the property of the grantees. It discloses further a deliberate intention to pass title at the very time the deed was executed, and that she at least believed and intended that all the formal steps necessary to make a complete and valid delivery had been taken. By this endorsement the grantor made herself a trustee for the grantees to hold the deed for them, and effectively passed out of her hands the control over the deed and any right which she might theretofore have had to recall or revoke it. It is inconceivable that, with this endorsement on the envelope, she would have assumed that she had the right to retake the deed and to either alter or destroy what she had voluntarily certified to be "the property" of the grantees.

[10] The facts of the case bring it squarely within the rule of Cahlan v. Bank of Lassen County, 11 Cal.App. 533, 105 P. 765, where on a similar state of facts it was held that such an endorsement and deposit constituted the holder a trustee. The one essential difference in the facts is that in the Cahlan case the enclosures were certificates of stock where here the enclosure was a deed to real property. But this does not affect the rule of the case. It was sufficient for the purposes of this case if the grantor had made herself a trustee of the deed alone and had assumed to hold the deed in trust for the grantees. She did not need to become a trustee of the real property and did not need to assume to hold that property in trust for the grantees. Thus the statutory requirements relating to the creation of a trust in real property had no application, and it is not necessary that the word "trust" be used to create that relationship. "Any words which indicate with sufficient certainty an intention or purpose to create a trust will be effective in so doing, without the use of the words 'trust' or 'trustee'." Cahlan v. Bank of Lassen County, supra, 11 Cal.App. 540, 105 P. 767. As trustee of the deed alone she took delivery as trustee, or agent, of the grantees. Hence, if we disregard the presumption of due delivery arising from section 1055 of the Civil Code, the proof of a complete delivery for the benefit of the grantees is not only satisfactory and clear but is beyond reasonable doubt.

[11] The question of the effect of conflicting presumptions and when one controls over the other is one of wide dispute. This is discussed in McKay v. McKay, 184 Cal. 742, 195 P. 385, 387, where a judgment of the trial court based upon the presumption that money paid was money due was reversed upon the ground that the presumption was overcome by the presumption that money obtained by a husband from his wife was obtained by undue influence. Section 2235 of the Civil Code. The court there said that the latter presumption prevailed over the former because, for one reason, "[it is] the less general of the two." That rule would seem to apply here because the presumption arising from mere possession is the more general, and of far wider use and application. But a firmer ground for determining the relative weight of the conflicting presumptions in this case is that since the action is one to quiet title in the respondent the burden of proof is on him to prove his title and he can prevail only by proof of his title and not upon the weakness of appellant's proof. Such being the case if these presumptions are of equal weight—the one of delivery balancing the one of non-delivery—there is no substantial evidence to support the finding of nondelivery since the burden rested upon respondent to prove his title by a clear "preponderance" of the evidence. For these reasons there is no basis upon which the trial court, or this court, could reach a conclusion that one presumption was dispelled by the other. The judgment therefore is not supported by a preponderance of the evidence showing title in the respondent and "no right, title, or interest," in the appellant. To the contrary these essential allegations of the complaint upon which respondent's cause of action rests remain unproved and the

only legal conclusion that a court could make upon the record is that the moving party failed to sustain his burden of proof.

The judgment is reversed and the cause remanded with directions to amend the findings of fact and conclusions of law in accord herewith, and to enter judgment for the defendant.

STURTEVANT, J., concurred.

SPENCE, Justice (dissenting).

I dissent. The determinative question on this appeal is whether the evidence was sufficient to support the trial court's finding that the deed had not been delivered. There was no direct evidence on this issue and the trial court's finding was necessarily based upon the indirect evidence which was before it. In my opinion, that evidence was ample to sustain the trial court's finding.

It is undisputed that the deed was found in a safe deposit box over which the deceased had exclusive control. It has been said that this fact alone "supports a presumption that it was never delivered" (Donahue v. Sweeney, 171 Cal. 388, 390, 153 P. 708, 709) and that the burden of proof on the issue of delivery then rests upon the party claiming under the deed. Lample v. McDougall, 103 Cal.App. 779, 781, 285 P. 328. See, also, 26 C.J.S., Deeds, § 184, 593; 16 Am.Juris. 664. The defendant here offered no proof on this issue.

But there were other surrounding circumstances to support the trial court's finding of non-delivery. "Delivery or non-delivery is always a question of fact to be found from the surrounding circumstances of each transaction." Donahue v. Sweeney, supra, 171 Cal. page 391, 153 P. page 710. The deed was found in deceased's safe deposit box with many other papers. Among these papers was a will which purported to dispose of the entire estate of the deceased. There were also the deed, bills of sale and other instruments signed by the deceased purporting to dispose of the same property. The bills of sale covered, among other things, all personal effects as well as money in banks. There were also letters addressed to various persons. In the letters, deceased stated, "I have tried to fix my bit of property, if there should be any left when I pass on where it would do most good"; also "I have tried to fix things so there would be no expense. I hope it works;", also "I have tried to arrange it so it would not have to go through court, but you never know what might be done, so I have also made a will. * * *"

Considering all of these papers together, the trial court was entirely justified in concluding that the deceased had no intention of presently divesting herself of title to any of said property but had the intention of making testamentary disposition thereof to be effective only upon her death. Under such circumstances, the finding that there had been no delivery of the deed should not be disturbed as the intention to make a present transfer is an essential element of a valid delivery. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703; 9 Cal.Jur. 153, § 52.

In my opinion, the judgment should be affirmed.

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53 Cal.App.2d 516

JOLTON v. MINSTER-GRAF & CO. et al.

Civ. 13395.

District Court of Appeal, Second District, Division 3, California.

July 23, 1942.

1. Brokers 🔑38(4)

In action against brokers for breach of duty with result that plaintiff was unable to exercise option to purchase lease of hotel property, evidence sustained findings that plaintiff did not misrepresent the term of the lease and that brokers did not terminate their agency, but that agency continued during life of the option and until the lease was sold by brokers.

2. Brokers 🔑38(4)

In action against brokers for breach of duty with result that plaintiff was unable to exercise option to purchase lease of hotel property, evidence sustained finding that agreement between owners of lease and plaintiff was in fact an option and that plaintiff was not the agent of the owners of the lease and did not represent himself to the brokers as such agent.

3. Appeal and error 🔑205

Defendant could not complain of the exclusion of testimony of a witness on cross-examination where no offer was made to prove such statements by the testimony of other witnesses.

4. Appeal and error ⚿1047(3)

In action against brokers for breach of duty with result that plaintiff was unable to exercise option to purchase lease of hotel property, with defense that plaintiff was merely an agent of owners of the lease to sell the lease, striking testimony whether optionor ever conversed with plaintiff relative to plaintiff's acting as the optionor's agent was not error and was harmless in any event where the answer was negative.

5. Brokers ⚿3

An optionee was not barred from recovery against brokers for breach of duty with result that optionee was unable to exercise an option to purchase a lease of hotel property because he was not a licensed real estate broker where the evidence disclosed that he was buying and selling real estate on his own account, since he was not required to hold a broker's license to engage in business for himself.

6. Landlord and tenant ⚿74

Option to purchase lease of realty for $2,000 was not invalid because of the fact that the lease was subsequently sold for $9,600.

7. Brokers ⚿38(4)

In action against brokers for breach of duty with result that plaintiff was unable to exercise an option to purchase lease of hotel property, evidence was not sufficient to defeat a recovery on the ground that the owner of the leased realty would not have consented to an assignment of the lease, which would have been necessary to a valid transfer of the lease.

8. Brokers ⚿10

Brokers employed by holder of option to purchase lease of realty, to obtain purchasers of the lease, were under duty to act in the highest good faith and to inform the optionee of every fact material to the optionee's advantage.

9. Brokers ⚿38(7)

Where broker employed by holder of option to purchase lease of realty, to obtain purchasers of the lease, fraudulently delayed consummation of the sale of the lease until after option expired, trial court properly awarded optionee damages in the amount of the gross profits that the optionee would have made on the sale of the lease to those who subsequently purchased it from the brokers, after deducting therefrom the amount which the optionee had agreed to pay the brokers for obtaining purchasers.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Nat Jolton against Minster-Graf & Company (a partnership) and others, to recover damages for breach of duty and fraudulent conduct in failing to represent plaintiff diligently and faithfully as his agents in the matter of the sale of property which defendants had been engaged to sell for plaintiff. From a judgment in favor of the plaintiff, defendants appeal.

Judgment affirmed.

Jensen & Jensen, of Los Angeles, for appellants.

Henry S. Cohen and Bernard B. Cohen, both of Los Angeles, for respondent.

SHINN, Justice.

Appeal by defendants from a judgment in an action for damages for breach of duty and fraudulent conduct in failing to diligently and faithfully represent plaintiff as his agents in the matter of the sale of property which defendants had been engaged to sell for plaintiff.

The basis of the judgment, as established by the findings, was that defendants actually found a purchaser and made a sale of the property for the owner but intentionally delayed consummating the sale until an option which plaintiff held to purchase the property had expired, as a result of which conduct plaintiff suffered a loss to the extent of the profit that he would have made had the sale been concluded during the lifetime of his option.

On or about March 21, 1940, one Linck and his wife, owners of a lease upon the Breevort Hotel in Hollywood, executed and delivered to plaintiff an option to purchase the lease, on or before April 27, 1940, for the sum of $2,000 cash. Two days later plaintiff engaged J. D. Minster and Fred Graf, doing business under the name of Minster-Graf & Co. and who are licensed real estate brokers, to act for him as his agents to procure a purchaser at a price of $6,000 and they agreed to accept for their services in the event of a sale $1,000. Defendants advertised the property for sale and early in April they contacted G. N.

Nickson and Elias Sternglanz as prospective purchasers and notified plaintiff in writing of their plans to sell the property to them. On or about the 10th of April plaintiff introduced Graf to Linck and shortly thereafter Graf, Linck, Nickson and Sternglanz had a conference from which plaintiff was excluded, and from the date of the introduction of Graf to Linck defendants would have nothing to do with plaintiff and refused to confer with him regarding their plans to sell the property. On April 15, through defendants' efforts, an agreement was entered into between Nickson and Sternglanz as purchasers and Linck and wife as sellers for the sale of the property to the former for a price of $9,600; $4,800 in cash and $4,800 to be paid at the rate of $100 a month, this agreement providing that it was conditional upon plaintiff's failure to exercise his option to purchase the property on or before April 27. On April 16 defendants obtained from each of the purchasers a check for $250 as deposit and part payment on the purchase. On April 25 Linck wrote to plaintiff reminding him that his option would expire at midnight on April 27 and notifying him that it would not be extended. On or about May 2 the sale to Nickson and Sternglanz was concluded and they received from the owners of the real property a new lease for the unexpired term of the existing lease for the consideration theretofore agreed upon, and defendants received a commission of $1,000 from Linck.

The court found that defendants concealed from plaintiff the fact that they had made a sale of the property to Nickson and Sternglanz and intentionally concealed the fact that they had received a deposit on the sale until plaintiff's option had expired; that they were guilty of fraud, bad faith and deceit in their dealings with plaintiff; that they did not exercise diligence in completing the sale for plaintiff and prevented a consummation of the sale with intent to deprive plaintiff of the profit he would have received had the sale been made during the life of his option, to his damage in the sum of $3,000, for which plaintiff received judgment. His demand for exemplary damages was denied.

[1] As a defense to the action and in attempted justification of their refusal to close the sale as plaintiff's agents, defendants alleged by answer that plaintiff had represented himself to be the agent of Mr. and Mrs. Linck, had misrepresented the terms of the lease, that plaintiff's option had been obtained without consideration, that plaintiff could not have obtained the written consent of the owner of the real property to a transfer of the lease to the proposed purchasers, and that for these reasons defendants, upon learning the true facts, notified plaintiff that they would not represent him further in the transaction. The court found that plaintiff did not make all or any of the representations alleged by the defendants, did not make any representation to them fraudulently, and that defendants did not terminate their agency but that the same continued during the life of plaintiff's option and until the property was sold. The evidence fully sustains these findings.

[2] Much of appellants' argument fails because it is based upon assumed facts consistent with their theories but contrary to the findings of the court. It is contended by appellants that plaintiff did not hold an option from Linck and wife but that while his agreement was, in terms, an option to purchase, it created a mere agency; that the agreement of Linck and wife to sell the property for $2,000 to their agent was unfair to the former; that plaintiff would have made an unfair profit if he had effected the sale for $6,000, and that therefore his contract was unenforceable and worthless. Plaintiff's agreement with Linck and wife was in form an option to purchase the lease for $2,000 cash, duly acknowledged by Linck and wife. There was no evidence that plaintiff was acting as the agent of Mr. and Mrs. Linck other than the testimony of defendants that plaintiff stated to them that he was so acting, which was denied by plaintiff. In a letter of April 16, 1940, written to defendants, signed by Nickson, Sternglanz and Mr. and Mrs. Linck, and another letter written by Mr. Linck to plaintiff April 25, 1940, the agreement was referred to as an option which would expire at midnight, April 27. The court found upon ample evidence that the agreement was an option and that plaintiff was not the agent of Mr. and Mrs. Linck and did not represent himself to defendants as such agent.

[3, 4] Appellants complain of certain rulings in the exclusion of testimony, all relating to the question whether plaintiff

was representing Mr. and Mrs. Linck as their agent and so represented to defendants. The court admitted all the conversations between plaintiff and defendants on that subject but refused to allow defendant on cross-examination of plaintiff to question him whether he had listed the property for sale with other brokers and had made statements to other brokers that he was the agent of plaintiff. No offer was made to prove such statements by the testimony of other witnesses. We see no error in these rulings. Defendants asked Mr. Linck if he had ever had a conversation with plaintiff relative to plaintiff's acting as his agent. The witness answered that he had not, the answer was stricken, and the ruling is now assigned as error. The ruling was proper and obviously harmless, considering the answer.

[5] It appeared that plaintiff was not a licensed real estate broker although he had been formerly licensed as a salesman. It is contended that he could not lawfully have received compensation in his transaction with Mr. and Mrs. Linck unless he had been a licensed broker. The evidence was that he had been buying, selling and building on real estate on his own account, and the finding of the court that he was not acting as the agent of Mr. and Mrs. Linck but only as an optionee dealing on his own account is conclusive on this point. He was not required to hold a broker's license to engage in business for himself.

Appellants' next contention is that defendants had a right in good faith to terminate their agency for just cause and thereafter to enter into transactions involving the matters embraced within the agency on their own account. The weakness of this argument is that the court found from abundant evidence that defendants had no just cause for terminating their agency, did not terminate it, and that they disregarded and violated their obligations to their principal in bad faith.

[6, 7] The next contention is that plaintiff's evidence failed to show that the sale could have been made to Nickson and Sternglanz by defendants as agents of plaintiff; also that it failed to show that plaintiff could have enforced his option against Mr. and Mrs. Linck, and further that plaintiff's evidence did not show that the owner of the real property would have consented to an assignment of the lease to Nickson and Sternglanz, which consent would have been necessary to a valid transfer of the lease to them by Mr. and Mrs. Linck. These contentions are without merit. It is true that plaintiff had an option to purchase property for $2,000 which Mr. and Mrs. Linck subsequently sold for $9,600, but that fact alone would not render the contract invalid and apparently it was considered by Mr. and Mrs. Linck to be binding upon them. Their letters which we have mentioned would bear this construction. Defendants questioned a witness named A. Brigham Rose as to whether he had ever expressed his willingness or unwillingness to consent to a transfer of the lease to plaintiff and the answer of the witness was "Definitely yes" which answer was stricken out. Mr. Rose was an attorney at law and held a power of attorney which would have authorized him to act in the matter on behalf of the owner of the realty. A sufficient answer to the contention that plaintiff's evidence did not show his ability to obtain the consent of the lessor is that a new lease was executed to Nickson and Sternglanz, as lessees, at the rental and for the unexpired term of the lease under option to plaintiff. It conclusively appears that the new lessees were regarded as satisfactory tenants and the fact that they entered under a new lease instead of under an assignment of the existing lease is quite immaterial. There is no reason to believe that the same new lease could not have been obtained by negotiations through plaintiff, as optionee, as well as by negotiations through the Lincks.

[8, 9] The law governing the case is clear. Defendants were plaintiff's agents and were under duty to act in the highest good faith. Gammon v. Ealey & Thompson, 1929, 97 Cal.App. 452, 458, 275 P. 1005, and cases there cited. It was their duty to inform their principal of every fact material to the advantage of the principal. McPhetridge v. Smith, 1929, 101 Cal.App. 122, 139, 281 P. 419; Orfanos v. California Insurance Co., 1938, 29 Cal.App.2d 75, 80, 84 P.2d 233. The court found from ample evidence that defendants were guilty of the concealments and breaches of duty toward plaintiff which we have noted and that plaintiff was thereby damaged to the extent of $3,000, consisting of the gross profit he would have made upon a sale of the property to Nickson and

Sternglanz of $4,000, after deducting therefrom $1,000 which he had agreed to pay defendants. We find no error in the manner in which the trial was conducted nor in the result reached.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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53 Cal.App.2d 406

MOBLEY et al. v. RICHFIELD OIL CORPORATION.

Civ. 3036.

District Court of Appeal, Fourth District, California.
July 14, 1942.

1. Landlord and tenant 🔑28(1)

In landowner's suit to cancel lease of gasoline station, evidence sustained finding that oil company secured execution of lease by fraudulent representations and failed to carry out oral promises to paint the service station and erect electric signs which promises were made as an inducement to the execution of the lease.

2. Contracts 🔑270(1)

A prompt disaffirmance is necessary to the maintenance of an action to cancel an instrument.

3. Landlord and tenant 🔑112(1)

Generally, a party having knowledge of a breach of a covenant in a lease has no right to continue to accept benefit to which he would not be entitled if he desired to exercise his right of forfeiture.

4. Cancellation of instruments 🔑32

The principles applicable to a suit for the termination of a contract because of a subsequent breach giving rise to the right of forfeiture are not controlling in a suit involving the setting aside of a contract on the ground that it was never legally entered into.

5. Landlord and tenant 🔑31

Where benefits received by landlord after discovery of fraud by which oil company obtained lease on gasoline station were not such as landlord would not otherwise be entitled, landlord did not "waive" right of rescission by continuing to receive such benefits.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Contracts 🔑99(3)

In suits for rescission of a contract for fraud, defendant relying on a claimed waiver of the right of rescission has burden of proving waiver by clear and convincing evidence.

7. Landlord and tenant 🔑31

In landowner's suit to cancel lease of gasoline station to oil company for fraud in procuring execution of lease where, upon discovery of fraud, landlord immediately objected and thereafter sought to bring matter to adjustment, and was lulled by acts of oil company, and oil company was in no way misled as to landlord's intention, and landlord received no benefit to which she was not otherwise entitled in attempting to keep the matter in status quo until the case could be tried, landlord did not "waive" right to rescind by continuing to perform and accept benefits under lease.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Joseph Mobley and others against Richfield Oil Corporation to rescind and cancel a written lease for fraud and for declaratory relief. From a judgment for plaintiffs, defendant appeals.

Affirmed.

H. L. Dunnigan, of Los Angeles, for appellant.

N. E. Youngblood, of Los Angeles, for respondents.

BARNARD, Presiding Judge.

This is an action to rescind and cancel a written lease on the ground that it had been fraudulently obtained, and for declaratory relief. The main defense relied upon was a claimed waiver by the plaintiffs of the right of rescission through continued compliance, after discovery, with the terms of the lease and a sublease and the payment of certain amounts thereunder. The court found in all respects in favor of the plaintiffs finding, among other things, that the lease had been obtained by fraudulent representations, that the plaintiffs immediately after discovery had demanded the cancellation of the lease contract, and that the plaintiffs had acted as ordinary and reasonably prudent persons under the circumstances and had not waived their rights to a rescission and cancellation. From a judgment canceling the lease, the defendant has appealed. The property in question was owned by Nannie E. Mobley as her separate property and she will be referred to as the respondent.

In 1929, the respondent acquired certain lots in Mojave upon which were located a motel, a cafe and a service station, all of which she has since owned and operated, the service station portion being also used for a number of purposes in connection with the cafe and motel. From 1929 to 1940, the respondent sold Richfield products in the service station under various contract arrangements. On June 15, 1938, she entered into a purchase and sale contract with the appellant under which she purchased gasoline and other products and under which she made a profit of 5 cents a gallon on gasoline, 1 cent per gallon of which was in the form of a rebate given to her by the appellant. This contract was to expire on July 30, 1940. Shortly before that date the parties began negotiations for a new agreement. Appellant's agent informed the respondent that because of certain policies of the company a new agreement similar in form to the old one could not be entered into; that it would be necessary for her to lease the service station to the appellant; that the appellant in turn would sublease the service station to the respondent's son, Roger White, who was working for his mother on a salary; that the son would simply be a "dummy"; that the change in the form of agreement was a matter of form only; that she could continue to operate the service station in the same manner as under the previous contract; and that she would receive the same profit. A ten-year lease from the respondent to the appellant and a short time sublease from the appellant to Roger White were executed on July 19, 1940, the entire transaction being carried on between the appellant and the respondent. The respondent did not read the lease, being assured by one Williams, an agent of the appellant, that there was no need for her to read it; that it was exactly as represented to her, and that it was the same contract as she then had except for the length of the term and Roger White's position as her "dummy."

In practical effect, the new arrangement differed from the one it was to succeed mainly in that under the new arrangement the profit which the respondent was to receive was divided into two classes, one in the way of rental under the lease and the other as profit on the sale of products. An important difference, however, which was unfavorable to the respondent and not disclosed to her, was that under the new arrangement the rental under the sublease and the purchase price of gasoline and other products purchased from appellant by the respondent were to be paid for monthly in cash, with only a slight reduction from retail prices, and the larger part of the rental coming to the respondent under the main lease was not to be paid until the end of each year.

After the execution of the leases the respondent continued in possession and in operation of the service station exactly as she had previously done, paying the appellant for merchandise as she had been doing under the previous contract, and her son continued to work for her on a salary. The station continued under her sales tax permit, the same as before. The respondent first learned of the true nature of the contract on or about November 6, 1940, when the appellant through one Goddard demanded an additional payment of $225.71 for merchandise and rentals under the sublease and threatened to evict Roger White as subtenant. The respondent was then given a copy of the leases for the first time. Immediately, she demanded that an adjustment be made so that the contract would conform with her understanding of the terms and asked Goddard what he would advise. Goddard advised her to pay the $225.71 and stated that he would take the matter up with the appellant and have it adjusted to her satisfaction. The respondent paid the money and, when nothing was done, made a number of efforts to get in touch with Williams, appellant's agent who had concluded the original negotiations, asking him to come out and adjust the matter. He finally came out in December and promised to adjust the matter and return, but he never came back. The respondent consulted an attorney in January, 1941, and in an effort to adjust the matter the time for a settlement of the controversy was extended. No settlement having been reached a formal notice and demand for cancellation and rescission was served and this action was filed on February 11, 1941.

[1] The appellant states as one of its grounds for reversal that the evidence does not support the court's findings that the execution of the lease was procured by a fraudulent representation, that the appellant had failed to paint the service station as it orally agreed to do, and that it had failed to erect certain electric signs in accordance with an oral promise made as an inducement to the execution of the lease. While some portions of the testimony are set forth in the opening brief no argument is made in this regard and the reply brief indicates an abandonment of this ground. In any event, the point is without merit as the evidence amply sustains the findings.

[2, 3] The appellant earnestly contends, however that it must be held as a matter of law, that the respondent waived any right of rescission she might have had by continuing, after discovery of the fraud in November, 1940, to comply with appellant's demands and by receiving rent, purchasing gasoline, paying rent on the sublease, and paying for the merchandise in accordance with the terms of the lease and sublease of July 19, 1940, as the bills therefor were presented by the appellant. In addition to the general rule that a prompt disaffirmance is necessary, the appellant relies on such cases as McGlynn v. Moore, 25 Cal. 384; Jones v. Maria, 48 Cal.App. 171, 191 P. 943; Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P.2d 71, 80 A.L.R. 453, in which it has been held that the acceptance of rent after full knowledge of the breach of a covenant to build or a covenant to drill for oil, unless the covenant breached was a continuing one, constitutes a waiver of the right to declare a forfeiture and terminate the lease. The general principle involved in such cases is that a party having knowledge of the breach has no right to continue to accept benefits to which he would not be entitled if he desired to exercise his right of forfeiture.

[4-6] In our opinion, different principles are applicable under the circumstances here appearing and the cases relied upon by appellant are not controlling. This action involves the setting aside of a contract on the ground that it was never legally entered into, rather than the termination of a contract because of a subsequent breach giving rise to the right of forfeiture. While forfeitures are not favored, relief from established fraud is another matter. Moreover, the respondent did not continue to receive benefits arising from the contract and to which she could not otherwise be entitled, under the rules and principles properly applicable to the situation which here appears. It has been said that a claimed waiver of the right of rescission for fraud "ought to be watched with the utmost strictness, and to stand only upon the clearest evidence as an act done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place." See Green v. Duvergey, 146 Cal. 379, 80 P. 234, 239. In such a case the burden is on the party asserting and relying on a waiver to prove it by evidence which does not leave the matter doubtful or uncertain. Aronson v. Frankfort, etc., Ins. Co., 9 Cal.App. 473, 99 P. 537; Mott v. Cline, 200 Cal. 434, 253 P. 718.

In Munson v. Fishburn, 183 Cal. 206, 190 P. 808, it was held that the payment of assessments on stock after discovery of the fraud did not necessarily bar a right of rescission. In French v. Freeman, 191 Cal. 579, 217 P. 515, 519, where the trial court had found that the plaintiff had not waived the right of rescission, the court said: "The question of waiver or nonwaiver was one of fact for the trial court to pass upon, and the acts or conduct which defendant claims constituted said waiver were the evidence to be considered in determining the ultimate fact of waiver or nonwaiver. * * * Whether or not a person has ratified a voidable contract, or elected to affirm it rather than to rescind it, depends primarily upon his intention, and this is shown by his declarations, his acts, or his conduct, which are matters of fact. The question is therefore a question of fact for the determination of the jury." In Sutton-Watts v. Sarnow, 80 Cal.App. 91, 251 P. 654, 655, a payment was made after notice of rescission and another payment after the action was filed. The court there said: "Respondent's intention to rescind was clearly manifested by the prompt service of notice to that effect, which was followed and confirmed by the commencement of suit, and we think that the payments mentioned, standing alone, cannot be reasonably construed as a revocation of the legal course already adopted by her to rescind the sale, nor did the fact that they were made mislead appellant or operate to respondent's benefit, but, as remarked by the trial court, were doubtless made by respondent under the fear that if she defaulted in that respect she would become more deeply involved." "'In the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been mislead, to his prejudice, into the honest belief that such waiver was intended or consented to.'" Craig v. White, 187 Cal. 489, 202 P. 648, 652; 27 R.C.L., p. 908.

In Switzler v. Robert A. Klein & Co., 94 Cal.App. 410, 271 P. 367, 370, it was held that there was no waiver of a right to rescind where on discovery the plaintiffs employed an attorney to investigate the facts and to take up with the defendant the matter of adjustment and settlement. The court said: "The record shows that no considerable time elapsed while these negotiations were being carried on, and instead of being construed as a waiver of any rights to rescind, we think the effort to secure settlement without litigation should be looked upon favorably." It was also claimed in that case that the plaintiffs had waived the right to rescind by making one of the monthly payments on the purchase price of the property after the discovery of the fraud and during the period of attempted settlement. In that regard the court said: "While the payment of the purchase price has in many cases been held to indicate a ratification, it cannot be held that keeping up monthly payments for a short period of time during the pendency of negotiations seeking a settlement, is such a ratification as to bar rescission. Such payments, under the circumstances, constituted merely facts or acts to be considered by the trial court in determining whether the plaintiffs had or had not ratified the transaction." It was further held in Curtis v. Title Guarantee, etc., Co., 3 Cal.App.2d 612, 40 P.2d 562, 42 P.2d 323, that the making of payments after discovery is not necessarily a waiver of rescission where fears have been lulled by representations or promises of the other party.

[7] In the instant case, it appears that the respondent protested and demanded an adjustment immediately after discovery of the fraud; that she was advised by an agent of the appellant to pay the amount claimed and he promised to have the matter adjusted; after considerable effort the respondent secured an interview with Williams, the agent of appellant who had been in charge when the contract was executed; when he finally appeared he promised to adjust the matter; after a not unreasonable time an attorney was consulted with a further attempt to adjust the matter; and notice and demand for rescission was then given, followed by the filing of this action. The respondent was attempting at all times to bring the matter to an adjustment, she was lulled by the acts and promises of the appellant, and the appellant was in no way misled as to her intentions. If she had not kept up the rentals on the sublease, paid for the merchandise furnished her and made the payments demanded from her, she might well have feared that she would lose control of the property in question. She might then have been in an intolerable position in view of the relation and connection of the leased property to the other portions of her business enterprise. As the court specifically found, the appellant had not painted the buildings, erected the signs or made any other expenditures, and it was in the identical position it had been in before the lease contract was executed. The appellant was not mislead or prejudiced and the respondent received no benefit to which she was not otherwise entitled, by her efforts to keep the matter in status quo until the case could be tried. Under the principles and rules to which we have referred it cannot be held, as a matter of law, that respondent waived her right to rescind and the court found to the contrary upon rather clear and convincing evidence.

The judgment is affirmed.

MARKS, and GRIFFIN, JJ., concurred.

53 Cal.App.2d 413

RICHFIELD OIL CORPORATION v. MOBLEY.

Civ. 3014.

District Court of Appeal, Fourth District, California.

July 14, 1942.

Pleading ⟹93(2)

In lessee's action against lessor for forcible entry and detainer in taking possession of premises allegedly abandoned by subtenant, who was lessor's son, lessor could properly plead invalidity of lease as a defense and in the alternative, if lease were held valid, that lessor was in possession under a power of attorney from her son and such defenses were not inconsistent.

◆

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Richfield Oil Corporation against Nannie E. Mobley in forcible entry and detainer for purpose of securing possession of certain premises used for a service station. From a judgment for defendant, plaintiff appeals.

Affirmed.

H. L. Dunnigan and Louis J. Irving, both of Los Angeles, for appellant.

N. E. Youngblood, of Los Angeles, for respondent.

BARNARD, Presiding Judge.

This is an action in forcible entry and detainer for the purpose of securing possession of certain premises used for a service station. It involves the same parties and property as those involved in Mobley v. Richfield Oil Corporation, Cal. App., 128 P.2d 105, this day decided. The case referred to was tried on May 21–22, 1941, and taken under submission. Before it was decided and on June 10, 1941, a notice and demand for possession was served by this plaintiff, followed by the filing of this action on June 20, 1941.

The complaint alleged, among other things, that on or about June 1, 1941, Roger White abandoned his sublease from the plaintiff and abandoned the leased premises and that thereafter the defendant Nannie E. Mobley, with her agents and employees, unlawfully entered and took possession of the premises in question and refused to deliver possession thereof to the plaintiff on demand therefor. The answer of Mrs. Mobley alleged that on July 11, 1940, she had signed a lease of this property to the plaintiff; that she had been induced to sign this lease by fraudulent representations; that she had brought an action for rescission of said lease, which had been tried and was then under submission; that for these reasons the plaintiff had no right to sublet the premises to Roger White; and that at all times named in the complaint she had been in the sole and exclusive possession of the premises, as sole owner thereof. In a separate answer, it was denied that Roger White had abandoned the leased premises and alleged that on June 1, 1941, the said Roger White was duly inducted into the United States Army, where he still is, and that on May 9, 1941, the said Roger White had executed and delivered to this answering defendant his general power of attorney, and that said defendant has held and now holds said demised premises as agent and attorney-in-fact for said Roger White.

This action was tried on September 8, 1941, after judgment had been entered in the other case, canceling the original lease and decreeing that this plaintiff had no further interest in the property. The court found herein that the defendant Nannie E. Mobley is, and at all times here involved has been, the owner of and entitled to the possession of the premises in question, and that the plaintiff is not and at no time has been entitled to possession of said premises or any part thereof. From a judgment in favor of Mrs. Mobley the plaintiff has appealed.

It is not contended that the findings are not sustained by the evidence. The sole contention here made is that the allegation of the answer, to the effect that Mrs. Mobley is in the sole and exclusive possession of the property in her own right, and the further allegation in a separate answer that she is holding the property under a power of attorney from her son Roger White, together with the testimony of Mrs. Mobley in connection with these allegations, are all so inconsistent that the trial court should not have believed any of her testimony. It clearly appears that the allegations in the answer were intended to set up the invalidity of the lease as a defense to the appellant's cause of action and as an alternative defense in the event it should be held that appellant's lease was valid, that she was holding possession under a power of attorney as agent for her son. We see nothing improper in these inconsistent defenses, under the circumstances, and anything appearing on this appeal is immaterial so long as the judgment in the other action remains in force and effect.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

53 Cal.App.2d 467

JENSEN v. JONES MILLER, Inc., Ltd. et al.

Civ. 13535.

District Court of Appeal, Second District, Division 1, California.

July 20, 1942.

Hearing Denied Sept. 14, 1942.

1. Appeal and error 🔑533(1), 717

Where trial judge's memorandum, prepared subsequent to decision, did not constitute a part of the judgment roll, and appeal was on judgment roll alone, memorandum did not constitute a part of the "record" under the statute and appellate court would not consider findings with the memorandum, but would assume absence of conflict between memorandum and findings, notwithstanding that memorandum was inserted in and certified as part of judgment roll. Code Civ.Proc. § 670, subd. 2, § 953.

See Words and Phrases, Permanent Edition, for all other definitions of "Record".

2. Appeal and error 🔑717

Though an appellate court may, for certain purposes, examine a memorandum prepared by trial court to assist counsel in preparing findings and framing judgment, the reviewing court will not consider the memorandum to defeat the judgment.

3. Appeal and error 🔑907(3)

Where appeal was before appellate court on judgment roll alone, appellate court was required to presume that evidence was introduced supporting the findings without any objection by appellant and that the facts so found were treated by all parties as issues properly before the court at the trial. Code Civ.Proc. § 670, subd. 2, § 953.

4. Principal and agent 🔑78(4)

If a fiduciary relationship has been established and the agent's acts are questioned by his principal, the agent has burden to prove that he acted for principal with utmost good faith and that he made full disclosure of all facts relating to the attacked transaction.

5. Appeal and error 🔑1071(6)

In principal's action, on ground of fraud, against brokers and agent employed by them, for secret profits in sale of real estate, where trial court's findings negatived the allegations of the complaint and further findings would have been adverse to principal, principal could not complain because there were no findings exonerating brokers and agent of alleged constructive fraud by taking advantage of a fiduciary relationship. Civ. Code, § 1573.

6. Appeal and error 🔑1071(6)

In principal's action on ground of fraud, against brokers and agent employed by them, for secret profits in sale of real estate, where trial court's findings negatived actual fraud and further findings would have been adverse to principal, failure to adopt more complete findings was not reversible error, in view of rule that findings should be construed to uphold, rather than to defeat, a judgment. Civ.Code, § 1573.

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Katherine P. Jensen against Jones Miller, Incorporated, Limited, and others, to recover commissions paid defendants upon a sale of real estate. From a judgment for defendants, plaintiff appeals.

Affirmed.

Cryer & Jones, of Los Angeles, for appellant.

Harry Sutton, of Hollywood, Charles R. Morfoot, of Los Angeles, and George W. Zent, of Hollywood, for respondents.

WHITE, Justice.

This is an action by a principal against her brokers to recover secret profits and commissions paid upon a sale of real estate. By her complaint plaintiff alleged that on or about June 20, 1939, she and her co-trustee authorized defendants Jones Miller, Inc., Ltd., and Harry Miller, as brokers, to procure a purchaser for certain described real property at a minimum price of $35,000 or such higher price as said defendants might obtain, and orally agreed that in the event that such purchaser was procured through the efforts of the named defendants, the latter would be paid a commission of five per cent of the amount of the agreed selling price. That thereafter, on or about July 15, 1939, defendants just named employed defendant L. L. Hullet to assist them in finding a purchaser for said real property and agreed with said defendant Hullet that in the event he should procure a purchaser he would receive as commission for his services the entire amount of the selling price of the property in excess of $34,125. The complaint further charged that defendants did not at any time report to plaintiff or her co-trustee the employment of said Hullet and that she and her co-trustee had no knowledge of the employment or the terms thereof, and that such employment was wholly without authority from plaintiff or her co-trustee. It was then alleged that on July 24, 1939, defendant Hullet procured one Jennie Grawoig as a purchaser of the property at an agreed price of $36,000 and obtained from said Jennie Grawoig a deposit of $1,000 on the purchase price; that on the same day defendants placed the transaction in escrow. The complaint further charged that defendants did not ever report to plaintiff or her co-trustee the sale to said Jennie Grawoig, but that on the contrary the defendants "deliberately and with intent and purpose to deceive and to defraud plaintiff and her co-trustee, concealed and withheld from said trustees all knowledge and information relative to said sale to said Jennie Grawoig at and for said price of $36,000."

Plaintiff further alleged in her complaint that in furtherance of the alleged plan and scheme to deceive her and her co-trustee and to conceal from them the sale to Jennie Grawoig, the defendants caused one Charles E. Grimes and Wilma Grimes, his wife, to be named as vendors of the property in escrow and caused to be opened another escrow wherein plaintiff and her co-trustees were named as vendors of the property and the Grimes' named as vendees at a sale price of $35,000. Then followed allegations that no report of such proceedings was ever made by defendants to plaintiff or her co-trustee, and that neither they nor the Grimes' had ever been consulted or had any knowledge of said escrow or the use of their names therein. The complaint then charged that on July 28, 1939, without disclosing to plaintiff or her co-trustee any information whatever relative to any pending sale to Jennie Grawoig, defendants "falsely and fraudulently reported to plaintiff and to her co-trustee that they had procured a buyer for the above described property, to wit, one Charles E. Grimes, at a price of $35,000; that said sum of $35,000 was the best price they could obtain for the property, and the best price for which it could be sold under prevailing conditions"; that at the time this last mentioned information was transmitted to plaintiff and her co-trustee the defendants "well knew that said Grimes was not the purchaser of said property, at any price; that he was a mere 'dummy' being used by defendants in furtherance of their scheme to conceal from their principals" (plaintiff and her co-trustee) "all knowledge of the proposed sale of the property to Jennie Grawoig at a price of $36,000, and said defendants well knew that the simulated sale to Grimes * * * was solely for the purpose of placing the title to the property in Grimes to be immediately deeded to Jennie Grawoig."

By her complaint plaintiff further alleged that relying upon the representations of defendants that Charles E. Grimes was the buyer of the property and that the sum of $35,000 was the best price for which the property could be sold, plaintiff and her co-trustee accepted and approved the sale upon the terms and conditions aforesaid and executed their deed to said property in favor of said Grimes. It was further alleged that the intent and purpose of defendants' activities in the use of the two escrows was to enable them to collect and obtain for themselves, and that they did collect and retain, in addition to the regular commission of five per cent, the difference between the amounts of the respective selling prices of the two sales, to wit, the sum of $1,000. In the prayer of her complaint plaintiff asked that defendants be required to account to her for the selling price of the property; that she have judgment against defendants for the sum of $1,750 paid to them as commission and for the sum of $1,000 allegedly taken and retained without authority by defendants out of the "true selling price of the property."

Defendants Jones Miller, Inc., Ltd., and Harry Miller filed an answer denying that they or either of them entered into any plan or scheme of concealment as charged in the complaint, or that the sale to Grimes was a simulated sale, or that they ever made any sale of the property in question to Jennie Grawoig for the price of $36,000 or any other price. These answering defendants also denied participation in any double escrow as alleged in the complaint or any double escrow for the purpose of obtaining a sum greater than the sum of $1,750 which they claimed was due them as a commission pursuant to their agreement with plaintiff and her co-trustee. These defendants specifically denied that they obtained any secret profit or any portion of the sum of $1,000 received in excess of the agreed sale price of $35,000.

The defendant Hullet filed a separate answer in which he denied participation in any scheme or plan for the purpose of defrauding plaintiff and alleged that he acted in good faith and made no concealments, statements or representations to any parties in connection with the transaction other than as was reflected in the escrows through which the transactions were consummated.

[1-3] The cause was tried before the court sitting without a jury and resulted in a judgment for the defendants, from which judgment plaintiff prosecutes this appeal. No reporter's transcript has been filed, and this appeal comes before us on the judgment roll alone. Following trial of the action the judge presiding thereat wrote a "memorandum for judgment" apparently for the purpose of assisting counsel in the preparation of findings and the framing of a judgment. The clerk included this memorandum among the documents contained in the purported judgment roll. We are invited by appellant to consider the findings of the court in the light of the aforesaid memorandum of the trial judge, it being contended that such memorandum becomes a part of the record by reason of the provisions of section 953 of the Code of Civil Procedure, as amended in 1919, St.1919, p. 290, and particularly the following language appearing therein:

"* * * If it appear that there is any paper or record in the custody of the clerk of the trial court which was before the trial court but which is not included in the record on appeal, and an examination of such paper or record will assist in a determination of the appeal on its merits, the court in which the appeal is pending may, on motion of either party, or on its own motion, require the production of a certified copy of such paper or record, and the same shall thereupon be deemed a part of the record on appeal."

The provision just quoted has no reference to a document such as the memorandum prepared by the trial judge in the instant case. In the first place, such document was never "before the trial court," nor did it in any manner influence his decision. It was prepared subsequent to the rendition of such decision and simply as an aid to counsel, as heretofore pointed out, in drawing the findings and judgment. There are several other reasons why appellant's contention cannot be sustained. In the first place, the statute (Code Civ. Proc. § 670, subd. 2) clearly specifies what documents constitute the judgment roll, and manifestly the memorandum above mentioned is not one of the documents specified in the statute. Nor is any additional standing given to such a document because it is inserted in the judgment roll and certified as a part thereof. Sutcliffe v. Sutcliffe, 220 Cal. 398, 401, 31 P.2d 195. Though in some instances an appellate court may examine such a memorandum for certain purposes, it is well established that a reviewing court will not give consideration to such a memorandum for the purpose of defeating the trial court's judgment. Under a record such as is here presented, we must assume the absence of any conflict between the "memorandum for judgment" and the findings as made and signed by the trial judge; and if there be any such conflict, we must presume that the memorandum was changed to conform to the findings as signed. Wittman v. Wittman, 32 Cal.App.2d 184, 186, 89 P.2d 419. Furthermore, this appeal being before us on the judgment roll alone, we must presume that evidence was introduced which would support the findings as made without any objection on the part of appellant, and that the facts so found were treated by all parties as issues properly before the court at the trial. A different situation might be presented if the entire record were before this court, but not otherwise. First Trust & Savings Bank v. Warden, 18 Cal.App.2d 131, 133, 134, 63 P.2d 329.

[4-6] The main and most important point urged by appellant is that while the findings are adverse to plaintiff as to the issue of actual fraud, in that the court found that the defendants did not conspire together to defraud plaintiff, there are no findings which operate to exonerate defendants of the charge of constructive fraud predicated on the claim that defendant brokers took advantage of a fiduciary relationship to mislead plaintiff to her prejudice. Civ.Code, § 1573. We are not unmindful of the universally recognized rule that where a fiduciary relationship has been established and the acts of an agent are questioned by his principal, the burden is cast upon the agent to prove that he acted with the utmost good faith toward such principal and that he made a full disclosure of all the facts relating to the transaction under attack. Schwarting v. Artel, 40 Cal. App.2d 433, 105 P.2d 380. But in the instant case the court found, and, we must assume, upon sufficient and competent evidence, that defendants Jones Miller, Inc., Ltd., and Harry Miller at no time employed defendant Hullet to aid or assist them in finding a purchaser for or making a sale of plaintiff's property, but on the contrary found that defendant Hullet was at all times acting as "an independent dealer and contractor." Further, the court found that defendant corporation, acting through its secretary, defendant Harry Miller, agreed to sell the property to Hullet or his nominee for a net price of $34,125, "which said net price was arrived at by deducting one-half of a 5 per cent commission of $35,000, or the sum of $875, from said price of $35,000." The court found that there was no conspiracy or plan between defendants to prejudice plaintiff, and a summarization of the court's findings indicates that it was found that plaintiff agreed with defendant corporation and defendant Harry Miller to sell the property for $35,000 and pay them $1,750 as commission—in other words, to sell for a net consideration to her and her co-trustee of $33,250; that defendant Hullet, acting for himself and not in concert with his co-defendants, provided a buyer who would not pay $35,000, but would pay $34,125, and that defendant corporation and Harry Miller waived one-half of their commission, thereby effecting a sale of the property and paying to plaintiff and her co-trustee the amount agreed upon by them as consideration for such sale, viz., the sum of $33,250. True, defendant Hullet had a buyer for the property who would pay $36,000, and Grimes was used as a "dummy"; but the court found that defendant corporation and Harry Miller were not parties to such transaction, had no knowledge thereof, and never profited thereby. Under the court's findings Hullet never was the agent of plaintiff and her co-trustee, while he, as well as defendant corporation and defendant Harry Miller, was absolved of participation in any conspiracy or plan to effectuate a sale of the property under circumstances which would enrich plaintiff's agents beyond the terms of the agreement between such agents and plaintiff principal. It was also found that none of the defendants was guilty of any concealment, misrepresentation, fraud or deception, or of receiving any unauthorized profit in connection with the sale of the property. In short, the findings negative each and every material allegation contained in the complaint. If a specific finding upon an allegation incident to the charge of constructive fraud or deception has been omitted, plaintiff may not complain for further findings, if adopted by the court, upon any of the issues of this case would be bound to be adverse to appellant. Remembering the rule that findings should be construed to uphold rather than to defeat a judgment (Ensele v. Jolley, 188 Cal. 297, 302, 204 P. 1085), it follows, under the circumstances here present, that the failure to adopt more complete findings is not reversible error. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

53 Cal.App.2d 789

OWINGS v. LAUGHARN.

Civ. 13278.

District Court of Appeal, Second District, Division 3, California.

Aug. 5, 1942.

Hearing Denied Oct. 1, 1942.

1. Appeal and error 🔑1008(1)

In wife's action to quiet title against husband's trustee in bankruptcy, inconsistencies and discrepancies in testimony, offered to establish that fund with which property was purchased was wife's separate property, presented a question for trial court whose acceptance of the testimony was conclusive on appeal.

2. Bankruptcy 🔑179
Fraudulent conveyances 🔑49(1)

Where one who holds property as trustee for another under a resulting trust conveys to that other the property so held, neither the creditors nor the trustee in bankruptcy of the grantor can attack the conveyance.

3. Trusts 🔑86

Under statute providing that, when a transfer of real property is made to one person and the consideration therefor is paid by or for another, a trust is presumed, the presumption is rebuttable; the question being as to the intention of the parties at the time. Civ.Code § 853; Code Civ.Proc. § 1961.

4. Appeal and error 🔑1008(1)
Bankruptcy 🔑303(5)

In wife's action to quiet title against husband's trustee in bankruptcy, evidence that property which husband conveyed to wife was purchased in husband's name but that it was paid for with money constituting wife's separate property sustained trial court's determination that presumption that husband held title as trustee under a resulting trust in favor of wife had not been overcome and the determination was binding on appellate court. Civ.Code § 853; Code Civ.Proc. § 1961.

5. Trusts 🔑43(1)

In wife's action to quiet title against husband's trustee in bankruptcy, where wife claimed that realty conveyed to her by husband was purchased in husband's name but was paid for with money constituting wife's separate property, the trust was properly proved by parol evidence even though it was regarded as an express trust orally agreed upon where husband did not object to its validity because of absence of writing but carried it out. Civ.Code § 852.

6. Trusts 🔑55

Even though husband held title to realty under an express trust orally agreed upon, where husband did not object to its validity because of absence of writing but carried it out, husband's trustee in bankruptcy could not assert its invalidity on that ground. Civ. Code § 852

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action to quiet title by Ida M. Owings against Hubert F. Laugharn, trustee in bankruptcy in the matter of bankruptcy of Christopher T. Owings, bankrupt, in case No. 34500-C of records of the United States District Court for the Southern District of California, Central Division, wherein the defendant filed a cross-complaint. From a judgment for plaintiff defendant appeals.

Affirmed.

For prior opinion of District Court of Appeals, see 125 P.2d 605.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

Zuckerman & Stein, Edward K. Zuckerman, and Arthur Edmund Stein, all of Los Angeles, for appellant.

John C. Kleber, of Los Angeles, for respondent.

SHAW, Justice pro tem.

Plaintiff brought this action to quiet her title to four lots, alleged to be her separate property, against defendant as the trustee in bankruptcy of plaintiff's husband. Defendant filed a cross-complaint in which he alleged that a deed of these lots, made to plaintiff by her husband, was fraudulent and void as against creditors of the husband, and sought to have his title as trustee quieted against plaintiff and her husband. Judgment was rendered in favor of plaintiff on both complaint and cross-complaint, from which defendant appeals.

[1] Plaintiff and her husband were married more than forty years before the trial, lived in Nebraska from 1903 to 1921, and have lived in California since 1921. While they lived in Nebraska the plaintiff acquired some real property which she and her husband testified was her separate property, although the title stood of record

in her husband's name. This property was sold for $3,100 at or before the purchase of any of the property now in question. The plaintiff's husband also gave her, back in Nebraska, the profit, amounting to $2,800, on the sale which she negotiated of some property belonging to him. She also worked at dressmaking and other things, under an agreement with her husband that what she made should be her own property. Altogether she had more than $7,000. Defendant criticizes the testimony by which these facts are shown and asks us to reject it, as far as it goes to establish plaintiff's ownership of funds which were her separate property. But, while this testimony contains some inconsistencies and discrepancies, these presented only a question for the trial court, whose acceptance of the testimony is conclusive here.

In 1919 plaintiff's husband came to Los Angeles on a visit, apparently preliminary to their move out here, and saw some property which he liked, being two of the lots here in question, on which was a house. On his return to Nebraska he told plaintiff of it; he sent some of her money out here to hold the deal, with her consent, and later the property was conveyed to him, the entire purchase price being paid from plaintiff's separate funds, above described. A year or two later plaintiff bought three more lots, taking the title in her husband's name and mortgaging those first bought for enough money to make the down payment. Then she sold one of these three lots for enough to pay the price of all three, leaving all the lots clear of encumbrance.

[2] It is plaintiff's contention that, although the title to all the lots above named was taken in her husband's name, yet, since she paid the entire price, a trust resulted in her favor and he held the property merely as her trustee. It is further contended that, assuming the existence of this trust, the conveyance which he made to her was merely in execution of this trust and for that reason it was valid as against this defendant and the creditors whom he represents. As defendant tacitly concedes, where one who holds property as trustee for another under a resulting trust conveys to that other the property so held, neither the creditors nor the trustee in bankruptcy of such grantor can attack the conveyance. Nishi v. Downing, 1937, 21 Cal.App.2d 1, 3, 67 P.2d 1057; Zeller v. Knapp, 1933, 135 Cal.App. 122, 128, 26 P.2d 704; Bank of Cottonwood v. Henriques, 1928, 91 Cal. App. 88, 95, 266 P. 836; Murphy v. Clayton, 1896, 113 Cal. 153, 159, 45 P. 267.

Defendant denies, however, that there was such a trust as plaintiff claims. Section 853 of the Civil Code reads as follows: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." In line with this presumption it has been held: "Where a husband purchases property with money which is part of the separate estate of his wife and takes title in his own name, equity regards the purchase as made in trust for the wife. From such facts alone there is no presumption of a gift from the wife which would change the status of the property to that of the community, the presumption being that it continues to be the separate property of the wife held in trust for her by her husband." Zeller v. Knapp, supra, 135 Cal. App. 126, 127, 26 P.2d 706. To the same effect, see Title Insurance and Trust Company v. Ingersoll, 1908, 153 Cal. 1, 5, 94 P. 94; Title Insurance and Trust Company v. Ingersoll, 1910, 158 Cal. 474, 481, 111 P. 360; Shaw v. Bernal, 1912, 163 Cal. 262, 271, 124 P. 1012; Harris v. Hensley, 1927, 83 Cal.App. 283, 288, 256 P. 832.

[3, 4] The presumption declared by section 853 is rebuttable, the question finally being as to the intention of the parties at the time. Lezinsky v. Mason Malt W. D. Co., 1921, 185 Cal. 240, 251, 196 P. 884; Code Civ.Proc. sec. 1961. In addition to the facts above stated, the record contains the following testimony regarding the understanding between plaintiff and her husband for the purchase of the first two lots. The plaintiff testified:

> "Well, I told him to take the title in his name. He knew the people that were to buy the place, I didn't, and I was sent out here by the doctor expecting to live not longer than six years, and said, 'Take the title in your name, and if anything happens to me, you won't have to go through a lot of court procedure; and if I get well, you can give them back to me if I ever want them.'"
>
> "Q. What was the understanding with reference to how Mr. Owings should hold the title to that, in trust for you, or otherwise? A. Why, just in trust for me; if I ever wanted it, he would give it back to me, if I ever got well."

On the same subject plaintiff's husband testified:

"Q. What, if anything, was said between you and she regarding the taking of the legal title to that property at the time the purchase was made and payments were made?"

"Q. By Mr. Kleber: Tell the court what the agreement was between you and the other party as to how this title was to be taken. A. She suggested the title to be out in my name on account of her own health and the health of the daughter; we had the best doctors that you have here and in Nebraska at that time, we had a very good name there, I believe—

"Q. Never mind that. What was done? A. She had the title put into my name.

"Q. Did you make any agreement with her about transferring to her if she asked for a transfer? A. Yes, that was specifically stated, that at any time if she wanted it transferred into her own name, I should do it, I would do it."

Regarding the second purchase of three lots the testimony is:

By plaintiff, "A. I borrowed this money, made the down payment, and told Mr. Campbell to put it in my husband's name, to put it in trust for me."

"Q. What did you say was your agreement with your husband when these Lots 71, 72 and 73 were bought, as to taking the title in your name? Was there any agreement?"

"Q. By Mr. Kleber: Did you have any agreement? A. Yes, I told him when I bought them I was going to take them in his name, just the same as 104 and 105 were."

Defendant concedes that under the circumstances of this case the ownership of the second group of lots is the same as that of the first group. In some respects the testimony quoted seems inconsistent with the presumption above stated, but we cannot say it is so wholly irreconcilable with the presumption that the latter is dispelled, or overcome as a matter of law. The trial court undoubtedly considered this testimony and weighed it against the presumption; its conclusion that the presumption was not overcome was one of fact, which is binding upon us.

[5, 6] The trust here was properly proved by parol evidence. Even though it be regarded as an express trust, orally agreed upon, and in this respect running counter to the provisions of section 852 of the Civil Code requiring a writing for that purpose, plaintiff's husband, who might have objected to its validity on that ground, has, instead, carried it out. The defendant is not, thereafter, in position to assert its invalidity on that ground. Polk v. Boggs, 1898, 122 Cal. 114, 116, 54 P. 536; Nishi v. Downing, supra, 1937, 21 Cal.App. 2d 1, 3, 67 P.2d 1057. Indeed, oral testimony to show a trust other than that resulting by operation of law has been held improper. Root v. Kuhn, 1921, 51 Cal.App. 600, 603, 197 P. 150.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concur.

CALIFORNIA CASUALTY INDEMNITY EXCHANGE v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 12130.

District Court of Appeal, First District, Division 2, California.

July 25, 1942.

Hearing Granted Sept. 21, 1942.

1. Workmen's compensation 🔑1487, 1753

Findings that a particular employee sustained injury arising out of employment and in the course of employment are sufficient, but, when sufficiency of evidence to sustain the findings is raised, the inquiry is whether the evidence is sufficient to fulfill all conditions of the act. St.1937, p. 269, § 3600.

2. Workmen's compensation 🔑609

In determining whether employee's injury is compensable as "proximately caused by the employment", the place of the injury is not the sole test, and there must be some connection between the injury and the employment other than mere fact that employment brought the employee to the place of injury. St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximately Caused by the Employment".

3. Workmen's compensation ⚷609

Under Workmen's Compensation Act providing for compensation for injuries to claimant "arising out of and in the course of his employment", where injury is "proximately caused" by employment, it must be shown that the injury was the natural or probable result of the employment or of the conditions thereof. St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of and in the Course of Employment".

4. Workmen's compensation ⚷609

In order for injury to be compensable as being "proximately caused by the employment", there must be some causal connection between the employment and the injury in the sense that by reason of the employment there was an unusual or additional exposure of the employee to the kind or character of hazard and danger which caused the injury. St.1937, p. 269, § 3600.

5. Workmen's compensation ⚷667

Where office employee, who had left employer's premises to engage in personal errand, caught her heel in her skirt after she was about to alight from her automobile after returning to the employer's premises to finish her work, and sustained injury when she fell from the automobile to employer's private driveway, the employee's injury was not one "arising out of the employment" and was not "proximately caused by the employment", and was therefore not compensable. St.1937, p. 269, § 3600.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Employment".

◆

Proceeding under the Workmen's Compensation Act by the California Casualty Indemnity Exchange, insurance carrier, against the Industrial Accident Commission and Cecelia E. Cooper, employee, to annul the workmen's compensation award made by the commission in favor of the employee.

Award annulled.

Burbank & Laumeister, of San Francisco, for petitioner.

Everett A. Corton and Dan Murphy, Jr., both of San Francisco, for respondents.

SPENCE, Justice.

Petitioner, as the compensation insurance carrier of Lathan Company, seeks the annulment of an award made by the respondent commission in favor of Cecelia Cooper, an employee of said Lathan Company.

The facts are undisputed. Said employee had worked for her employer as a bookkeeper many years. Her duties were performed entirely within the building of her employer. Said building was set back from the street on a corner lot and a private driveway of the employer ran in a semicircular fashion from one street to the other and in front of the entrance to said building. Said employee's normal working hours were from 8 a.m. to 4:30 p.m. She had the implied consent of her employer however to go upon short personal errands if she desired to do so.

On the day of the accident said employee drove her car to work in accordance with her usual custom. Said car belonged to her and was not used in any way for the purpose of her employer's business. On said day she desired to have said car greased while she was at work and she telephoned to a service station and requested such service. Said automobile was picked up and was taken to the service station for that purpose at 8:30 a.m. At about 4 p.m. she noticed that the car had not been returned. She telephoned the service station and, as the attendant was alone at that place, it was agreed that he would deliver the car to her and that she would drive him back to the service station. This was done and said employee then drove her car back and parked it on the private driveway on her employer's premises. As she was about to alight from her car and return to her employer's building to finish her work for the day she caught her heel in the hem of her dress and fell from the car to said private driveway and broke her wrist.

Upon the foregoing undisputed facts the respondent commission found that "Cecelia Cooper, while employed as a bookkeeper on October 27, 1941, at South San Francisco, by Lathan Company, Inc., sustained injury arising out of and in the course of her employment when she fell and broke her left wrist. * * *" The question of the sufficiency of the evidence to sustain said findings and the award based thereon is the question presented in this proceeding to review said award.

Section 3600 of the Labor Code, St.1937, p. 269, provides: "Liability for compensation * * * shall * * * exist against an employer for any injury sustained by his employees arising out of and in the course of the employment * * * in those cases where the following conditions of compensation concur: * * * (b) Where, at the time of the injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment. (c) Where, the injury is proximately caused by the employment * * *."

[1] It has apparently been the practice of the respondent commission to confine its findings under said section to findings with respect to whether the particular employee sustained injury (1) "arising out of" his employment and (2) "in the course of" his employment. In other words, no specific findings are ordinarily made following the wording of all the specified concurrent conditions found in subsections (b) and (c) of the section above quoted. We believe, however, that the concurrent conditions mentioned in said subsections are merely definitive of the preceding terms "arising out of" and "in the course of" the employment, and that findings in the ordinary form above mentioned are sufficient. When the question of the sufficiency of the evidence to sustain the findings is raised, however, the inquiry then is whether the evidence is sufficient to fulfill all of said conditions.

Petitioner herein contends that the evidence was insufficient to sustain the findings, express or implied, with respect to any of the above mentioned conditions specified in said section 3600 of the Labor Code. We need not discuss the evidence in its relation to all of these conditions as we believe it is clear under the authorities that the material finding herein that said employee's injury was one "arising out of" her employment finds no support whatever in the evidence and that the award must therefore be annulled.

The respondent commission takes the position that "since the evidence in this case shows that the employee was injured on the employer's premises to which she had returned for the purpose of finishing her work, she is entitled to compensation." In other words, respondent commission thereby necessarily takes the position that the place of the injury is the sole test under the circumstances without regard to the cause of the injury. This position is obviously untenable as it totally ignores the express conditions of the section that the injury must be one "arising out of" the employment and must be one "proximately caused" by the employment.

We believe that the position so taken is the result of a misconception by the respondent commission of the effect of certain decisions which have sustained awards to injured employees where the employees had been injured on the employer's premises, or in close proximity thereto, while going to or coming from their actual work. The general rule commonly known as the going and coming rule, which ordinarily denies compensation to employees for injuries sustained while going to and coming from their actual work, has certain well recognized exceptions, and one of these so-called exceptions is illustrated by the decisions upon which the respondent commission relies. But none of these decisions has ignored the cause of the injury or made the place of the injury the sole test.

[2, 3] That the place of injury cannot be made the sole test under said section is well illustrated in the case of Storm v. Industrial Acc. Comm., 191 Cal. 4, 214 P. 874. The court there said, on page 6 of 191 Cal., on page 875 of 214 P.: "An injury, in order to be compensable under the terms of the Compensation Act (St.1917, p. 831), must have been sustained by the employee 'arising out of and in the course of the employment,' and must have been 'proximately caused by the employment.'" It was conceded there that the injury had been sustained on the employer's premises and "in the course of" the employment but the award was annulled upon the ground that it was not one "arising out of" the employment and was not one "proximately caused by the employment." On page 7 of 191 Cal., on page 875 of 214 P., the court said: "To render an injury compensable there must be discernible some relationship of cause and effect between the employment and the injury. 'It is not sufficient for a workman to say, "I should not have been injured unless I had been where I was and doing the work which I was employed to do."' Cooper v. Northeastern Ry. Co., 9 B.W.C.C. 129. It must be shown, in addition, that the injury was a natural or probable result of the employment, or of the conditions thereof. Such would seem to be the meaning of the requirement that it must have been 'proximately caused by the employment.' This case would have been

no different, on principle, if the employee had been injured by a stray bullet coming from the scene of an attempted hold-up, several blocks away. Under those circumstances it would scarcely be claimed that the injury was proximately caused by the employment."

[4] The necessity of the existence of a causal connection between the employment and the injury is further illustrated by decisions in Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744; California C. I. Exch. v. Industrial Acc. Comm., 190 Cal. 433, 213 P. 257; and Lumbermen's M. C. Co. v. Industrial Acc. Comm., 134 Cal.App. 131, 25 P.2d 22. In the last mentioned case, the court said at page 134 of 134 Cal.App., at page 23 of 25 P.2d, "There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured party to the kind or character of hazard and danger * * * which caused the injury. The injury must have its origin in a risk connected with the employment, and must have flowed from that source as a rational and natural course."

In treating the subject of "Parking Cars on Employer's Premises," Campbell in his work on "Workmen's Compensation," Vol. 1, p. 198, cites certain cases from other jurisdictions in support of the rule in those jurisdictions but states, "A contrary and possibly better rule requires the premises in some way to cause the injury." He cites in support of the "better rule," Herrera v. Hartford Acc., etc., Co., 17 I. A. C. 28 and Industrial Comm. v. Enyeart, 81 Colo. 521, 256 P. 314. In both of said cases the employees were injured while on the employers' premises but the cause of the injuries in each case was a defect in the employee's automobile which the employee was driving at the time. In the Herrera case, the respondent commission held that "* * * although at the time of the injury applicant was within the actual confines of the employer's premises, the injury did not arise out of the employment since the injury was the result solely of a defective instrumentality brought to the employer's premises by the applicant herself for her own purposes, in no way related to the employment."

The respondent commission cites and relies upon the holdings or language used in the following decisions: Bountiful Brick Co. v. Giles, 276 U.S. 154, 48 S.Ct. 221, 72 L.Ed. 507, 66 A.L.R. 1402; Judson Mfg. Co. v. Industrial Acc. Comm., 181 Cal. 300, 184 P. 1; Globe Ind. Co. v. Industrial Acc. Comm., 208 Cal. 715, 284 P. 661; Makins v. Industrial Acc. Comm., 198 Cal. 698, 247 P. 202, 49 A.L.R. 411; Starr Piano Co. v. Industrial Acc. Comm., 181 Cal. 433, 184 P. 860; and Pacific Elec. Ry. Co. v. Industrial Acc. Comm., 137 Cal.App. 245, 30 P.2d 444. To these may be added Freire v. Matson Navigation Co., 19 Cal.2d 8, 118 P.2d 809. These cases illustrate the principle that an injury may be compensable even though the employee may not be actually at work with his tools at the time the injury is sustained. They further support the proposition that an employee may be said to be "in the course of the employment" under certain circumstances when he is going to or coming from his work and is at a point either on the employer's premises or in such close proximity thereto that the place of injury should be treated in the same manner as though it were a part of the employer's premises. But none of said cases involves the question before us here. In all of said cases, it was assumed or held that if the employee could be said to be "in the course of his employment," then the cause of the injury was one "arising out of" the employment and the injury was "proximately caused by the employment." Such causes were generally causes having to do with the condition of the premises or the condition of the traffic thereon. The dangers and risks involved were risks "connected with the employment," and the injuries "flowed from that source as rational and natural cause." In other words there was "some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured party to the kind and character of hazard and danger * * * which caused the injury."

[5] The authorities cited by the respondent commission do not sustain their position here. While the employee was admittedly injured on the employer's premises, the accident occurred at a time when she was not actually performing her duties but at a time when she was returning from a purely personal errand to resume the performance of said duties. She was in her

own automobile and the cause of the injury was the catching of her heel in the hem of her skirt while she was still in said automobile. Said injury was in the same category as an injury resulting from a defective automobile brought upon an employer's premises for the employee's own purposes. In such cases there is no causal connection between the employment and the injury under the authorities above cited. We therefore conclude that the employee's injury here was not one "arising out of the employment" nor was it one "proximately caused by the employment." Such injury was therefore not compensable.

The award is annulled.

NOURSE, P. J., and STURTEVANT, J., concurred.

53 Cal.App.2d 399

CAMPBELL v. BIRCH et al.

Civ. 2626.

District Court of Appeal, Fourth District, California.

July 14, 1942.

Hearing Denied Sept. 10, 1942.

1. Corporations 🔑1

A corporation's acts and obligations cannot be legally recognized as those of particular person or vice versa, unless it appears that corporation was not only influenced and governed by such person, but that there is such unity of interest and ownership between them that their individuality or separateness has ceased, and that adherence to fiction of corporation's separate existence would sanction fraud or promote injustice.

2. Corporations 🔑1

Tenants' transfer of all or practically all of their property to corporations in exchange for all stock thereof *held* not to show that corporations were tenants' alter ego and authorize direct levy of execution on property to satisfy judgments against tenants for unpaid rents, though they subsequently assigned stock to certain persons as security for debts, especially in view of corporations' large indebtedness to others.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Roy Campbell, as trustee, against A. Otis Birch and wife for a declaratory judgment holding assets transferred by defendants to corporations in exchange for all stock thereof subject to levy of execution on plaintiff's judgments against defendants for unpaid rents. Judgment for defendants, and plaintiff appeals.

Affirmed.

Syril S. Tipton, of Los Angeles, for appellant.

George Edward Acret, of Los Angeles, for respondents.

Chas. L. Nichols, of Los Angeles, amicus curiae, for respondents.

BARNARD, Presiding Justice.

This is an action for declaratory relief. It is another of the actions which arose out of a breach of the covenants of a ninety-nine-year lease and the formation of certain corporations as described in the case of Campbell v. Birch, 19 Cal.2d 778, 122 P.2d 902. In that case, a claim for damages on the ground that a modification of the terms of the lease had been secured through fraudulent representations that the stock of the corporations had been pledged to a Miss Minter as security for a large existing indebtedness was upheld. In the instant case, it was sought, without alleging fraud and without seeking to set aside any transfers, to have it held that the assets which had been transferred to the corporations in exchange for all of the stock thereof, as distinguished from the corporate stock itself, were subject to the levy of an execution on judgments obtained by the plaintiff for unpaid rentals under the ninety-nine-year lease. The plaintiff's theory seems to have been that upon pleading and proving that all or nearly all of the property owned by Mr. and Mrs. Birch had been transferred to the corporations and that all of the stock of the corporations is owned by them he was entitled to a judgment declaring that an execution on his judgment might be levied directly upon the assets held by the corporations.

The complaint alleges a failure to pay the rent under the lease after April 1, 1937, and the recovery of judgments amounting to $14,321.42 against A. Otis Birch and M. Estelle C. Birch; that Mr. and Mrs. Birch owned 100 per cent of the stock of the Birch Holding Company, a corporation.

which in turn owned 100 per cent of the stock of Birch Ranch and Oil Company and of the Birch Securities Company; that Birch Ranch & Oil Company owns an 87½ per cent copartnership interest in Birch-Royer Oil Company, a copartnership, and also owns about 71 per cent of the copartnership interest of Birch Oil Company, another copartnership; that A. Otis Birch operates, governs and has complete charge of the operations of all of the corporations and copartnerships above mentioned; that prior to October 15, 1934, Mr. and Mrs. Birch owned all of the properties now owned by the above named Birch corporations; that the Birch Holding Company, Birch Ranch & Oil Company and Birch Securities Company were organized for the express purpose of owning and operating the properties of Mr. and Mrs. Birch; and that these three corporations, the Birch Oil Company and the Birch-Royer Oil Company are the double or alter ego of Mr. and Mrs. Birch. A second cause of action sets up a claim for attorney's fees. The prayer is that the three corporations and the two copartnerships be declared to be the alter ego of the Birches, that all properties and assets of the three corporations and the two copartnerships be declared to be the property and assets of Mr. and Mrs Birch, and that said property be subject to levy in satisfaction of the plaintiff's judgments, and for attorney's fees as against Mr. and Mrs. Birch.

This case was tried while the abovementioned case of Campbell v. Birch was pending on appeal. Very little evidence was received, aside from the introduction of certain exhibits, and about thirty pages of the typewritten transcript cover all of the testimony. The court found, among other things, that the defendant A. Otis Birch has had, and now has, no authority in connection with the operation or control of the defendant corporations other than as a manager subject to the control of the directors of each of said corporations; that following the sale of the stock of these corporations to Stanley C. Benson in 1935 the said Benson named the directors of the corporation and for a period of about 2½ years "said defendants were not shown by the evidence to have any authority at all"; that each of said corporations and copartnerships are engaged in separate businesses and each has different creditors separate and apart from the credit and liability of the Birches and separate and apart from each other; that the total amount of such indebtedness of said corporations and copartnerships is at least $800,000; that at the time of the organization of the three corporations Mr. and Mrs. Birch transferred to said corporations various portions of their property, not including certain real property of the value of $200,000; that subsequently the Birches lost this real property by foreclosure but a portion thereof was acquired by Hollymont Corporation and later acquired by the Birch Ranch & Oil Company as a part of the consideration when Birch repurchased from Benson the stock of the Birch Holding Company in November, 1937; that in 1935, the Birches transferred and assigned to Benson all of the stock of the Birch Holding Company, subject to a pledge thereof to secure an indebtedness of $155,000 to Lulu M. Minter and further subject to a pledge of said stock to Anna M. Conaway securing an indebtedness of $76,000; that subsequently the Birches reacquired from Benson all of the said stock of the Birch Holding Company subject to the indebtedness to Minter and Conaway, all of which continues to exist; that none of the said corporations or copartnerships is the alter ego of the other defendants or copartnerships or of the Birches, or either of them; that the defendant corporations and copartnerships have never had any dealings with the plaintiff or with the property involved in the ninety-nine-year lease; and that at the time these corporations and copartnerships were formed the Birches were not in default in the payment of rentals under the lease and no such default was contemplated. As conclusions of law, the court found that these corporations and copartnerships are not the alter ego of the Birches and that none of the property or assets of the corporations or copartnerships is subject to levy of execution by the plaintiff. A judgment to the same effect was entered and the plaintiff has appealed.

No question is here involved as to who was originally liable on the ninety-nine-year lease or who is liable now. No attempt has been made to assign that lease either with reference to the liability for rent or as to the possession of the leased property. The corporations and copartnerships, as such, have had nothing to do with the lease or the leased property. No attempt was here made to set aside any transfers as having been fraudulently made. The appellant contends that an allegation of fraud is to be implied from the allegation that these companies were the alter ego of the Birches. This is not necessarily true insofar as the matter is here presented, and no specific amendment was offered during the trial although appellant's attention was called to the deficiency in the complaint. The appellant's contention that he was unduly restricted in the introduction of evidence is without merit and the record shows that no real attempt was made to enlarge or change the issues during the trial and there was no offer of proof in support of any such theory. It was stipulated, and the court found, that there was no past due indebtedness in connection with the ninety-nine-year lease at the time the corporations were formed. There is evidence, and the court found, that these corporations owed more than $800,000 to other creditors for which the Birches were not directly liable and there is no contention that these were not legitimate debts. The appellant argues in his briefs that all of this indebtedness is secured, but there is no evidence to that effect in the record. While the court found that there was an existing indebtedness of the Birches in favor of Lulu M. Minter, the Supreme Court has held otherwise in Campbell v. Birch, supra. While the court found that there was an existing indebtedness to Anna M. Conaway, secured by a pledge of the stock of these corporations, we can find no evidence of this other than a statement of such a situation at that time contained in the 1935 agreement between Birch and Benson, which agreement was introduced in evidence. Disregarding immaterial matters, the controlling question here is whether, in an action of this nature, evidence to the effect that all or practically all of the property of the Birches was transferred to these corporations in exchange for all of the stock thereof compels the conclusion that these corporations were the alter ego of these individuals within the meaning of that doctrine, with the further effect that the property so transferred to the corporations may be directly levied upon by the appellant as the property of the individuals and in disregard of the corporate entities and debts.

[1] There is no question that a separate corporate entity may be disregarded in a proper case and upon sufficient pleading and proof. The general principles governing such a situation are thus stated in Minifie v. Rowley, 187 Cal. 481, 202 P. 673, 676: "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice." The doctrine has usually been applied for the purpose of imposing liability under a contract upon a person or corporation on account of an obligation ostensibly made by the one but which, in equity, should also bind the other. Examples are to be found in the cases of Shea v. Leonis, 14 Cal.2d 666, 96 P.2d 332, and Marr v. Postal Union Life Ins. Co., 40 Cal.App.2d 673, 105 P.2d 649. It may be assumed that the doctrine of alter ego could be applied in a proper case where all of the person's property is transferred to a corporation organized for the purpose of receiving the property in order to prevent the collection of a judgment obtained against the transferor. The appellant cites Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 50 P.2d 106, as being such a case. While the theory of alter ego was there applied, it appeared that the assets in question were transferred to the corporation without any consideration therefor. This circumstance justified equitable relief under the established rule pointed out in Minifie v. Rowley, supra.

[2] In the instant case, there was no attempt to get rid of the assets by transferring them without consideration to another entity. The assets in question were transferred to the corporations in exchange for all of their stock which was still held by the Birches, who still owned and held property of the same value as they had before. Of itself, this change in the form of the assets neither affected the obligation of the lease nor the enforcement thereof and there is nothing in that, standing alone, which would in any way make it inequitable to recognize the separate entities of the corporations or sanction a fraud or promote injustice. The assets, although

changed in form, were still in the hands of the same individuals and still subject to levy on execution.

If as now claimed in the briefs but not alleged in the complaint, this corporate stock was improperly assigned as security to Miss Minter that matter would present another question as to the right of the Birches to prefer that creditor, but is immaterial upon the question as to whether the identity of the corporations should be ignored as presented in this action. Moreover, the assignment to Miss Minter was held invalid in Campbell v. Birch, supra. It is further argued that this stock was also assigned as security to Mrs. Conaway. Assuming this to be true, it furnishes no reason for ignoring the corporate entities in the absence of proper pleading and proof.

A further consideration is the matter of the large obligations incurred by these corporations and the rights of its other creditors. While the appellant had a right to levy upon the Birches' interests as stockholders in the corporations and sell the same at execution, it is a far different matter to say that he has the right, under such a showing as was here made, to take the assets of these corporations away from their creditors on the theory that the separate entity of the corporations should be ignored. In Nighbert v. First Nat. Bk. of Bakersfield, 26 Cal.App.2d 624, 79 P.2d 1105, 1110, this court said: "The doctrine has been employed * * * in order to permit the plaintiff to recover against the party actually responsible, but it * * * should not be applied where its effect would be to permit a stockholder to seize assets properly belonging to a corporation and thereby deprive other stockholders and creditors of something properly belonging to the corporation and in which they were entitled to share." Similar considerations are applicable here.

The Birches, at least after the cancellation of the Benson agreement in 1937, owned and possessed property of exactly the same value as that possessed by them before the organization of the corporations. Assuming that complete unity of interest and ownership appears as between the Birches and the corporations, the second requisite of the rule in question is lacking. Not only does it not appear that a continued recognition of the separate existence of the corporations would sanction a fraud or promote injustice, but it more probably appears that to ignore the separate entity of the corporations would work an injustice as to the creditors of the corporations. So far as disclosed by the record before us, the appellant has his remedy by proceeding against the property admittedly owned by the Birches, their corporate stock, and no reason appears for thus preferring the appellant over the creditors of the corporations.

As we view the record before us, it would have supported no other conclusion and judgment than that drawn and entered by the trial court. The appellant now complains because at the hearing of his motion for a new trial the trial court refused to allow him to reopen the case for further evidence and refused to allow him to file an amended complaint which was then proffered. The case had previously been reopened for further evidence, no substantial reason for a still further delay was given, the offered complaint was still not sufficient and no abuse of discretion appears.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

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53 Cal.App.2d 458

POWELL v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N. et al.

Civ. 6733.

District Court of Appeal, Third District.
California.

July 18, 1942.

Hearing Denied Sept. 14, 1942.

1. Banks and banking 🔑169

Where warehouse receipts for grain were delivered by lienholder to bank with directions to collect and remit certain amount to lienholder and balance to grain owner, but bank applied balance on an outlawed judgment held by it against grain owner, assignee of grain owner was entitled to recover from bank on theory of conversion where grain owner was neither a customer nor depositor of the bank and the instruction for "collection and remittance" did not create relationship of debtor and creditor between bank and grain owner. Civ.Code, § 3054.

2. Banks and banking 🔑169

Where warehouse receipts for grain were delivered by lienholder to a bank for "collection and remittance" to lienholder and to grain owner, bank did not acquire a lien under the statute on the proceeds due grain owner where owner was neither a customer nor a depositor of the bank and funds were not held in the relationship of debtor and creditor but only as "trustee" or "agent" for the fulfillment of instructions. Civ.Code, § 3054.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Trustee".

3. Banks and banking 🔑156

Where a bank receives commercial paper for "collection" merely, the proceeds become property of the collecting bank and the relationship of debtor and creditor arises between it and the owner but where such paper is received for "collection and remittance", the relationship of principal and agent is created and the bank becomes an agent until paper is collected and then becomes a trustee of the proceeds.

See Words and Phrases, Permanent Edition, for all other definitions of "Collection" and "Collection and Remittance".

4. Banks and banking 🔑169

Where warehouse receipts for grain were delivered by lienholder to the bank with instructions to sell the grain and after paying a specified sum to lienholder to "remit direct to L. M. Miller" balance of proceeds, the bank custom of crediting an account and creating relationship of debtor and creditor had no application, since the instruction made the bank an "agent" for collection and a "trustee" of the proceeds.

5. Banks and banking 🔑175

Where warehouse receipts for grain were delivered by lienholder to a bank with instructions to collect and remit amount due to lienholder and balance to grain owner, but bank applied balance on its outlawed judgment against grain owner, latter's action against bank and lienholder for conversion of money was properly dismissed as to lienholder since latter was not a party to bank's misappropriation.

Appeal from Superior Court, Yolo County; J. G. Bruton, Judge.

Suit by Robert Powell against Bank of America National Trust & Savings Association and another for conversion of money. From a judgment for defendants, plaintiff appeals.

Affirmed in part and reversed in part with directions.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for appellant.

G. D. Schilling, D. Bianco, Louis Ferrari, and C. H. White, all of San Francisco, Rich, Weis & Carlin, of Marysville, and Hugh L. Preston, of Ukiah, for respondents.

PER CURIAM.

The plaintiff, Robert Powell, has appealed from a judgment which was rendered against him in a suit for conversion of money. The lienholder of certain warehouse receipts for a quantity of grain delivered them to the Bank of America National Trust and Savings Association, at Woodland, with written instructions to sell the grain to designated dealers for a specified sum of money, and to pay said lienholder from the proceeds of sale the sum of $240.09, and to remit the balance directly to the owner, L. M. Miller. The bank sold the grain and paid the lienholder said sum of $240.09, as directed, but refused to remit to the owner any portion of the balance of the proceeds of sale. On the contrary, the bank retained and applied the balance of said money toward the satisfaction of a judgment, upon which the statute of limitations had expired, which the bank held against L. M. Miller and others. It does not appear that L. M. Miller was, at any time, a customer or a depositor in that bank. After the application of that fund to the satisfaction of the judgment, and the refusal of the bank to pay the same to L. M. Miller, he assigned and transferred his claim therefor to J. M. Miller and Robert Powell. This suit for conversion of the funds was then commenced.

On account of the death of one of the plaintiffs, J. M. Miller, which occurred before the judgment was rendered, the defendant bank moved this court to dismiss the appeal, on the ground that the cause abated as to the interest of J. M. Miller, upon his death, for failure to substitute in his place another party plaintiff. Thereupon, the plaintiff Powell, who in the meantime had acquired from the estate of Mr. Miller his undivided interest in that chose of action, moved this court to substitute himself to also represent that interest in the suit. Those motions were presented to this court separately from the appeal on its merits. Both motions were determined adversely to the bank, in an opinion which was recently filed (Miller v. Bank of America, etc., 52 Cal. App.2d 512, 126 P.2d 444), to which reference is made for a more particular statement of facts in that regard.

From the record we have gleaned the following facts: Mr. L. M. Miller was the owner of 1,667 sacks of barley which he deposited in a warehouse in Yolo county, for which he held warehouse receipts, subject to a lien to secure the payment of $240.09 owing to Chico Production Credit Association. By agreement between L. M. Miller and the Chico association, these warehouse receipts were delivered to the Bank of America at Woodland on August 14, 1936, with written directions to sell the barley to Gill & Gill, grain dealers, for the sum of $2,186.89, to pay the lienholder, Chico Production Credit Association, the sum of $240.09, and to remit direct to L. M. Miller the balance of the purchase price. The written directions contained the following language:

"You are authorized and requested to deliver these warehouse receipts to Gill and Gill, grain dealers, when you have collected for our account the amount of $2,186.89. From this amount you are to remit to this association the sum of $240.09, plus interest at the rate of 3¢ per day from August 17 to the date of our receipt of payment.

"The balance of the proceeds are to be remitted direct to L. M. Miller, Knights Landing, California. The above collection is to be net to this association."

At the time when these warehouse receipts were sent to the bank for sale of the grain and collection and remittance of the proceeds pursuant to the foregoing written directions, the bank was the owner and holder of a judgment which was rendered against L. M. Miller and others, April 5, 1928, for the sum of $3,569.17, no part of which was paid. The judgment had never been renewed, and the statute of limitations (§ 336, Code Civ.Proc.) had run against it. Neither L. M. Miller nor the Chico association was a customer or depositor in the bank.

On August 18, 1936, the bank sold the grain for $2,186.89, from which sum it paid the Chico association the full amount of its lien of $240.09, leaving in the possession of the bank a balance of $1,946.74, which, without the knowledge or consent of the owners thereof, the bank applied toward the payment of its outlawed judgment of $3,569.17. L. M. Miller promptly demanded of the bank payment to him of said sum of $1,946.74, which was refused. August 29, 1936, for value received, L. M. Miller sold and assigned that claim jointly to the original plaintiffs in this action, J. M. Miller and Robert Powell. This suit for conversion of the funds was commenced against the bank and Chico association, on April 21, 1937. The cause was tried by the court sitting without a jury. At the close of the evidence a nonsuit was granted as to the defendant Chico association. Findings were adopted favorable to the defendant bank. Judgment was accordingly rendered to the effect that plaintiffs take nothing by this action. From that judgment this appeal was perfected.

The chief issue to be determined on this appeal is whether, under the circumstances of this case, the Bank of America National Trust and Savings Association was authorized under section 3054 of the Civil Code, or otherwise, to appropriate the proceeds remaining in its possession which were derived from the sale of the grain belonging to L. M. Miller, and apply it toward the satisfaction of the judgment which it held against L. M. Miller and others, upon which the statute of limitations had expired.

[1] We are of the opinion the findings and judgment are not supported by the evidence for the reason that the owner of that fund was neither a customer nor a depositor in the bank which acquired the money pursuant to specific instructions to remit the balance direct to L. M. Miller. Under no reasonable construction of the written instructions may it be said that the bank was authorized to deposit the money in the bank to the credit of L. M. Miller, or to create the relationship of debtor and creditor between them. That being true, it becomes immaterial that the statute of limitations had expired against the judgment held by the bank.

[2] From the written instructions which were given to the bank by the Chico Production Credit Association, it is clear that the bank was not authorized to deposit any portion of the proceeds of sale of the grain, either to the credit of the association or to the credit of the owner of the grain, L. M. Miller. On the contrary, the bank was clearly

instructed to pay to the lienholder, association, the sum of $240.09, and to remit the balance of the proceeds direct to L. M. Miller. Not only did the bank violate its clear instructions, but it arbitrarily applied the balance of the proceeds, in the sum of $1,946.74, towards the satisfaction of an outlawed judgment which it held against L. M. Miller and others. It does not even appear that either Miller or the association was a customer or depositor in the bank. This conduct on the part of the bank amounted to a wrongful conversion of the balance of the funds contrary to the trust established by the written instructions. The bank held no lien upon the funds, pursuant to section 3054 of the Civil Code, under the circumstances of this case. Miller was not a customer of the bank, and the funds were not held in the relationship of debtor and creditor, but only as trustee or agent for the fulfillment of its written instructions.

[3] The principle applicable to the right of a bank to offset a debt due to the bank by the application of proceeds derived from sales of property or the collection of paper pursuant to specific instructions to remit the same to the owner thereof, is aptly stated in 8 Zollmann on Banks and Banking, Perm.Ed. § 5621, page 402, as follows: "The receipt by a bank of paper for collection and such receipt *for collection and remittance* are thus on entirely different planes. Where the receipt is for collection merely, in view of the general custom of collecting banks to mingle the proceeds of collections, such proceeds become the property of the collecting bank, and the relationship of debtor and creditor arises between it and the owner. On the other hand, a commercial paper sent to a bank *for 'collection and remittance' clearly creates the relationship of principal and agent,* not that of creditor and debtor. *The collecting bank becomes an agent until the check is collected, and then becomes a trustee of the proceeds,* and can avoid such relationship and create that of debtor and creditor only by consent." (Italics added.)

The preceding text is supported by numerous authorities, many of which are cited by the appellant. While there is apparently some conflict of authorities regarding the question as to whether a deposit of paper with a bank for "collection and remittance" constitutes a relationship of agency, bailment or trust, the majority of the cases so hold. In an elaborate note upon that subject, which is found in 90 A.L.R. page 6, it is said in the heading to the paragraph on page 15 thereof: "The rule supported by the majority of the cases in which paper has been sent to a bank for 'collection and remittance' or 'collection and return' is that the relationship of the parties to the proceeds of the collection is not that of creditor and debtor, but one of agency, trust, or bailment."

It is true that the relationship between a bank and one who deposits with it a check or other paper to be collected or transferred for cash will be determined *by the intention of the parties* as shown by the circumstances of the transaction or by the instructions of the depositor. In support of its contention that the relationship between the bank and L. M. Miller, with respect to the proceeds derived from the sale of the grain represented by the warehouse receipts, was that of debtor and creditor, the respondent cites 7 American Jurisprudence, page 504, section 696. That section, however, contains the following statement: "If they intended that the proceeds should be remitted immediately upon the receipt thereof, or if in any other way it can be shown that the parties intended that the proceeds of the paper as well as the paper itself should remain the property of the owner of the paper, such intention will control and the bank will not take title to the proceeds."

In the present case it is not contended that Chico Production Credit Association, the lienholder of the warehouse receipts, was a creditor of the bank. The association had no authority to deposit in the bank the proceeds of the sale of barley to the credit of L. M. Miller. The instructions to the bank were just the contrary. The bank was directed to sell the grain and send to the Chico association, the lienholder, the sum of $240.09, and that "the balance of the proceeds are to be remitted direct to L. M. Miller." Certainly that language may not be construed to authorize the bank to deposit the balance of that fund to the credit of L. M. Miller and thus create the relationship of debtor and creditor between them.

Nor is the language of the late Mr. Justice Cardozo, which is found in the case of Jennings v. United States Fidelity & Guaranty Co., 294 U.S. 216, 55 S.Ct. 394, 395, 79 L.Ed. 869, at page 872, 99 A.L.R. 1248, thereof, which is quoted by the respondents, in conflict with the foregoing statement of law. That quoted language reads: *"In the* *absence of tokens of a contrary intention,* the better doctrine is, where the common law prevails, that the agency of the collecting bank is brought to an end by the collection of the paper, the bank from then on being in the position of a debtor, with liberty, like debtors generally, to use the proceeds as its own." (Italics added.)

The basis of the statement of the court in the preceding quotation is that the bank becomes the debtor of the depositor, after the proceeds of the check or paper are received by it, only "in the absence of tokens of a contrary intention." In the present case, the token of a contrary intention is clearly expressed in the written instructions which were furnished to the bank.

We find nothing in Gonyer v. Williams, 168 Cal. 452, 143 P. 736, or any of the other authorities relied upon by the respondent, in conflict with what we have previously said regarding the relationship of the bank to one who delivers to it paper, such as warehouse receipts for grain in storage, with specific written instructions to collect or sell the property and remit the proceeds to the owner thereof.

In the case of Gonyer, supra, the plaintiff, who for several years had been a regular depositor in Kern Valley Bank, deposited therein on May 11, 1911, a check in his favor for the sum of $300, drawn upon another bank. No instructions accompanied the deposit of that check. According to custom, the check was immediately credited to his account. It appears that the Kern Valley Bank was then insolvent, but the depositor had no knowledge of that fact. That money was not applied as an offset to a debt due to the bank. The depositor owed the bank no debt. Upon failure to pay that amount on demand, suit was brought to recover the money on the theory that it was held by the bank in trust. The trial court so held. On appeal it was properly determined that, under the circumstances of that case, "the transaction was not one which created the relation of principal and agent but rather that of creditor and debtor." In conclusion the court said: "The contract was for the collection of the draft, and the manner of disposing of the assets was clearly one resting in general usage." There is no doubt that principle is true in the absence of specific directions to the contrary, such as existed in the present case. The syllabus of that case correctly announces the well-known principle upon which that case was determined, as follows: "Where a regular depositor of a bank in the ordinary course of business, deposits with it a check drawn in his favor on another bank and bearing his indorsement in blank, the title to the check is transferred to the depositary, and upon its placing the amount of the check to the credit of the depositor on its books the relation of debtor and creditor is created between them."

[4] Contrary to the facts of that case, a banking relationship of debtor and creditor did not exist between the bank and either L. M. Miller or the Chico association. Neither of them was given credit on the books of the bank. Moreover, the warehouse receipts were delivered to the bank with specific written instructions to sell the grain represented thereby, and, after paying a specified sum to the lienholder, to *"remit direct* to L. M. Miller" the balance of the proceeds. Under such definite instructions there is no room for application of the "bank custom" of crediting an account and creating the relationship of debtor and creditor, as was done in the Gonyer case. That case has no application to the facts of this suit.

[5] The court properly granted the motion for nonsuit in favor of the codefendant, Chico Production Credit Association. It was a mere holder of the warehouse receipts as collateral security of its claim for payment of a debt of $240.09. The association did not convert or misappropriate any part of the proceeds of sale of the grain. The receipts were delivered to the bank with specific directions to pay direct to L. M. Miller the balance of the proceeds. These directions were given to the bank in writing with the consent of Miller. This suit involves only the conversion of the balance of the purchase price. It does not involve the satisfaction of the lien for $240.09 which was paid with the consent of all parties to the association. The association clearly was not a party to the misappropriation of the balance of that fund. It was converted by the bank in direct violation of the written instructions which were signed by the association. The judgment of nonsuit is affirmed.

The judgment in favor of the bank is reversed and the court is directed to render judgment in favor of the appellant, Robert Powell, for the sum of $1,946.74, together with interest thereon at the rate of 7 per cent per annum from August 18, 1936, and costs of appeal.

53 Cal.App.2d 522

SWARTFAGER v. WELLS et al.

Civ. 6702.

District Court of Appeal, Third District California.

July 23, 1942.

Hearing Denied Sept. 21, 1942.

1. Lis pendens ⇨24(1)

Where it appeared that adverse possessor instituting suit to quiet title recorded notice of lis pendens, that during pendency of action defendant, who was former owner of paper title, conveyed land to his attorney, that attorney did not record his conveyance or seek permission to be substituted as party defendant or appear as party defendant, and that judgment was rendered for adverse possessor, in attorney's suit to set aside the judgment and to quiet his title, evidence sustained findings and judgment against the attorney. Code Civ.Proc. §§ 385, 409.

2. Quieting title ⇨44(2)

In suit to quiet title, judgment and proceedings in former suit quieting title to same property in defendant against plaintiff's predecessor in title were properly received in evidence.

3. Judgment ⇨518, 747(5)

Where it appeared that adverse possessor instituting suit to quiet title recorded notice of lis pendens, that during pendency of action defendant, who was former owner of paper title, conveyed land to his attorney, and that attorney did not record his conveyance or seek permission to be substituted as party defendant or appear as party defendant, judgment quieting title in adverse possessor was "res judicata" of attorney's claim of title in subsequent suit to quiet title which constituted a "collateral attack" upon the judgment. Code Civ.Proc. § 409.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Res Judicata".

4. Abatement and revival ⇨58(2)

A cause of action to quiet title to real property did not abate on account of death of defendant during pendency of the suit. Code Civ.Proc. § 385.

5. Attorney and client ⇨76(2)

Death of defendant during pendency of suit to quiet title absolutely terminated authority of his attorney to represent him as attorney in that suit.

6. Attorney and client ⇨76(2)
Executors and administrators ⇨20(4)

Where defendant in suit to quiet title conveyed his interest in real property to his attorney who did not move for substitution as party defendant, after death of the defendant, attorney could not complain of lack of personal notice of subsequent application for letters of administration of estate, or of selection of another attorney to represent the estate.

7. Attorney and client ⇨76(2)

Where a defendant died during pendency of suit to quiet title, administrator of defendant's estate had right to select his own attorney.

8. Attorney and client ⇨76(2)

Where defendant died during pendency of suit to quiet title and administrator of his estate was duly substituted as a party defendant, the administrator had authority to consent to trial of the case without notice to attorney who had represented the original defendant.

9. Lis pendens ⇨24(1)

Where successor in title acquired title by deed subsequent to commencement of suit to quiet title against grantor and after lis pendens had been filed therein, the successor in title was bound by decree quieting title in the grantor's adversary. Civ.Code, § 1214; Code Civ.Proc. § 1908.

10. Lis pendens ⇨24(1)

A judgment quieting title to real property is absolutely controlling against one, though not a party to the action, who acquires from a party thereto a deed to that property subsequent to the commencement of suit and after recording of lis pendens. Code Civ.Proc. § 409.

◆

Appeal from Superior Court, Napa County; Ben R. Ragain, Judge Assigned.

Action by Bryce Swartfager against Henry W. Wells and others to set aside a judgment and to quiet title, wherein the named defendant filed a cross-complaint. During the pendency of the action the named defendant died and the administrator of his estate was substituted in his stead as defendant. From an adverse judgment, the plaintiff appeals.

Affirmed.

Bryce Swartfager in pro per., of Santa Rosa, and E. J. Dole, of Petaluma, for appellant.

King & King, of Napa, for respondents.

PER CURIAM.

The plaintiff, who is an attorney at law, appears in proper person in an appeal from a judgment which was rendered against him in a suit to quiet title to 200 acres of land in Napa County. The appellant holds a deed to the land, which was executed to him by his client, E. E. Morrison, former owner of the paper title thereto, pending the trial of a previous suit brought by Henry W. Wells to quiet title to said land, in which action Mr. Swartfager appeared as attorney for Mr. Morrison, who was a party defendant therein. Before judgment was rendered in the former action, Mr. Morrison died and the administrator of his estate, who was represented by an attorney other than this appellant, was duly substituted in the place of Morrison as a party defendant. With full knowledge of the proceedings in that previous suit, Mr. Swartfager made no application, as successor to the title held by Morrison, or otherwise, to be substituted or to be permitted to appear as a party defendant in that action. Judgment was rendered in the previous suit quieting title, by adverse possession, in this defendant Henry W. Wells. That decree became final. It was received in evidence on the trial of this suit and the court held it to be res judicata and conclusive of the issues herein, and that the grantee, Bryce Swartfager, has no right, title or interest in the land in question. Judgment was accordingly rendered against him. From that decree he has appealed. This appeal is presented on a bill of exceptions.

The facts which are necessary to consider in determining this appeal appear from the record as follows: E. E. Morrison was former owner of the record title to the 200-acre tract of land in Napa County, which is involved in this suit, subject to a mortgage held by Henry W. Wells, to secure a debt amounting to $5,500. In December, 1930, Wells commenced suit against Morrison and others to foreclose that mortgage. Bryce Swartfager appeared in that litigation as attorney for Mr. Morrison. That suit seems to have been abandoned. It was not finally terminated. The status of that case has no legal bearing on this appeal. It is not necessarily involved herein.

May 11, 1935, Henry W. Wells brought suit in Napa County against E. E. Morrison and others to quiet title to the said 200-acre tract of land. At the time of filing the complaint in that suit, the plaintiff recorded notice of lis pendens, pursuant to section 409 of the Code of Civil Procedure. June 14, 1935, this appellant, Bryce Swartfager, appeared as attorney for Mr. Morrison and filed therein his answer and cross-complaint, and he represented his client in all proceedings until November 16, 1936. It appears that on June 27, 1935, after Mr. Swartfager had appeared as attorney and had filed in that suit an answer and cross-complaint in behalf of Mr. Morrison, his client executed and delivered to him a deed to that property, described by Morrison as a quitclaim deed, which was not recorded until April 28, 1936. That deed was not called to the attention of the court until after the first suit to quiet title was completed. On November 16, 1936, E. E. Morrison died, and Mr. Swartfager's relationship as his attorney then ceased. Subsequently, on application of another lawyer, and upon proceedings duly had in the Superior Court of Napa County, Theodore J. Treadway was appointed and qualified as administrator of the estate of E. E. Morrison, deceased. On September 3, 1937, the administrator was substituted for E. E. Morrison, deceased, as a party to that action, under the provisions of section 385 of the Code of Civil Procedure. In the application for letters of administration, and in all subsequent proceedings, including the trial of the former suit to quiet title, the interest of E. E. Morrison, deceased, in said property, and of his heirs, was represented by W. W. Everett, Jr., as attorney for the administrator. By consent of all parties to that action, it was regularly set for trial for September 3, 1937. Evidence was adduced by the respective parties. Notwithstanding the fact that Byrce Swartfager held the deed to said land, dated June 27, 1935, which was executed about a month after he appeared for Mr. Morrison and filed an answer in the former suit to quiet title, with full knowledge of all proceedings in that action, he failed to call the court's attention to that deed, or to make an application to become a party to that suit. Findings in that action were adopted favorable to the plaintiff in every respect. The court held that the plaintiff, Henry W. Wells, acquired title to said land by adverse possession thereof for a period of more than twenty years; that he was therefore the owner and entitled to possession, and that the heirs, the representatives of the defendant, E. E. Morrison, or any of the other defendants in that suit did not have any right, title or interest in the land. Judgment in that suit was thereupon rendered in favor of the plaintiff Wells, quieting title in him to said land. Subsequently, this appellant, Bryce Swartfager, appeared in that action and made two separate motions to set aside that decree on the ground that the court was without jurisdiction or authority to appoint Theodore J. Treadway as administrator of the estate of E. E. Morrison, deceased, or to substitute him as a party defendant in that suit. Both motions were denied. No appeal was taken from those orders. The decree quieting title in Henry W. Wells became final.

This suit was then instituted by Bryce Swartfager, on September 22, 1938, against Henry W. Wells, and his attorney and against the administrator of the estate of E. E. Morrison, to set aside the decree in the former action on the ground of fraud, and to quiet title to said land in the plaintiff, Bryce Swartfager, as successor in interest of the title of his deceased client, E. E. Morrison. Each of the defendants in this action separately answered the complaint. A cross-complaint was also filed in behalf of Mr. Wells, asking that title to the land be again quieted in him. He also pleaded the decree of the former action quieting title in him as a bar to this suit. On April 4, 1939, during the progress of this action, Mr. Wells died. The administrator of his estate was duly appointed and substituted in his stead as defendant in this suit. The decree and proceedings of the former action, together with other evidence, were received at the trial. The court adopted findings favorable to the defendants and cross-complainant, and against the plaintiff, on every essential issue, including that of the alleged fraud, and it thereupon rendered a decree that plaintiff take nothing by his action and also quieting title to said land in the heirs of Henry W. Wells, deceased. From that judgment this appeal was perfected.

[1] The appellant contends that the judgment is not supported by the evidence for the reason that the former decree quieting title to the land in Henry W. Wells was procured, without notice to him, by means of fraud consisting of securing the appointment and substitution of an administrator of the estate of E. E. Morrison, deceased, through the representation of another attorney, and in prosecuting that suit to final judgment, with full knowledge that Bryce Swartfager then held a deed to the property, executed by his client after the commencement of the suit, rendering that judgment void, and that, since Morrison's interest in the land was transferred to this appellant after the commencement of that action, it was not necessary, under section 385 of the Code of Civil Procedure, that the grantee be substituted as a party defendant, but, on the contrary, that that section authorizes the continuation of the suit "in the name of the original party."

[2, 3] We are of the opinion the findings and judgment in the present case are adequately supported by the evidence. The judgment and proceedings in the former suit quieting title to the same real property which is here involved, in Henry W. Wells against this appellant's predecessor in title, were properly received in evidence. Riverside Land & Irr. Co. v. Jensen, 108 Cal. 146, 41 P. 40. That judgment is res judicata of the appellant's claim of title, in the present action, and it became a bar to this proceeding. This suit constitutes a collateral attack upon that judgment which, under the circumstances of this case, is controlling upon the appellant.

[4, 5] The previous cause of action to quiet title to the real property in question, which was filed May 11, 1935, did not abate on account of the death during the pendency of that suit of the defendant, E. E. Morrison. § 385, Code Civ.Proc.; Miller v. Bank of America N. T. & Sav. Ass'n, 52 Cal.App.2d 512, 126 P.2d 444. The death of Mr. Morrison, however, absolutely terminated the authority of this appellant, Bryce Swartfager, to represent him, as attorney in that suit Deiter v. Kiser, 158 Cal. 259, 110 P. 921; 3 Cal.Jur. 631, § 40. In the text last cited it is said in that regard: "The authority of an attorney necessarily ceases with the death of the client, for no one can act for a dead man. After the death of the client, his attorney therefore becomes a stranger to the proceedings."

[6-8] As a grantee of the interest of Mr. Morrison in the real property Bryce

Swartfager might have moved the court for substitution as a party defendant in that action, in the place of his former client, but he failed to do so. The relationship of attorney for his deceased client having ceased, the appellant may not complain of a lack of personal notice of the subsequent application for letters of administration of the estate of E. E. Morrison or of the selection of another attorney to represent the estate. The administrator had a perfect right to select his own lawyer. 5 Am. Jur. 279, § 30. The administrator, having been duly substituted as a party defendant, had authority to consent to the trial of the case. That stipulation was made. The cause was regularly tried and the administrator appeared and participated therein. Findings were adopted against the administrator and favorable to Henry W. Wells, the plaintiff in that action. Judgment was rendered accordingly. That judgment became final.

[9] The remaining question is whether this appellant Bryce Swartfager, as successor in title to E. E. Morrison, deceased, by a deed of conveyance which was executed to him after the commencement of the former action and after the filing of a lis pendens therein, is bound by that decree.

We are of the opinion this appellant is bound by the judgment in the former suit quieting title to the real property in Henry W. Wells, for the reason that his interest therein is in privity with that of his client, E. E. Morrison, since he acquired it by deed subsequent to the commencement of that action and after the lis pendens was filed therein. § 1214, Civ.Code; § 1908, Code Civ.Proc.; Warnock v. Harlow, 96 Cal. 298, 31 P. 166, 31 Am.St.Rep. 209; 22 Cal.Jur. 195, § 62; 15 Cal.Jur. 95, § 165; 25 Cal.L.Rev. 480; 30 Am.Jur. 959, §§ 226, 227. In the text last cited it is said regarding the conclusiveness of a judgment upon the grantee of property under such circumstances: "In the absence of the applicability of a statutory provision requiring a different result, the general rule is that although one to whom an assignment is made or property is granted by a party to an action during the pendency thereof *is regarded as in privity with such party* within the meaning of the doctrine of *res judicata*, a judgment is regarded as conclusive only between the parties and their successors in interest by title acquired subsequent to the commencement of the action, so that a person to whom a party to an action has made an assignment or granted property or an interest therein before the commencement of the action is not regarded as in privity with the assignor or grantor so as to be affected by a judgment rendered against the assignor or grantor in the subsequent action." (Italics added.)

In 15 California Jurisprudence, page 185, section 216, it is said: "Judgments affecting title are conclusive against the holders of prior conveyances and mortgages which were not recorded before the lis pendens."

The preceding text, which is supported by numerous authorities, is a mere statement of the principle declared in section 1214 of the Civil Code, which provides that: "Every conveyance of real property * * * is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, *whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action.*" (Italics added.)

[10] Conversely, the statement of the foregoing section is equally true that when the subsequent deed to real property is not "recorded prior to the record of notice of action," a judgment affecting that title is not void even though the subsequent purchaser acquired the property "in good faith and for a valuable consideration." That clearly means that a judgment quieting title to real property is absolutely controlling against one, though not a party to the action, who acquires from a party thereto a deed to that property subsequent to the commencement of the suit and after the recording of the lis pendens.

In the present case, the appellant not only took his deed of conveyance to the property in question after the filing of the lis pendens pursuant to section 409 of the Code of Civil Procedure, but he also had actual notice of the pendency of that action, for he appeared as attorney in behalf of his own client and represented him until the time of his death. In 30 American Jurisprudence, page 954, section 222, it is said:

"With regard to the persons in whose favor or against whom the doctrine of res judicata is applicable, the rule is well settled that a judgment is binding upon all parties to the proceedings in which it is rendered, and their privies. In the strict sense of the term, parties to a judgment in the eye of the law are those only who are named as such in the record, and are properly served with process, or enter their appearance, but the term 'parties,' within the contemplation of the rule of res judicata, is sometimes extended beyond the mere nominal parties to the record."

This is a clear case in which the preceding rule is extended to include as a party who is bound by the judgment one who claims title to real property as a grantee by deed secured from his client during the pendency of a former case in which he represented the grantor.

The judgment is affirmed.

53 Cal.App.2d 691

DIETERLE et al. v. YELLOW CAB CO. et al.

Civ. 12869.

District Court of Appeal, Second District, Division 3, California.

July 30, 1942.

Hearing Denied Sept. 24, 1942.

1. Trial 🔑296(3)

In taxicab passengers' action against taxicab company and operator of taxicab for personal injuries sustained in intersectional collision with motorist, where passengers contended that there was concurrent negligence of defendants and motorist, instruction using the article "the" preceding the words "proximate cause" instead of the article "a" was improper, but was not misleading where the jury was adequately instructed regarding essential legal principles on subject of concurrent negligence.

2. Trial 🔑295(8)

In taxicab passengers' action against taxicab company and taxicab driver for personal injuries sustained in intersectional collision with automobile, instruction that if inference of proximate cause arising from happening of accident was not overthrown by evidence or if inference preponderated over contrary evidence, it "warranted" a verdict for passengers was not objectionable on ground that it deprived passengers of full benefit of the doctrine of "res ipsa loquitur" where remainder of instruction indicated that it was not optional with jury whether to return verdict for passengers if inference was not rebutted.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur" and "Warrant".

3. Trial 🔑296(3)

In taxicab passengers' action against taxicab company and taxicab driver for personal injuries sustained in intersectional collision with an automobile, instruction that while defendants were charged with duty of exercising the utmost care, that did not mean that they were obliged to use exceptional skill or foresight to anticipate the conduct of others was not objectionable on ground that no distinction was made between utmost and ordinary care relative to the duty of the defendants, where in view of other instructions the jury was not misled.

4. Carriers 🔑321(23)

In taxicab passengers' action against taxicab company and taxicab driver for injuries sustained in intersectional collision with motorist, where sole liability of motorist was an issue, it was proper to give an instruction stating in effect that if negligence of motorist was sole proximate cause of accident verdict should be for taxicab company and taxicab driver.

5. Appeal and error 🔑1170(1)

In taxicab passengers' action against taxicab company and taxicab driver for injuries sustained in intersectional collision with motorist, where there was evidence that motorist did not make boulevard stop at stop sign erected according to law, and that taxicab was first in the intersection, consideration of instructions and examination of evidence did not disclose that judgment for defendants resulted from prejudicial error. Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Personal injury action by William Dieterle and others against the Yellow Cab Company and another. Judgment for defendants, and plaintiffs appeal.

Affirmed.

A. Ronald Button, Paul Barksdale D'Orr, and Thomas A. Reynolds, all of Los Angeles, for appellants.

Harry B. Ellison and J. L. Ronnow, both of Los Angeles, for respondents.

PARKER WOOD, Justice.

Plaintiffs were passengers for a reward in a taxi-cab of defendant Yellow Cab Company, operated by defendant Nave. The action was for damages for personal injuries resulting from a collision at an intersection between the cab and an automobile. Plaintiffs appeal from the judgment for defendants Yellow Cab Company and Nave entered upon the verdict of a jury.

This is the second appeal in this action. Upon the first trial the defendants were the Yellow Cab Company, Nave, one LaForce, who was the driver of the automobile, and one Whelan, the alleged owner thereof. Judgment in that trial was for plaintiffs against LaForce, and in favor of Whelan, the Yellow Cab Company and Nave. The trial court directed the verdict for Yellow Cab Company and Nave. Plaintiffs appealed from the judgment in favor of Whelan, the Yellow Cab Company and Nave. The judgment in favor of Whelan was affirmed. In reversing the judgment in favor of the Yellow Cab Company and Nave the District Court of Appeal stated that it was error to direct the verdict and, "Since plaintiffs were being transported as passengers for a reward by respondents, they could rely upon the obligation of the driver of the taxicab to use the utmost care and diligence for their safety. In presenting their case to the trial court they were entitled to the presumption embodied in the doctrine of res ipsa loquitur." Dieterle v. Yellow Cab Co., 1939, 34 Cal.App.2d 97, 100, 93 P.2d 171, 173.

The collision occurred in December, 1937, about 8 p. m., at the intersection of Beverly Boulevard and Lucerne Street in Los Angeles. The taxicab was going east on Beverly. The automobile was going north on Lucerne. A boulevard stop sign had been erected, according to law, at the south entrance to said intersection requiring vehicles approaching Beverly from the south on Lucerne to stop before entering the intersection. The streets were wet; it had been raining but was not raining at the time of the accident; the night was dark and Beverly Boulevard was lighted.

The complaint alleged that the collision between the cab and the automobile was caused by the concurrent negligence of all defendants.

Appellants contend that the trial court erred prejudicially in giving certain instructions and in refusing other instructions requested by plaintiffs.

The court instructed the jury, in defining the issues to be determined, that if it found defendants were negligent plaintiffs could not recover unless *that* negligence was *the* proximate cause of any injury to plaintiffs. Appellants claim that this instruction disregarded the issue of the *concurrent* negligence of Yellow Cab Company and Nave, defendants herein, and LaForce, a defendant in the first trial, as the proximate cause of the injuries to plaintiffs; that by reason of the use of the definite article "the" instead of the indefinite article "a", preceding the words "proximate cause", the whole issue was changed and plaintiffs were restricted to a recovery based upon the negligence of the Yellow Cab Company and Nave as the sole proximate cause of the accident and thus were prevented from recovering for "any, even the slightest negligence," on the part of said defendants Yellow Cab Company and Nave. That instruction was incorrect. The jury, however, was instructed further: "* * * that even if you should believe from the evidence that the driver of the Plymouth car was negligent at the time and place of the accident, in failing to make the boulevard stop or otherwise, nevertheless if you also believe from the evidence that the driver of the taxicab failed at said time and place to *use the utmost care and diligence for the safe carriage of plaintiffs, to provide everything necessary for that purpose and exercise reasonable degree of skill,* under the circumstances, for the safety of his passengers (as I have defined such care elsewhere in these instructions), and that his failure to exercise *said degree of care* contributed to proximately cause injury and damage to the plaintiffs, then regardless of the negligence of the driver of the Plymouth car, the taxicab company and its employee would be liable for damages suffered by the plaintiffs." After defining the expression "proximate cause" in an instruction, the court gave a further instruction: "This does not mean that the law seeks and recognizes only one proximate cause of an injury, * * *. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause." The court also instructed the jury: "When the negligent acts * * * of two or more persons * * * contribute concurrently, and as proximate causes, to the injury of another, each of such persons is liable. * * * it is no defense for one of such persons that some other person, not joined as a defendant in the action, participated in causing the injury even if it should appear to you that the negligence of that other person was greater, * * *."

In the case of Hellman v. Los Angeles Ry. Corp., 1933, 135 Cal.App. 627, at page 645, 27 P.2d 946, 28 P.2d 384, referring to the expression "*the* proximate cause" in an instruction, it was stated: "If such instruction stood alone, we would unhesitatingly declare it to be prejudicially erroneous. A similar defect existed in an instruction complained of in the case of Squier v. Davis Standard Bread Co., 181 Cal. 533, on page 537, 185 P. 391, 392, concerning which the court says: 'The sentence containing the objectionable words is immediately preceded by a sentence requiring the jury to determine whether plaintiff's negligence, if any, was "a proximate cause" of the injuries received by him. Moreover, the jury was elsewhere fully and correctly instructed on the law of contributory negligence. Considering the instructions as a whole, we consider the possibility that the jury could have been misled by the error complained of so remote as to be altogether unworthy of serious consideration.' "

The case of Chandler v. Benafel, 1934, 3 Cal.App.2d 373, 374, 39 P.2d 892, 893, involved an injury to plaintiff, a pedestrian, as the result of a collision between two automobiles. One of the issues therein was the alleged concurrent negligence of the drivers. The jury was instructed, in referring to one of the drivers, that in order to hold that driver liable, it must find that his negligence was *the* proximate cause of injury to plaintiff. The court held that the instruction was incorrect but stated further: "The jury, however, was further instructed: 'If the concurrent or successive negligence of two persons combined result in an injury to a third person, he may recover of either or both.' The whole theory of the case upon which it was submitted to the jury, and the discrimination with which they decided it, supports the contention * * * that the jurors understood the law and knew just what they were doing in returning their verdicts in this case. Under such circumstances, their determination should not be disturbed."

[1] In the present case, considering all the instructions together, it cannot be held that the jury was misled by the defect in the instruction wherein the article "the" was used preceding the words "proximate cause" instead of the article "a". The jury was adequately instructed as to the essential legal principles upon the subject of concurrent negligence.

[2] The opinion upon the former appeal stated, as shown above, that plaintiffs were entitled to the presumption embodied in the doctrine of res ipsa loquitur. At the retrial the court on its own motion gave the following instruction: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, exercise the utmost care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part."

It will be noted that the instruction did not include the word "presumption" which was used in the former opinion in stating that plaintiffs "were entitled to the presumption embodied in the doctrine of res ipsa loquitur." As noted, the instruction stated "there arises an *inference* that the proximate cause * * * was some negligent conduct. * * * " (Italics added.)

Appellants assert that the instruction did not give plaintiffs the full benefit of the doctrine of res ipsa loquitur. They state that their claim of error is not based upon the use therein of the word "inference" rather than "presumption", but upon the use of the word "warrants" in the expression therein, "it warrants a verdict for the plaintiffs." Their argument is that the word "warrants" makes the drawing of the inference by the jury permissive rather than mandatory; that such inference of negligence, which is founded upon a doctrine of law rather than the permissive reasoning of the jury, must be accepted by the jury as necessitating a verdict for plaintiffs in the absence of sufficient evidence produced by defendants to satisfy the jury that the inference, so created, has been rebutted or overcome.

The remainder of the instruction immediately following the sentence in which the word "warrants" was used indicates that the meaning to be ascribed to the word as there used was not, as suggested by appellants, that it was optional with the jury whether it returned a verdict for plaintiff if the inference was not rebutted. The remainder of the instruction, which was in the nature of a deduction based upon the preceding statements, was: "Therefore you should weigh any evidence tending to overcome that inference, bearing in mind that *it is incumbent upon the defendant to rebut the inference* by showing that it did, in fact, exercise the utmost care and diligence or that the accident occurred without being proximately caused by any failure of duty on its part." (Italics added.)

That such a meaning was not to be attributed to that word was also indicated by two other instructions given next succeeding the one in which the word "warrants" was used. The first one commenced, "Lest these statements give you an incorrect understanding of the law generally, I would inform you that they constitute an exception to the general rule that the mere happening of an accident does not support an inference of negligence. However, certain exceptional circumstances, when existent, authorize the exceptional rule. They are as follows: * * * (here various circumstances are stated). * * *" The last paragraph of that instruction was: "When the conditions I have mentioned exist, the inference of negligence, to which they give birth, will support a verdict for the plaintiff, in the absence of a showing by defendant that offsets the inference." The next instruction was:

"In making such a showing, it is not necessary for a defendant to overcome the inference by *a preponderance of evidence.* Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule I have mentioned. It follows, therefore, that in order to hold the defendant liable, the inference of negligence must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant.

"If such a preponderance in plaintiff's favor exists, *then it must be found that some negligent conduct on the part of defendant* was a proximate cause of the injury; but if it does not exist, if the evidence preponderates in defendants's favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then the verdict must be for the defendant." (Italics added.)

The instructions, relative to such inference, show from the whole context thereof that the jury was instructed that an inference of negligence on the part of defendants existed; that such inference was evidence in favor of plaintiffs and defendants were required to rebut, offset or overcome it; that if the inference was of greater weight than the explanation offered by defendants it "*must be found*" that defendants were negligent.

In addition to giving the instructions above mentioned that the inference of negligence was evidence in favor of plaintiffs, that plaintiffs' burden of proving negligence was not changed because such inference existed, and that such inference evidence should be weighed with that opposed to it, the court told the jury in other instructions that, "The burden is upon the plaintiffs to prove by a preponderance of the evidence that the defendants were negligent * * *." and, "If plaintiffs fulfill this burden, *they are entitled to recover* from defendants. If plaintiffs fail in carrying this burden, the defendants are entitled to your verdict." (Italics added.) A further given instruction was that the jury should consider the instructions as a whole and regard each in the light of the others.

It thus appears from the whole context of the instructions above referred to, that the direction to the jury, relative to the inference, was that the verdict should be for plaintiffs if the inference of negligence to which plaintiffs were entitled under the doctrine of res ipsa loquitur was not rebutted or overcome by defendants.

[3] Appellants assign the giving of the following instruction as error:

"* * * while the defendants were charged with the duty of exercising the utmost care * * *, that this does not mean that they were obliged to use exceptional skill or * * * foresight *to anticipate the conduct of others.* While exceptional skill is to be admired * * *, the law does not demand it as a standard of conduct.

"In other words, if you find that * * * Nave in the operation of the taxicab conducted himself as might reasonably be expected of the ordinary prudent person charged with the duty of exercising a high degree of care for his passengers, then I instruct you that he was not negligent, * * *."

The criticism thereof is that no distinction was made between "utmost" and "ordinary" care relative to the duty of defendants to anticipate the conduct of others, and that the cab driver was required to conduct himself as an *ordinary prudent person* only. In another instruction the court stated that defendants were "required by law to use the utmost care and diligence for the safe carriage of plaintiffs to provide everything necessary for that purpose and to exercise a reasonable degree of skill." Thereafter, in six different instructions, the court stated that defendants were required to use "the utmost care and diligence," and in another instruction stated that they were "bound to exercise the highest degree of care." In view of these various instructions, it does not appear that the jury was misled by the criticized instruction as to the degree of care required of defendants.

[4] Appellants also object to an instruction which stated in substance that if the negligence of LaForce was the sole cause of the accident the verdict should be for the Yellow Cab Company and Nave. The claim is that the instruction ignored the theory of joint liability of all the original defendants for concurrent negligence. The sole liability of LaForce was an issue in the case and it was proper to give the instruction.

It is claimed further that other instructions which were given, although correct as statements of law, were unnecessary and tended to mislead the jury. Such instructions, so referred to, were entitled: "Guessing Cause of Accident not Permitted"; "Elaboration on Duty of Carrier"; "Negligence, Definition"; "Negligence not to be Compared"; and "Imminent Peril." The substance of each of the instructions was in accord with the ordinary implications of its title. It does not appear that these instructions were improper.

Concerning the happening of the collision, four witnesses who were not acquainted with any of the parties testified as follows:

A pedestrian, who was at the intersection, testified that LaForce did not make the boulevard stop and that the cab was in the intersection first.

A person in an automobile following the cab, said the cab was going 20 miles per hour; that he saw the other car about 75 feet south of the intersection, going 30 miles per hour, and its speed was not reduced and it did not stop; that LaForce said he did not stop.

A person in an automobile going west on Beverly, said that the cab was going 20 miles per hour; that he saw the other car about 50 feet south of Beverly going over 25 miles per hour and it did not stop.

A person in an automobile about 60 feet back of the cab, said that the cab was going about 20 miles per hour and the car was going about 30 miles per hour.

There was other testimony as follows:

Plaintiff Charlotte Dieterle said that the cab was going 30 miles per hour and that it did not decrease its speed; that she saw a light coming from the right side, then there was an impact.

Plaintiff William Dieterle said that the cab was going 30 miles per hour and that he did not see the other car before the accident.

Defendant Nave said that he was going about 20 to 25 miles per hour as he approached the intersection and he went on compression to cross the dips on the west and east sides of Lucerne; that he saw the other car about 125 feet away when he was 60 feet from the intersection and that he did not judge its speed; that he did not see LaForce stop and the only time he took his eyes from the other car was for a second when he went through the dip.

A police officer said that LaForce told him he did not make the boulevard stop.

LaForce did not testify.

[5] When all of the instructions are considered as a whole and the evidence (the substance of which as to liability is

above set forth) is examined, it should not be concluded in view of the provisions of section 4½, article VI of the State Constitution that prejudicial error has resulted.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concur.

MARLENEE v. BROWN et al.

Civ. 13279.

District Court of Appeal, Second District, Division 3, California.

July 31, 1942.

Rehearing Denied Aug. 27, 1942.

Hearing Granted Sept. 28, 1942.

1. Executors and administrators ⇨380(3)

Under order confirming executrix' sale of decedent's realty and directing conveyance for $10,000 less amount of liens and encumbrances, evidence that executrix' deed recited consideration of $5,670 received, and that total amount of unpaid taxes and assessments amounted to $3,773.79, was insufficient to overcome presumption that deed conformed to order, since there might have been liens other than for taxes and assessments and liens for taxes and assessments which were not due. Probate Code, § 785.

2. Evidence ⇨383(3)

Certified copies of records of deeds were "prima facie" evidence of genuineness, due execution and delivery of deeds. Civ.Code, § 1055.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie".

3. Deeds ⇨194(3)

The statutory presumption that deed duly executed has been delivered at its date extends to the fact, as well as the time, of delivery. Civ.Code, § 1055.

4. Pleading ⇨8(3), 129(2)

In action to set aside order confirming executrix' sale of decedent's realty, wherein complaint alleged that party named in order as grantee had made no bid, had no intention to purchase, and did not in fact purchase, failure to deny such allegations admitted that there was no sale to such party, notwithstanding allegation in answer of conclusion that sale was an actual sale.

5. Executors and administrators ⇨375

An order finding that sale of decedent's realty by executrix was fairly conducted and legally made to certain party as alleged in return, and confirming sale, was a direct adjudication that there was such a sale, which adjudication was binding as against executrix and in favor of party named as grantee and his successors. Probate Code, §§ 754, 755, 780, 785, 788, 1200; Code Civ.Proc. § 1908.

6. Executors and administrators ⇨375

An order finding that sale of decedent's realty by executrix was fairly conducted and legally made to certain party as alleged in return, and confirming sale, was not void for want of "jurisdiction" on ground that no such sale had been made. Probate Code, §§ 754, 755, 780, 785, 788, 1200; Code Civ.Proc. § 1908.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction".

7. Courts ⇨2

"Jurisdiction" always depends upon the allegations and never upon the facts.

8. Executors and administrators ⇨380(3)

In action to set aside order confirming executrix' sale of decedent's realty, plaintiff could not prevail on evidence showing, outside the record, that no such sale as was described in order was in fact made, notwithstanding that fact that no such sale was made was admitted in pleadings, and that no objection was made to evidence of such fact. Probate Code, § 785.

9. Executors and administrators ⇨383

An action to set aside order confirming executrix' sale of decedent's realty, except in so far as plaintiff sought to set aside order for fraud, was a "collateral attack" on order. Probate Code, § 785.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

10. Judgment ⇨660½

A person acquiring title to property in good faith and for value under judgment not void on its face and without knowledge or notice of fraud by which it was procured is fully protected against one assailing judgment for fraud.

11. Vendor and purchaser 🔑232(1)

Possession of land by one other than seller puts intending purchaser on inquiry as to possessor's rights, and charges intending purchaser with knowledge of all that such inquiry, if pursued, might have developed, but if inquiry is made, intending purchaser is not charged with notice of anything beyond what it discloses.

12. Executors and administrators 🔑380(1)

An order confirming executrix' sale of decedent's realty would not be set aside for fraud on executrix inducing sale, where title had passed through two parties to purchasers who had no actual notice of fraud, and where, although tenants were in possession, executrix did not claim title, but told such purchasers that she was collecting rents "for" their vendor. Probate Code, § 785.

"For" is often used to import an agency, and, when so used, means as agent of, or in behalf of.

See Words and Phrases, Permanent Edition, for all other definitions of "For".

13. Appeal and error 🔑1011(1)

A reviewing court was required to accept trial court's finding on conflicting evidence.

14. Estoppel 🔑22(2)

A recital in executrix' deed that decedent's realty had been sold to grantee "estopped" executrix from denying that sale was made to such grantee as against subsequent bona fide purchasers claiming through such grantee. Code Civ.Proc. § 1962, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

15. Estoppel 🔑22(2)

Recitals by deeds do not constitute "estoppels" when they are immaterial and not contractual or essential to the purposes of the instruments.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

16. Estoppel 🔑22(2)

A recital of giving of notice which is necessary to validity of deed is material and binding on grantor as an "estoppel".

17. Estoppel 🔑22(2)

A recital in executor's deed that he has letters testamentary is conclusive against him as to such fact on ground of "estoppel".

18. Estoppel 🔑12, 54

The rule that "estoppel" to dispute a fact does not arise unless party against whom it is urged is apprised of the true state of his own title when he does act claimed to constitute an estoppel relates only to estoppel by conduct and not to estoppel by deed.

19. Estoppel 🔑22(2)

One who recites a material fact in his deed must, at his own peril, make sure of the truth of the recital, and cannot later deny existence of such fact merely because he was ignorant of the truth or deceived in regard to it as against one entitled to rely on "estoppel".

20. Estoppel 🔑70(1), 80

An executrix who made return of sale of decedent's realty to certain grantee, who, on inquiry by subsequent bona fide purchasers claiming through such grantee, claimed no title, and who executed affidavit showing her knowledge that she had not in fact sold to grantee named in return and order of confirmation but to third party who took deed from such grantee, was "estopped" by her conduct from claiming title as against bona fide purchasers. Probate Code, § 785.

21. Appeal and error 🔑931(4)

A party's testimony that addition had been made to affidavit after she signed it raised "question of fact" for trial court, and, on such party's appeal, reviewing court was required to presume that trial court had decided that affidavit as signed was the same as that presented in court, which decision was binding on reviewing court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

22. Affidavits 🔑18

Attorney and client 🔑123(1)

A client's affidavit, obtained by attorney, was not an "advantage" within statute declaring presumptively invalid all transactions by which attorney obtains advantage over client, and hence fact that attorney procured affidavit did not affect its admissibility, but only its weight. Civ.Code, § 2235.

See Words and Phrases, Permanent Edition, for all other definitions of "Advantage".

23. Appeal and error ⚿**1012(1)**

A trial court's decision on weight of evidence is binding on reviewing court.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Phoebe A. Marlenee, sometimes known as Phoebe A. Colvin, as executrix of the last will and testament of Charles Lee Marlenee, against James E. Brown and others to set aside an order confirming the executrix' sale of realty belonging to decedent's estate. From a judgment for defendants, plaintiff appeals.

Affirmed.

Vere Radir Norton, W. H. Gregory and Finlayson, Bennett & Morrow, all of Los Angeles, for appellant.

M. J. Rankin, Milo V. Olson, R. Leslie Sparks, Thomas Reynolds, and Howard Painter, all of Los Angeles, for respondents.

SHAW, Justice pro tem.

Plaintiff, as executrix of the will of Charles Lee Marlenee, deceased, brought this action to set aside an order, made in the probate proceedings on his estate, confirming a sale of real property of the estate, to have a deed thereof signed by her as executrix and other conveyances purporting to vest the title to the property in the defendants declared void, and to recover possession of, and quiet the title of the estate to, the property. She appeals from a judgment in favor of defendants.

Plaintiff's letters testamentary on the estate were issued May 9, 1931, and the estate is still in course of administration. On February 27, 1935, there was filed in the estate proceedings a return, signed and verified by plaintiff, of a sale of the real property here in question to William Gaston, with a prayer for its confirmation. Due notice of a hearing on this return was given, and on March 15, 1935, the court made an order purporting to confirm this sale and direct a conveyance to be made accordingly. On July 1, 1935, plaintiff as executrix signed and acknowledged such a deed and it was recorded June 2, 1936. Plaintiff denied the execution of this deed but there was testimony that she did execute it, sufficient to support the trial court's finding that she did so. Gaston, named as the purchaser, conveyed the property to Taylor O. Taylor, by deed recorded June 2, 1936. Taylor sold and conveyed the property to defendants, his deed to them being delivered March 31, 1937, and recorded the same day. They paid him $17,500 therefor.

Plaintiff makes no objection that the above mentioned return of sale and order confirming sale were not in all respects regular and valid, if regard is had only to matters appearing on the face thereof. She contends, however, that in fact there was no sale at all to Gaston and so no subject matter on which an order confirming the sale could operate, and that the order was therefore void. While apparently admitting that her attack on the order here may be regarded as collateral, in the ordinary sense of that term, she further claims that the facts from which its invalidity results were admitted by the answer and also proved without objection at the trial and that hence the case is the same as if those facts appeared on the face of the order, and the order must here be held void by reason thereof. Further contentions by plaintiff are that her deed to Gaston was never delivered and for that reason passed no title to him, that it is void because not in conformity to the order of confirmation, and that Gaston's deed to Taylor also was not delivered. Plaintiff also claims that she was induced to take the proceedings above mentioned, resulting in an apparent conveyance of the property to Gaston, by fraud of Taylor, the grantee of Gaston, who was also her attorney and confidential adviser, that this fraud was not discovered by her until a short time before this action was brought, that she was in possession of the property, by her tenants, when defendants bought it and that defendants did not make inquiry as to her rights and are hence subject to them.

Defendants concede here that there was in fact no sale to Gaston, take no position as to the asserted fraud of Taylor, and dispute all the other contentions of plaintiff. Defendants also contend that by reason of plaintiff's proceedings above mentioned and other matters to be mentioned later, plaintiff is estopped to deny the validity of the probate sale and of her deed to Gaston, and that they bought the property from Taylor, who appeared of record to be its owner, for value and without notice, actual or constructive, of plaintiff's claims, and therefore they hold it free therefrom.

[1] Plaintiff's contention that her deed to Gaston was in violation of the order of confirmation is not supported by the record. That order directed a conveyance for a total price of $10,000, Gaston to assume

"the existing liens and encumbrances on said property" and to deduct from the price "the amount of said liens and encumbrances up to March 1st, 1935" and pay the balance in cash. The deed recites a consideration of $5,670 received, which is $4,330 less than the stated price. Plaintiff's argument is that it was stipulated at the trial that on March 1, 1935, the liens and encumbrances amounted to only $3,773.79, and hence the deed was for too little cash. But the record referred to shows only a stipulation that on March 1, 1935, "the total amount of unpaid and due taxes and assessments against the property amounted to $3,773.79." This does not show the total amount of liens and encumbrances, for there might have been liens other than taxes and assessments, and liens for taxes and assessments which were not due, all of which would have been included in the terms of the order, but not in the stipulation. We find nothing else anywhere in the record on this subject, and in the absence of a contrary showing the presumption is that the deed was regular in this respect.

[2, 3] There is no direct testimony that plaintiff's deed was delivered to Gaston or that Gaston's deed was delivered to Taylor. The notary who took plaintiff's acknowledgment testified that Taylor brought plaintiff into the notary's office, that he produced the deed and plaintiff signed it, but said nothing as to what became of it. The same notary testified that Gaston signed his deed to Taylor in her presence and acknowledged it before her, but did not say what became of it. Gaston testified that he never had possession of plaintiff's deed and did not knowingly sign and acknowledge a deed to Taylor, but admitted that he went to the notary's office to sign a paper for Taylor, and that there one more document, the nature of which he did not know, was handed back and forth between himself and Taylor and the notary. The record of each deed in the Recorder's office states that it was recorded at the request of the grantee. A certified copy of the record of each deed was admitted in evidence on plaintiff's offer, and such certified copies were prima facie evidence of the genuineness, due execution and delivery of the original deeds. Anthony v. Chapman, 1884, 65 Cal. 73, 76, 2 P. 889; Davis v. Pacific Improvement Co., 1897, 118 Cal. 45, 49, 50 P. 7; Dockstader v. First Nat. Bank of Lemoore, 1930, 104 Cal.App. 169, 172, 285 P. 715; see, also, Campbell v. Genshlea, 1919, 180 Cal. 213, 223, 180 P. 336; Keele v. Clouser, 1928, 92 Cal.App. 526, 532, 268 P. 682. A deed duly executed is presumed to have been delivered at its date (Civil Code, § 1055), and this presumption extends to the fact, as well as the time, of delivery. Marple v. Jackson, 1920, 184 Cal. 411, 417, 193 P. 940; Lewis v. Burns, 1898, 122 Cal. 358, 362, 55 P. 132; McDougall v. McDougall, 1902, 135 Cal. 316, 319, 67 P. 778; McGorray v. Robinson, 1902, 135 Cal. 312, 314, 67 P. 279.

[4] One of the contentions most strongly urged by appellant is that there was in fact no probate sale of the property to Gaston and hence no subject matter on which the order of confirmation could operate, and therefore the order is void. The facts in this matter are admitted by the pleadings. The complaint alleges that Gaston "never at any time made any bid for said property or for any part thereof; he never at any time offered to purchase said property. * * * At no time did said Gaston have any intention of purchasing said property or any part thereof and never at any time did he purchase it or any part of it. At no time was there a sale of said property or any part thereof to said Gaston." These allegations are undenied by the answer, except by an affirmative statement, not directed at these allegations of the complaint, that the sale was "an actual sale." The specific facts thus admitted are sufficient to show that there was no sale to Gaston, and their effect is not overcome by a mere denial (affirmatively stated) of the conclusion that there was no sale. Schoonover v. Birnbaum, 1906, 148 Cal. 548, 551, 83 P. 999; Easom v. General Mortgage Co., 1929, 101 Cal.App. 186, 190, 281 P. 514; Gillons v. Turner Oil Co., 1921, 51 Cal.App. 139, 141, 196 P. 276.

We take it as a fact, therefore, that there was actually no sale by plaintiff to Gaston, up to the time of the return of sale and the order of confirmation; but we cannot agree to the proposition that this fact makes the order void. As already stated, it is tacitly conceded that both the return of sale and the order were complete and regular in form and appeared, on the face of the record, to be valid, and examination of the record discloses no defects in them. Under the statute in force now and at the time of these proceedings, where a sale of real property of the estate is necessary to pay debts, legacies, family allowance or expenses, an executor can make such a sale without any preliminary proceedings other than a notice of sale. Probate Code, §§ 754, 780. Such a sale must, however, be reported to and confirmed by the court before title to the property passes, and notice of hearing such a report, commonly called a "return," is given by the clerk by posting (Probate Code, § 755), which notice directs all persons interested to appear and show cause, if any they have, why the sale should not be confirmed. Probate Code, § 1200. At the hearing the court is required to examine into the necessity for the sale and examine the return and witnesses in relation to the sale, and to confirm the sale if it appears "that the sale was legally made and fairly conducted," that good reason existed for it, and that it complied with other requirements set forth in the statute. Prob.Code, § 785. If the purchaser does not comply with the terms of sale, the sale may be vacated and a resale ordered, with liability on the purchaser for any deficiency in the price on such resale. Prob.Code, § 788.

[5] In following the procedure thus laid down an executor must necessarily file a return stating, with other matters, that a sale has been made, and the court is clearly given the power and duty to determine whether the sale so returned should be confirmed. One of the facts necessarily included in an affirmative determination of this question is that the sale reported has been made. The return here did allege a sale to Gaston, giving its terms, and the order found "that said sale was fairly conducted and legally made," and confirmed it. This was a direct adjudication that there was such a sale and it was binding as such against the plaintiff, who was a party to, and in fact the initiator of, the confirmation proceeding, in favor of defendants, the successors in interest of Gaston, who was also a party by virtue of the allegations of the return and had due notice of the hearing by the clerk's posting. Code of Civ.Proc. § 1908. In Baldwin v. Stewart, 1933, 218 Cal. 364, 368, 23 P.2d 283, 284, the court said of the statutory provisions referred to above: "By requiring the court to inquire into the regularity and fairness of the sale, by making specific provision for the liability of the purchaser for a deficiency in the event of his default and a possible resale, and by giving the right of appeal from an order confirming sale, the Legislature has evidenced a clear intent to make conclusive an order confirming sale which has become final. And we can see no good reason why parties who have been duly notified of the proceeding and extended every opportunity to present their objections, if any they have, should not be concluded thereby." It was further declared in that case that the notice provided for by section 1200 of the Probate Code was notice to the purchaser, and the order confirming a sale was held binding on a purchaser as to several facts relating to the sale which he sought to dispute. Regarding the validity of this notice by posting, see Security-First Nat. Bk. v. Superior Court, 1934, 1 Cal.2d 749, 756, 37 P.2d 69, 72, where the court, speaking of a posted notice of a testamentary trustee's account, said: "The notice required by the sections is constructive notice to everyone of the pendency of the proceedings, and a hearing had and order entered pursuant thereto is conclusive upon all parties in interest. [Citing cases.] Absence of a personal notice in such proceeding does not deprive any person in interest of any of his constitutional rights. [Citing cases.]"

[6, 7] Plaintiff further contends, however, that because there was in fact no sale there was nothing on which the order of confirmation could operate, and hence the court had no jurisdiction to make the order. This point relates to jurisdiction of the subject matter, the rule on which is: "Jurisdiction always depends upon the allegations and never upon the facts. When a party appears before a judicial tribunal and alleges that a certain right is denied him, and the law has given the tribunal the power to enforce that right—his adversary being notified—it must proceed to determine the truth or falsity of his allegations. The truth of the allegations does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step. Its jurisdiction, necessarily, has to be determined from the allegations, assuming them to be true." Van Fleet on Collateral Attack, § 60, pp. 73, 74. This rule was followed in Stuart v. Allen, 1860, 16 Cal. 473, 501, 76 Am.Dec. 551, where the court, upholding an order authorizing a probate sale made under our former procedure requiring such an order, said: "* * * it is immaterial, so far as this question of jurisdiction is concerned, whether the statements of the petition are true or not; the jurisdiction resting upon the averments of the petition, not upon proof of them." This rule was followed in case of an order confirming sale in Johnston v. Kitchin, 1928, 203 Cal. 766, 769, 265 P. 941. Likewise following this rule the court in Security-

First Nat. Bk. v. Superior Court, supra, 1934, 1 Cal.2d 749, 755, 756, 37 P.2d 69, 72, said of a proceeding for settling the account of a testamentary trustee under the Probate Code: "The filing of the petition setting forth the matters required by the Code sections noted vests jurisdiction in the probate court (see Estate of Simmons, 168 Cal. 390, 395, 143 P. 697), whether or not the allegations of the matters necessary to vest jurisdiction accord with the actual facts. Estate of Strong, 119 Cal. 663, 666, 51 P. 1078; Nicholson v. Leatham, 28 Cal. App. 597, 601, 153 P. 965, 155 P. 98." Similarly, it was held in Wood v. Roach, 1932, 125 Cal.App. 631, 639, 14 P.2d 170, that, while the court confirming a probate sale is required to ascertain the existence of proper grounds for the sale before acting, an erroneous conclusion in that regard would constitute error in the exercise of jurisdiction rather than a want of jurisdiction.

In this connection the case of Townsend v. Tallant, 1867, 33 Cal. 45, 91 Am.Dec. 617, is cited to us. There the validity of an order confirming a sale of real estate by an administrator was in question. At that time the statute required the administrator, before making a sale, to obtain an order authorizing him to sell, and to obtain such an order a petition must be filed and four weeks' notice by publication given of a hearing thereon. In case of the sale there in question such notice was published for only three weeks and it was held that by reason of this defect the order of sale was void. The order of confirmation, which recited the three weeks' publication of the notice, and thus showed the invalidity of the order of sale, was also held void. In so holding the court used some language which tends to favor plaintiff here, saying at page 54 of 33 Cal.: "But if the order of sale was coram non judice, then the 'sale' was no sale, and it could not be made valid and binding by any number of so-called confirmations. The sale being void, there was no subject matter upon which the order of confirmation could act. If the Court had no jurisdiction to order the sale it had none to confirm it. Where there is no power to render a judgment or to make an order, there can be none to confirm or execute it; or none, at least, without the help of legislation." These statements were made in view of the statutory proceeding then provided for a sale, which included a petition for sale, a notice of hearing it, and an order of sale, to be followed by a return of sale, notice, and order of confirmation, and the court evidently regarded this whole proceeding as a unit, with the order of sale the principal element, or judgment, and all the following steps merely ancillary or subordinate to it. On this view of the matter the proceedings leading up to the order of sale would be a part of the record of the order of confirmation and if they showed any fatal defect it would be deemed to be carried over, of record, to the latter order. On any other view, the language just quoted appears inconsistent with the rule above stated in regard to the manner of obtaining jurisdiction of the subject matter, for if the proceeding for confirmation were independent of what had gone before, the allegation of a valid sale in the return of sale would give the court jurisdiction to determine whether there was such a sale. Of course the order of confirmation there showed that the order of sale was void, so the language quoted was not strictly necessary to the decision.

[8, 9] The fact that there was no sale to Gaston does not appear anywhere in the record of the probate proceeding for confirmation of the sale. Ordinarily, therefore, such fact could not be shown by evidence outside of the record for the purpose of avoiding the order of confirmation in a collateral attack thereon. Except as the plaintiff seeks by this action to set aside the order for fraud, this is a collateral attack on the order. Plaintiff, however, calls our attention to the admission of the fact in the pleadings in this case and the introduction of evidence of it without objection and contends that this works an exception to the rule above stated, or rather that thereby the case is put in the same legal condition as if the fact of no sale actually appeared in the record of the confirmation. In support of this contention plaintiff cites Hill v. City Cab, etc., Co., 1889, 79 Cal. 188, 191, 21 P. 728; People v. Harrison, 1895, 107 Cal. 541, 546, 40 P. 956; Akley v. Bassett, 1922, 189 Cal. 625, 639, 209 P. 576; Follette v. Pacific L. & P. Co., 1922, 189 Cal. 193, 205, 208 P. 295, 23 A.L.R. 965, and Estate of Ivory, 1940, 37 Cal.App.2d 22, 30, 31, 98 P.2d 761. These cases all relate to jurisdiction over the person of the defendant, not to jurisdiction of the subject matter, and none of them holds that jurisdiction of the latter disappears merely because the allegations showing it turn out to be untrue. We find nothing in any of

them to suggest, for instance, that proceedings to collect or renew a superior court judgment would be defeated if the judgment creditor should admit, contrary to his pleading and the finding, that the value of the subject matter of the action was below the jurisdiction of that court. The holding of these cases is thus summed up in Estate of Ivory, supra, 37 Cal.App.2d at page 31, 98 P.2d at page 766: "These cases establish the rule that, although a judgment cannot be collaterally attacked because of lack of service, if that fact is stipulated to, the judgment must be read as if that fact appeared on the face of the judgment. In such event the judgment is then void on its face." We see no reason to apply this rule to a case like that at bar, involving only jurisdiction of the subject matter.

[10] None of the rules above stated prevent one in the plaintiff's situation from bringing an action to set aside the order by reason of fraud and this the plaintiff here has undertaken to do. She alleges that she was induced to sign the return of sale and consent to the order of confirmation, and to sign the deed, if she did so, by reason of fraud perpetrated on her by Taylor, who was a lawyer and had at one time been her attorney of record in the estate and continued to be her confidential friend and legal adviser in estate matters, although retiring as attorney of record, and who falsely represented to her that a sale of the property in question was necessary and that it had been sold to Gaston. Taylor later took the title by deed from Gaston. Further details of the fraud are alleged, but need not be recapitulated here. A person acquiring title to property in good faith and for value, under a judgment not void on its face, and without knowledge or notice of fraud by which it was procured, is fully protected against one assailing the judgment for fraud. Newport v. Hatton, 1929, 207 Cal. 515, 519, 279 P. 134; Garrison v. Blanchard, 1932, 127 Cal.App. 616, 622, 16 P.2d 273; Wood v. Roach, 1932, 125 Cal.App. 631, 640, 14 P.2d 170. We think this rule must be applied to protect defendants from the charge of fraud here.

[11] Plaintiff's contention in this matter is that she was in possession of the property by her tenants at the time defendants bought it, and therefore defendants took it subject to her rights. It is not claimed that they had any actual knowledge regarding them. It appears that after the deeds from plaintiff to Gaston and from Gaston to Taylor, plaintiff continued to rent the property and collect rent from the tenants as she had done before. She testified that she did this on her own account. Assuming this to be the fact, it is not sufficient, under the circumstances of this case, as the trial court could have viewed them, to charge the defendants with notice of her rights. It is true that possession of land by one other than the seller is sufficient to put an intending purchaser upon inquiry as to the rights of such person in possession, and charges the purchaser with knowledge of all that such inquiry, if pursued, might have developed (J. R. Garrett Co. v. States, 1935, 3 Cal.2d 379, 383, 44 P.2d 538), but if such inquiry is made, the purchaser is not charged with notice of anything beyond what it discloses. Porter v. Johnson, 1916, 172 Cal. 456, 156 P. 1022.

[12, 13] In this case, inquiry of the actual tenants would have led the defendants to plaintiff, as their landlord, we may assume. It appears that defendants did come in contact with plaintiff before the sale. The defendant James E. Brown appears to have acted, throughout the transaction, for the other defendant, who is his wife; and, no contention being made to the contrary, we assume she must bear the burdens, and is also entitled to the benefits, of his acts and information in negotiating the purchase. Before the contract of purchase was signed, James E. Brown visited Taylor, who told Brown that he, Taylor, had a woman taking care of the rents and that she would go over them with Brown and introduce him to the tenants. Taylor called plaintiff from his office, and next day, but still before the purchase was consummated, plaintiff met Brown at the office of the real estate broker by whom the deal was handled and said to him, "I came down to check the rents with you." She also said to Brown at this time that she was "collecting the rent for Mr. Taylor." The word "for" has many meanings. It is often used to import an agency, and when so used means "as agent of" or "in behalf of". 26 C.J 791. Such is the most obvious interpretation of it as used in this statement of plaintiff. She argues now that this statement might merely mean that Taylor was her agent and that when she collected rent she turned the money

over to him to use on her behalf. This puts a strained and unusual meaning on the word "for" and we see no reason why the trial court should have so understood it, or should have attributed that understanding of it to defendants. After this conversation plaintiff went with Brown to the property and introduced him to several of the tenants, saying that he "was going to be the new purchaser of the property." She also told him that she owned some of the furniture in the property and offered to sell it to him, stated that some of the rents were unpaid and she would come back to attempt their collection and the sale of the furniture to tenants and asked him what he was paying for the property, but at no time told him that she claimed an interest in the property. Plaintiff, as a witness, denies most of the facts just recited, which were testified to by Brown or the real estate broker, but in view of the trial court's decision for defendants we must accept them as facts. We think they are sufficient to relieve defendants from the rule imputing to a purchaser notice of the rights of the possessor. Here defendants found the possessor, who, in effect, told them her possession was in behalf of the seller with whom they were dealing, said nothing of her own rights, and treated them as persons who would become owners of the property by the transaction. The case is very much like Porter v. Johnson, supra, 1916, 172 Cal. 456, 156 P. 1022 1023, where plaintiff, the buyer, talked to the occupant, who to his knowledge had an uncompleted contract of purchase, and she told him that she consented to a sale of the property to him by her vendor, saying nothing of any other rights she claimed in the property. Later she claimed that the contract was a mortgage in disguise, but it was held that her possession did not charge plaintiff with notice of her rights in this respect, the court saying: "The defendant relies on decisions to the effect that possession by her was notice of her claim sufficient to put the plaintiff upon inquiry at the time of his purchase. This proposition is not disputed. The answer is that, under the circumstances as appearing to the plaintiff, and under the statements made by the defendant herself, there was no occasion for inquiry. The possession of the defendant was fully explained, and it was in no manner inconsistent with the proposition that the investment company owned the legal title and was selling it with the consent and for the benefit of the defendant. The principle contended for is well established, but it has no application to the present case."

Defendants contend that for several reasons plaintiff is estopped from asserting her title, that is, the title of the estate, against them. "An executor or administrator, in his capacity as such, is as much bound by the laws of estoppel as if he were acting in his individual capacity." 23 C.J. 1178; see, also, Larco v. Casaneuava, 1866, 30 Cal. 560, 569. The plaintiff in her return of sale and in her deed of the property to Gaston stated the fact which she now seeks to deny, that is, that there had been a sale of the property to Gaston. Defendants and Taylor entered into a contract of sale which required Taylor to furnish a "guarantee" showing his title to be free and clear, and they also placed the matter in escrow with a title company under instructions calling for such a title to be insured by a policy running to defendants, and the transaction was closed through this escrow; from all of which the court might properly infer that the title company investigated the title, examined the documents just mentioned, and by means of the policy issued communicated the results of such examination to defendants, and that the defendants in legal effect relied on the facts stated in the return and deed.

[14-17] The legal rule applicable to this situation is thus stated in section 1962 of the Code of Civil Procedure: "The following presumptions, and no others, are deemed conclusive: * * * 2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration; * * *." This provision is applicable to plaintiff's deed, for defendants are the successors in interest of her grantee by a subsequent title. Recitals by deeds, it has been held, do not constitute estoppels when they are immaterial and not contractual or essential to the purposes of the instrument. 31 C.J.S. Estoppel, § 37, p. 215; 21 C.J. 1091; Osborne v. Endicott, 1856, 6 Cal. 149, 153, 65 Am.Dec. 498; Ingersoll v. Truebody, 1871, 40 Cal. 603, 610. But a recital of the giving of a notice which is necessary to the validity of the deed is material and is binding on the grantor as an estoppel. Simson v. Eckstein, 1863, 22 Cal. 580, 592. A recital in a deed made by an executor as such that he has letters testamentary is conclusive against him as to this fact. Larco v. Casaneuava, supra, 1866,

30 Cal. 560, 569. Recitals in the deed of a city that certain proceedings necessary to authorize the deed have been taken are binding on the city. Gordon v. City of San Diego, 1894, 101 Cal. 522, 527, 36 P. 18, 40 Am.St.Rep. 73. So here, the making of a sale to Gaston was one of the facts necessary to support plaintiff's deed to him and its recital in the deed is binding on plaintiff.

[18, 19] In opposition to the claim of estoppel plaintiff argues that an estoppel to dispute a fact does not arise unless the party against whom it is urged is "apprised of the true state of his own title" when he does the acts claimed to constitute an estoppel, citing Biddle Boggs v. Merced Mining Co., 1859, 14 Cal. 279, 367, 368, in support of the argument. This case has been cited and followed in many later cases and the rule declared by it must be regarded as settled in this state. But it relates only to an estoppel by conduct, otherwise known as an estoppel in pais. This is a different matter from an estoppel by deed. The latter is provided for by the part of section 1962 of the Code of Civil Procedure above quoted, and that does not state any such qualification to the estoppel, which is therein stated in the form of a conclusive presumption. No authority is cited to show any such limitation on an estoppel by deed, and the rules regarding such estoppels, as set forth in 31 C.J.S., Estoppel, §§ 36–39, pp. 213–219, do not state any such limitation. We think there is none. One who recites a material fact in his deed must at his own peril make sure of the truth of the recital and cannot later be heard to deny the existence of such fact merely because he was ignorant of the truth or deceived in regard to it, as against one entitled to rely on the estoppel.

[20, 21] Other estoppels claimed by defendants do arise from conduct. The conduct of plaintiff in her communications to and dealings with defendants in connection with the sale of the property to them by Taylor, which we have already recited, are sufficient to raise this sort of estoppel. Porter v. Johnson, supra, 1916, 172 Cal. 456, 156 P. 1022. The act of plaintiff in making a return of a sale to Gaston and stating therein that a sale to him had been made is sufficient to create an estoppel to dispute the fact of a sale, in favor of defendants, who, as the trial court could properly infer, relied upon that return and statement. Conceding that plaintiff's knowledge of the real facts is necessary to these estoppels, we find evidence of such knowledge. Defendants' Exhibit A, which is in evidence, is an affidavit purporting to be signed and sworn to by plaintiff July 7, 1937. She admitted that the signature to it was hers, but testified that when she signed the affidavit it contained only a part of the matter now appearing in it. Her testimony is uncertain on the question whether the part of the affidavit we are about to quote was in it when she signed it. Plaintiff further testified that she signed the affidavit at Taylor's office, then went to the notary with it and the notary did not notarize it, and plaintiff brought it back to Taylor and left it with him. The notary before whom the affidavit purports to have been made testified that plaintiff "executed" it in her presence and the witness "notarized" it, but had no recollection of the details of the incident. It was a question of fact for the trial court to determine whether the affidavit as signed was the same as that presented in court, and we must presume a decision that it was, which is binding on us. The affidavit contains this statement: "On March 1–35 the court ordered me to sell at once all the property then belonging to said estate, and I therefore carried through a probate sale of said property—(Lots one and eight of the Blondeau Tract with the buildings thereon and the furniture therein) to William Gaston. The fixed price was $10,000 gross, or $5,670 net, subject to liens and incumbrances amounting to more than $4,330. But Gaston couldn't raise the $5,670 and we couldn't get another offer from anyone. In order to avoid the expense of a second probate sale, enable us to hold the property for a better market, and enable me, in the meantime, to receive the rents thereof, I arranged with T. O. Taylor to take the title in his own name, through Gaston, hold it as long as he could, sell it for the best price obtainable, apply the net proceeds on my indebtedness to him, and meanwhile take care of all my litigation. The date of said transaction was July 1–35, and T. O. Taylor has fully kept and performed his agreement." The property described is that involved in this action. This is sufficient to show plaintiff's knowledge, at all times material here, that there was in fact no sale to Gaston.

[22, 23] Plaintiff contends that this affidavit was signed by her at the request of Taylor, who was then her legal adviser, and that it is therefore presumed to have been obtained by undue influence, which

presumption is not rebutted, and for that reason it cannot be used in evidence against her as an admission. The evidence of the fact on which this argument depends is doubtful. Plaintiff's testimony does not show that Taylor requested the signature, but only that it was made in his presence. In view of plaintiff's interest in the case and the various contradictions of her testimony in the record, in regard to this affidavit and other matters, the trial court may have rejected her testimony on this point. But if it be accepted as true and showing the affidavit was made at Taylor's request, no authority is cited in support of plaintiff's contention. While it is the rule that all transactions between attorney and client by which the attorney obtains an advantage over his client are presumptively invalid (3 Cal.Jur. 624; Civil Code, § 2235), we know of no rule that a written statement of fact signed by the client at the attorney's request, even though it may conceivably be useful to the attorney at some time as evidence in a controversy with the client, is to be regarded as an "advantage" to which this rule applies. All the cases cited by plaintiff to the rule above stated and all others which have come to our attention relate to contracts or other business dealings, or to matters affecting property, such as wills, deeds, gifts and other transfers. In 31 C.J.S., Evidence, § 298, p. 1067 and 22 C. J. 329, in the articles on Evidence, we find the rule that "The time and place of the making of an extrajudicial admission and the circumstances surrounding the admission bear only on its weight and not on its competency as evidence"; but neither in these articles, nor in the discussion of the subject of extrajudicial admissions in 4 Wigmore on Evidence, 3d (1940) Ed., §§ 1048 to 1087, do we find a hint of any such rule as that for which plaintiff now contends. The applicable rule is that just quoted from Corpus Juris and C.J.S. The affidavit was properly admitted in evidence and the matters now raised against it go only to its weight, on which the trial court's decision is binding on us.

Plaintiff's other contentions have been considered and found not determinative of the appeal, and it is not deemed necessary to lengthen this opinion by further discussion.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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53 Cal.App.2d 474

PEOPLE v. YECNY.

Cr. 1797.

District Court of Appeal, Third District, California.

July 20, 1942.

1. Perjury 🔑33(1)

Evidence warranted conviction for perjury of woman who having described to deputy district attorney and constable acts of sex perversion committed upon her by her husband testified in preliminary examination denying that she had ever made any such statement. Pen.Code, §§ 118, 288a.

2. Criminal law 🔑829(3)

Where jury was instructed that the specific intent willfully to swear falsely as to material facts known to the accused to be untrue coupled with the act of making such false statements under oath was necessary to warrant conviction for perjury, it was not error to refuse to give requested instructions to the same effect seeking to emphasize supposed misunderstanding by alleged perjurer of the questions put to her and the possibility of perjured testimony having been given under duress, particularly in the absence of any evidence of such misunderstanding or duress. Pen.Code, § 118.

3. Criminal law 🔑713

Closing argument of district attorney in prosecution for perjury that because of accused's false statements at preliminary examination charges against her husband of sex perversion committed upon accused had been dismissed and that accused ought to be punished therefor did not constitute "misconduct" preventing accused from securing a fair and impartial trial. Pen.Code, §§ 118, 288a.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

4. Criminal law 🔑1037(1, 2)

Where admonition to jury to disregard misconduct of district attorney will remove its prejudicial effect, possible effect upon jury of improper argument or other misconduct of district attorney will not be considered on appeal, unless accused promptly called the attention of the court to alleged impropriety and assigned misconduct thereon, or requested court to admonish jury to disregard the improper argument or conduct.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Gertrude Yecny was convicted of the crime of perjury, and she appeals.

Judgment affirmed.

W. A. McGugin and Nicholas H. Dubsick, both of Fresno, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant was convicted of the crime of perjury, it being charged in the information that she gave false testimony after being sworn as a witness at a preliminary examination in a case in which her husband, James A. Yecny, had been charged with a violation of section 288a of the Penal Code, to-wit, certain sex perversions. The perjured testimony with which appellant was charged consisted of answers made, in which she denied having had a conversation on October 8, 1941, in which she stated that James A. Yecny had committed sex perversions upon her on several specific dates.

Upon the trial, the shorthand reporters who had taken down appellant's statement on October 8, 1941, and also the testimony at the preliminary examination, were called as witnesses, and said statement and testimony were introduced in evidence. In addition, several witnesses testified to having heard appellant make the statements attributed to her on October 8, 1941, and also her testimony at the preliminary examination.

Appellant contends "that there is no evidence showing that appellant at any time freely and wilfully, and with freedom of thought and action, stated as true any material fact that she knew to be false." Appellant merely refers us "to the entire testimony at the trial as set forth in the reporter's transcript," and does not cite any testimony or go into any detail, or cite any authority. We have, however, read the record carefully, and it is quite clear therefrom that after making a statement to the deputy district attorney and the constable on October 9, 1941, in which she went into detail as to the acts of sex perversion committed upon her by James A. Yecny, appellant went upon the witness stand in the preliminary examination and denied ever having made any such statements, or any statement accusing her husband of sex perversion.

The crime of perjury is defined by section 118 of the Penal Code as follows:

"Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury."

[1] There was ample evidence in the record to justify the jury in concluding that appellant wilfully and contrary to her oath, stated as true, material matter which she knew to be false.

Appellant also contends that the court erred in refusing to give to the jury the following instructions offered by appellant:

"1. You are instructed that the intent to swear falsely is the specific criminal intent that must be proved beyond a reasonable doubt by the district attorney to establish the crime of perjury and, if you find from the evidence that Mrs. Yecny was honestly mistaken in her testimony, you must then return a verdict of Not Guilty.

"2. You are instructed that, if you find the defendant, Mrs. Yecny, did not understand the questions put to her by Mr. Coffee when she was under oath, then you must find her Not Guilty.

"3. You are instructed that it is not perjury to swear to that which a witness honestly believes to be true.

"4. You are instructed that it is essential to the crime of perjury that the sworn statement be made with knowledge of its falsity by the perjurer and with freedom of thought and action in so far as menace, threats or kindred inducing causes are concerned and, if you find from the facts introduced in this case that Mrs. Yecny acted by reason of any menace, or threats and not without absolute freedom of thought on her part, then you must find her Not Guilty."

It will be observed that all of these instructions point to the necessity that the prosecution prove a specific intent to swear falsely before the crime of perjury can be proved, and that if the appellant was honestly mistaken in her belief that her statements were true, she cannot be convicted of perjury.

The court in the instant case gave the following instructions upon this point:

"You are instructed that every person who having taken an oath that he will testify truly before a duly elected, qualified and acting Justice of the Peace sitting as a magistrate, wilfully and contrary to such oath, states as true any material matter which he knows to be false, is guilty of perjury.

"In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence. Intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused. All persons are of sound mind who are neither idiots or lunatics or affected with insanity. * * *

"The court further instructs the jury that it is not necessary to prove or establish all of the matters alleged and set up in the Information as constituting the charge of perjury against the defendant herein: It is sufficient if you believe from the evidence beyond a reasonable doubt, that the prosecution has proven that any of the matters charged in the Information were so sworn to or testified by the defendant under oath on the occasion of the preliminary examination of the complaint against James A. Yecny, as charged in the Information, and that the same is proven by the prosecution, beyond a reasonable doubt, to have been false and untrue at the time the same was sworn to, or testified to, to the then knowledge of the defendant, as charged in the Information, and that the same was material.

"You are instructed that criminal intent is a vital element in the crime of perjury, and if you find from the facts of this case that Mrs. Yecny did not have any criminal intent in making the statements as alleged in the Information, then you must find her Not Guilty."

The court also instructed the jury:

"A witness is presumed to tell the truth. This presumption, however, may be overcome by the manner in which such witness testifies, as well as by other circumstances or conditions such as may be used in testing the credibility of any witness, as I have heretofore instructed you. If you are convinced that a witness has sworn falsely to a material matter, and being convinced that such false testimony was not the result of mistake or inadvertence, but wilfully given with the design to deceive, then all of the testimony of such witness should be disregarded by you, unless such testimony or any portion thereof may be supported by other testimony entitled to greater weight, or for other reasons you may be convinced that the witness has testified truthfully as to a portion of his or her testimony."

[2] We believe the instructions given by the trial court covered all the material matter which was included in the proposed instructions of the appellant. The jury, in determining whether or not the appellant knew the nature of the questions, and fully understood her answers to them, and whether she was under any duress or menace, was determining her criminal intent. We see no reason for the court to have gone into further detail as to how the jury should have arrived at its decision in determining criminal intent. The evidence does not indicate that the false testimony for defendant was induced by reason of threats, menace or duress, and her own testimony suggests evasiveness rather than any lack of understanding of the questions asked her.

In the case of People v. Mizer, 37 Cal. App.2d 148, at page 154, 99 P.2d 333, at page 336, where perjury was defined by the court in its instructions in the language of the statute, this court had the following to say in regard to the necessary instructions regarding intent in a perjury case:

"The jury was properly instructed with respect to the intent with which the false testimony was given. Perjury was defined in the language of the statute. The jury was plainly told they could not convict the defendant unless it appeared beyond a reasonable doubt and to a moral certainty that, under oath, in a trial before a competent court, he wilfully testified falsely as to material facts, which were not only false, but which he knew to be untrue. It follows that such false testimony is necessarily given with the deliberate intent to deceive the jurors or the court with respect to the essential facts involved."

[3, 4] Lastly, appellant complains "that the district attorney committed error in his argument, and denied appellant a fair and impartial trial." In his closing argument the district attorney asserted in rather strong language that, because of the perjury of appellant, "this filthy man here (referring to James Yecny, appellant's husband), has been dismissed and goes scott free, and this woman ought to be punished for it." We do not believe that the district

attorney exceeded the bounds of legitimate argument in this case. Furthermore, counsel for defendant did not assign said, or any statements of the district attorney as misconduct, or ask the court to instruct the jury to disregard it. As is stated in 8 California Jurisprudence, page 508:

> "It is a general rule that where an admonition to the jury to disregard misconduct of the district attorney will remove its prejudicial effect, the possible effect upon a jury of improper argument or other misconduct of a district attorney will not be considered upon appeal, unless the defendant promptly called the attention of the court to the alleged impropriety and assigned misconduct thereon, or requested the court to admonish the jury to disregard it. The reason for this rule is that the court should be given the opportunity to correct the irregularity to prevent any prejudicial effect, if that be possible."

In view of the foregoing, we conclude that appellant was fairly tried, that the judgment of conviction is supported by sufficient evidence, and that there is no error in the record.

The judgment is affirmed.

WEST KEY NUMBER SYSTEM

MAGUIRE et al. v. HIBERNIA SAVINGS & LOAN SOC. et al.

EDWARDS et al. v. SAME.

CRILLY v. SAME.

CROWLEY v. SAME.

Civ. 11584, 11586, 11590, 11593.

District Court of Appeal, First District, Division 2, California.

July 23, 1942.

Rehearing Denied Aug. 22, 1942.

Hearing Granted Sept. 21, 1942.

1. Banks and banking 🔑293

Under by-laws and rules of incorporated savings and loan society providing that those who signed by-laws and paid entrance fees should be considered members, and otherwise referring to "members and stockholders", all "stockholders" were necessarily "members", but all "members" were not necessarily "stockholders". St.1853, p. 87.

See Words and Phrases, Permanent Edition, for all other definitions of "Member" and "Stockholder".

2. Action 🔑6

Actions in 1934 for declaratory judgments as to plaintiffs' membership in incorporated savings and loan society, which would involve investigation of plans, intentions, and acts of original incorporators and their associates from 1859 to 1864, were barred by "staleness of claims". St.1853, p. 87; St.1862, p. 199.

See Words and Phrases, Permanent Edition, for all other definitions of "Staleness of Claim".

3. Action 🔑63

The defense of "staleness of claim" exists independently of any statute of limitations, and does not rest alone upon the doctrine of "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

4. Action 🔑63

A "stale demand or claim" is one that has for a long time remained unasserted, one that is first asserted after unexplained delay of such great length as to render it difficult or impossible for court to ascertain truth of matters in controversy and do justice between the parties, or as to create presumption against existence or validity of claim, or presumption that it has been abandoned or satisfied.

See Words and Phrases, Permanent Edition, for all other definitions of "Stale Demand or Claim".

5. Action 🔑63

Strictly speaking, "laches" and "staleness of claim" are distinct conceptions, and staleness of claim necessarily implies great lapse of time, while, to constitute laches, delay need not necessarily be long continued.

6. Action 🔑63

To constitute "laches", change in conditions must have occurred that would render it inequitable to enforce a claim, while no such change need have occurred in order to make defense of "staleness of claim" available.

7. Action 🔑63

The defense of staleness of claim is recognized in California.

8. Pleading ⚿193(4)

The defense of staleness of claim is available on demurrer when such staleness appears on face of complaint.

9. Banks and banking ⚿307

Under by-laws of incorporated savings and loan society providing that, until otherwise provided, depositors should be entitled to same share of profits and same dividends as members, depositors who were not members were not entitled to share with members in reserve fund on reincorporation of society as a capital stock corporation. Civ. Code, § 1643; St.1853, p. 87; St.1862, p. 199.

◆

Appeals from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge Assigned.

Actions for declaratory relief by Thomas M. Maguire and others by Minnie B. Edwards and others, by Mary F. Crilly, and by Kate Hayes Crowley as executor, against the Hibernia Savings & Loan Society, a corporation, and others. From adverse judgments, plaintiffs appeal.

Affirmed.

Hearing granted; CURTIS, J., not participating.

M. Mitchell Bourquin, Keyes & Erskine, George Olshausen, Rosenshine, Hoffman, Davis & Martin, and Heller, Ehrman, White & McAuliffe, all of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Garret W. McEnerney and Tobin & Tobin, all of San Francisco, for respondents.

SPENCE, Justice.

The above entitled appeals have been submitted on one set of briefs as precisely the same questions are involved in all four cases. Plaintiffs in said actions sought declaratory relief as alleged members of and as alleged depositors in defendant The Hibernia Savings and Loan Society, a corporation. In each case defendants interposed a general and special demurrer to the final complaint therein, a motion to strike portions thereof and a motion to dismiss the action upon the ground that declaratory relief was not "necessary or proper." Code of Civil Procedure, section 1061. The trial court entered a written order in each case containing several provisions. Defendants' demurrer to the final complaint in each case was sustained without leave to amend upon the grounds specified in the order including the ground that neither the final complaint nor the first or second count thereof stated facts sufficient to constitute a cause of action. The demurrer in each case was sustained upon the further ground that the alleged causes of action were barred by the statute of limitations and by laches. It was further ordered in each case that the motion to dismiss, made under section 1061 of the Code of Civil Procedure, be granted. The order in each case expressly recited that other grounds of demurrer, including those set forth in the special demurrer, were not passed upon and likewise that the motion to strike portions of the final complaint was not passed upon. Judgment was thereupon entered in favor of defendants in each of said actions. An appeal was thereupon taken by the plaintiff or plaintiffs in each of said actions from the judgment so entered.

As the final complaint in each of said four actions contained substantially the same allegations, we will discuss the allegations of the final complaint in Maguire v. Hibernia Savings & Loan Society et al., No. 11584, in the same manner as though that case was the only one before us and we will make only passing reference to the allegations in the final complaints in the other three actions. Before proceeding to such discussion, however, it appears appropriate to refer generally to the historical background of this litigation. This background may be gleaned from the allegations of the final complaint, the early statutes of this state relating to corporations and from facts which are matters of common knowledge and of which we may take judicial notice.

In 1859, The Hibernia Savings and Loan Society was organized as a corporation under the act of 1853 entitled "An Act To Provide for the Formation of Corporations for Certain Purposes." St.1853, p. 87. By section 25 of that act, chapter five of the act of 1850 entitled "An Act Concerning Corporations" (St.1850, p. 347) was repealed. The act of 1850 had been divided into chapters providing for the formation of corporations for various purposes but there was no provision in said act for the formation of corporations for the purpose of conducting the business of banking. Chapter five of the act of 1850 provided only for the formation of corporations "for the purpose of carrying on any kind of manufacturing, mining, mechanical, or chemical business." Said chapter five was replaced by the act of 1853 which provided for "Corporations for manufacturing, mining, mechanical, or chemical purposes, or for the purpose of engaging in any species of trade or commerce. * * *" St.1853, p. 87, § 1. Four corporations, including The Hibernia Savings and Loan Society, purported to incorporate between 1853 and 1862 under said act of 1853 for the purpose of conducting the business of savings banks, but the question was soon raised as to whether savings banks could be legally incorporated thereunder. See Archbald, Savings Banks of California, 2 Overland Monthly 363. In 1862, there was enacted "An Act to Provide for the Formation of Corporations for the Accumulation and Investment of Funds and Savings." St.1862, p. 199. This was the first act relating to corporations which specifically provided for the formation of corporations for the purpose of conducting the business of savings banks. Thereafter and in 1864, section 27 of said act of 1862 was amended to provide that: "All corporations for the accumulation, preservation, and investment of funds and savings, all Savings and Loan Societies, and all associations or societies for the like purpose, claiming in good faith to be incorporated under the laws of this State, may avail themselves of the provisions of and become incorporated under this Act by filing with the County Clerk of the county in which their principal place of business is located, and a certified copy thereof in the Office of the Secretary of State, a certificate stating their intention and election to become so incorporated, which intention and election may be made and declared by the Trustees or Acting Trustees of such corporation, association, or society, or a majority thereof. * * * Such certificate shall in other respects conform to the requirements of this Act." Stats. 1863–64, p. 531. In 1864, The Hibernia Savings and Loan Society availed itself of the provisions of the act of 1864 by filing the certificate above mentioned.

Neither plaintiffs nor defendants question the validity of the original incorporation of 1859 under the act of 1853 or the reincorporation of 1864 under the act of 1862 as amended in 1864. Plaintiffs' claim of membership in the defendant corporation, as reincorporated in 1864, is based upon the original deposit of plaintiffs' predecessor, Michael Maguire, which original deposit was made in 1862 with the corporation organized in 1859. It is alleged that at the time of the original deposit in 1862, a passbook was issued to Michael Maguire containing a copy of the by-laws then existing. It is upon the alleged contract which came into existence at that time that plaintiffs predicate their present claim of membership as successors in interest of Michael Maguire. It therefore becomes necessary first to discuss briefly the act of 1853, the incorporation thereunder in 1859 and the by-laws adopted in 1859 and, thereafter, to discuss briefly the act of 1862 as amended, the incorporation thereunder in 1864 and the by-laws adopted in 1864 and later.

The Act of 1853, the Incorporation Under Said Act in 1859, and the By-Laws Adopted in 1859.

The act of 1853, St. 1853, p. 87, appears to contain many of the provisions ordinarily found in statutes providing for the formation of corporations of specified classes. It will suffice to call attention to a few provisions thereof. It provided only for the formation of corporations having a capital stock and made no provision for the formation of corporations without capital stock. In other words, there were no provisions for corporations to be composed of members rather than stockholders. It was required that the certificate of incorporation should state the amount of the capital stock and the number of shares of which the stock should consist. § 2. The corporate powers were to be exercised by a board of not less than three trustees who were to be elected by the stockholders. § 5. A stockholders' liability was imposed (§ 16) in conformity with the provisions of section 36 of article IV of the Constitution of 1849. The act also contained the provision that "the total amount of the debts of the corporation shall not at any time exceed the amount of the capital stock actually paid in." § 14.

The certificate of incorporation of 1859 provided for a capital stock of $600,000 consisting of 6,000 shares. It also set forth the other matters required by the act. Eleven trustees were named therein and it was signed by twenty incorporators. Plaintiffs' predecessor was not among the incorporators. Our attention is called to the statement therein by the incorporators "that we have associated ourselves together for the purpose of forming a Society, and that we desire to incorporate the same under" the act of 1853; and the further statement "that the object for which it is formed is, that by means of it the members thereof may be enabled to find a secure and profitable investment for small savings, and may have an opportunity of obtaining from it the use of a moderate capital, on giving good and sufficient security for the repayment of the same." We note the further statement in said certificate "that the Society shall go into operation as soon as thirty shares shall have been subscribed for, and an installment of five dollars per share paid thereon."

At the time of the incorporation in 1859, by-laws and rules of order were adopted. Our attention is called to the preamble which recited: "We, the undersigned, being desirous of forming a Society, by means of which its members may be enabled to find a secure and profitable investment for small savings, do, each for himself, covenant, promise and agree to and with all the other subscribers hereto, that the following By-Laws shall govern us, and determine our mutual duties, rights and privileges, as members of such Society." The by-laws stated the amount of capital stock as $600,000 and the number of shares as 6,000. It was provided that "Those who shall sign these By-Laws in the book to be kept for that purpose by the Secretary, and pay the entrance fee of two dollars, shall be styled and considered members of this corporation. Those, who, in addition to the above, shall hold one or more shares of its Stock, shall further be styled and considered Stockholders. * * * The entrance fee will in no case be repaid or credited back, but shall be considered part of the sinking fund hereinafter provided for." It was provided that the trustees should be elected by the stockholders and further provided that one of the trustees should be "elected by the Society" as President and another as Vice President. The members were "at liberty to make deposits" in sums of not less than $2.50. Each depositor was to be furnished with a pass-book having a printed copy of the by-laws appended to it, in which pass-book his deposits were to be entered. It was provided that "As soon as the amount to his credit shall form a full share, he shall be entitled to a Certificate of Stock, up to the number of twenty shares, the corresponding debt being entered on his pass-book, and such share may be transferred on the books of the Society to any member of the same, by the owner paying a fee of Fifty Cents, for the transfer of each share, and surrendering the Certificate which shall be marked 'cancelled' on its face; but whenever a member would thereby become the owner of more than twenty shares, then the excess over this number shall become a simple deposit, as contemplated in the preceding article, and shall be credited to the owner thereof on his pass-book." Provision was made for monthly meetings and annual meetings "of the Society" as well as monthly meetings of the board of trustees. Special meetings "of the Society" were to be called upon written request of ten stockholders and notice thereof was to be given to the "members and stockholders." The funds of the society were to be employed (1) "in refunding to members the whole or part of their shares, or deposits, which shall be done in order of their applications"; (2) in loans on shares in the society; and (3) in loans to members at one per cent per month, the funds being put up at auction by the presiding officer at the meetings of the society and being awarded to the member bidding the greatest premium. The by-laws could be amended only by three-fourths of the shares represented at a meeting of the society. It was also provided that "No money shall at any time be borrowed, nor shall any debt be contracted, for account, or in the name of this society."

[1] Other provisions of said by-laws and rules of order will be noted as the occasion may require. We may merely state here that as we understand the contentions of the parties, plaintiffs contend that the words "members" and "stockholders" were used synonymously in said by-laws and rules of order while defendants contend that the word "members," as used therein, was synonymous with "depositors." A reading of said by-laws and rules of order convinces us that the provisions thereof were somewhat anomalous, but it seems entirely clear that while all "stockholders" were necessarily "members," it may not be said that all "members" were "stockholders."

The Act of 1862 as Amended, the Incorporation Under Said Act in 1864, and the By-Laws Adopted in 1864 and Later.

The act of 1862, St.1862, p. 199, as already noted, was an act providing specifically for the incorporation of savings banks. That act permitted the formation of such corporations with or without a capital stock. § 2 and § 17. The corporate powers of such corporation were to be exercised by a board of not less than five directors who were required to be stockholders in the event that a capital stock was provided in the certificate of incorporation, or "members, each having deposits with the corporation to the amount of at least one hundred dollars," in the event that the corporation had no capital stock. § 6. In the case of corporations having no capital stock, the directors were required to retain, on each dividend day, at least five per cent of the net profits, to constitute a reserve fund. The disposal of any reserve fund in excess of $100,000 could be provided for in the by-laws. § 11. One section of said act purported to exempt the stockholders or members of such corporations from any liability in the nature of a stockholders' or members' liability § 27, but said section was later declared unconstitutional. McGowan v. McDonald, 111 Cal. 57, 43 P. 418, 52 Am.St.Rep. 149.

The amendment of 1864, St.1863–64, p. 531, which has been mentioned above, permitted savings banks "claiming in good faith to be incorporated under the laws of this State" to become incorporated under the act of 1862. Such a corporation could become so incorporated whenever the trustees of such corporation declared the "intention and election" of the corporation to become so incorporated and filed the required certificate. § 27. There was no specific method provided, however, for reincorporating a corporation, previously existing as a capital stock corporation, into a corporation without a capital stock under said act of 1862 as amended.

Following the adoption of said amendment of 1864, a certificate of incorporation, dated August 29, 1864, was signed by the president and secretary and was filed. It contained the required statements and was accompanied by a copy of the resolution of the trustees declaring the intention and election to become incorporated under the act of 1862. Said resolution and said certificate recited that "said corporation shall have no capital stock."

On September 29, 1864, a new code of by-laws was adopted which expressly repealed all former by-laws. Being a membership corporation rather than a capital stock corporation, no mention was made of stockholders. With respect to membership, this code provided in section I, article 4 as follows: "All persons who were members of The Hibernia Savings and Loan Society on the twenty-ninth day of August, 1864, shall be deemed and considered members of this corporation, and the signatures of such persons to an agreement on their part to become members of this corporation, and ratifying and confirming the incorporation of said The Hibernia Savings and Loan Society, as directed by a resolution of its Board of Trustees, adopted August 8th, 1864, shall be procured as speedily as may be. Other persons may be allowed to become members of this corporation by a vote of the Board of Directors, and not otherwise. Membership shall not pass with the ownership of moneys deposited with or under control of the corporation."

In 1867, the first portion of said article of the by-laws of 1864 was amended to apply only to those persons who were members on August 29, 1864, "and whose accounts have not since been closed." In 1868, said article was again amended to apply only to those persons who, on August 29, 1864, "had respectively not less than one hundred dollars to their credit." There was further added to the end of said article, a provision that "No one shall be deemed a member whose account is once closed." In 1870, said article was amended by changing the entire first portion of said article to read: "All persons, who, on November 1, 1870, had signed the agreement to become members of, and who then had accounts open with this Corporation, are deemed and considered members thereof." In 1871, the entire first portion of said article was again amended to read: "Those persons who, on January 17th, 1871, had signed the agreement to become members of The Hibernia Savings and Loan Society as a Corporation, incorporated and existing under an Act of the Legislature of the State of California, entitled 'An Act to provide for the Formation of Corporations for the Accumulation and Investment of Funds and Savings,' approved April 11th, 1862, and who at the date aforesaid, had accounts open with said Corporation, shall be deemed and considered the only members thereof at that date."

In 1874, said article was further amended by changing the first portion thereof to read "The only members of this Corporation are the persons who have signed the agreement hereinafter described, and who have kept accounts open with the Corporation since they respectively signed said agreement." In 1886, an amendment was added reading "Any person shall cease to be a member of this Corporation, The Hibernia Savings and Loan Society, who shall not have continuously and at all times, at least One Hundred Dollars to his or her credit upon an open deposit account on the books of this Corporation. Membership therein shall continue only so long as such credit shall exist, and shall cease whenever such credit shall cease to exist. Any provision of any By-Law in conflict with this By-Law is hereby repealed."

The record does not disclose any later amendment making any substantial change relating to membership. Other provisions of the by-laws adopted in 1864 or later will be mentioned as the occasion may require. We will now proceed to a discussion of the first and second counts of the final complaint.

First Count.

The first count of the final complaint is based upon plaintiffs' claim of the rights of a member of the defendant corporation. The incorporation of 1859 and the reincorporation of 1864 are alleged. The certificates are attached as exhibits as well as the various by-laws. As to the individual defendants, it is alleged that said defendants claim to be the only members of the defendant corporation and that "plaintiffs deny that said defendants, or any of them, are members of defendant The Hibernia Savings and Loan Society."

The theory of the first count appears to be that the incorporation of 1859, under the act of 1853, resulted in effect in the formation of a membership corporation rather than of a capital stock corporation because of the alleged "plan and intention" of the incorporators and their actions pursuant to such plan and intentions; that Michael Maguire, plaintiffs' predecessor, became a member of said corporation in 1862 and that plaintiffs as the successors in interest of Michael Maguire now have the rights of a member in the membership corporation formed in 1864; and that plaintiffs have the right as such member, and the individual defendants have not the right, to share in the alleged reserve fund of approximately $8,000,000 in the event that the present membership corporation may be reincorporated at any time as a capital stock corporation and the reserve fund converted into capital stock. It will be recalled that the act of 1853 provided only for the formation of corporations having a capital stock and made no provision for membership corporations.

The main allegations in support of plaintiffs' theory are found in paragraph four of the final complaint. Said paragraph reads as follows:

"That it was the plan and intention of the incorporators of said defendant The Hibernia Savings and Loan Society that said corporation should be conducted as a membership corporation, wherein the members were to be the owners, proprietors, and constituents of the corporation; that the members, stockholders and trustees carried out said plan, and no member, stockholder or trustee raised any objection thereto at any time; that the members of said corporation alone exercised the right to vote and to elect the trustees of said corporation and to amend the by-laws of said corporation, and to hold monthly, semi-annual, annual and special meetings of the corporation; and the trustees of said corporation at all times were elected from the members, not the stockholders of said corporation; that no dividends were ever declared or paid upon the outstanding stock of said corporation, but that all dividends were paid to the members upon their deposits.

"That no shares of stock of said corporation were issued prior to June 14, 1859; that during the period from June 14, 1859, to November 29, 1861, said corporation issued to certain members shares of stock in said corporation, but that no shares were issued subsequent to November 29, 1861; that after November 29, 1861, the outstanding shares were voluntarily surrendered, retired and cancelled; and that on or about June 27, 1863, all but four certificates had been retired and cancelled and the whereabouts of said four certificates were unknown, and after said last mentioned date the said corporation was composed of members only, none of whom held or owned any share or shares of stock; and that said members were the only owners, proprietors and constituents of the said corporation, recognized and considered as such by all persons interested in said corporation."

It is also alleged that in 1862, Michael Maguire entered into a "contract of membership" by signing the by-laws and by paying the entrance fee of two dollars; that a pass-book was issued to him showing the payment of said entrance fee and the deposit of the sum of $2,498; that since said time, Michael Maguire and his successors have continuously maintained a deposit evidenced by said pass-book, which deposit at the time of the commencement of this action in 1934 amounted to approximately $135; and that plaintiffs have succeeded to all the rights of said Michael Maguire as a member.

In further support of their theory, plaintiffs allege that no by-laws had ever been adopted by the members of the defendant corporation, other than the by-laws of 1859; that all by-laws adopted in 1864 and later, including those purporting to restrict membership, were invalid for the reason that all such by-laws were adopted by the directors and not by the members and such by-laws were adopted without any authority in law. It is alleged "That plaintiffs and each of them, and all their predecessors in interest have performed all conditions and requirements of all by-laws of the corporation, but have not performed the conditions and requirements of alleged by-laws referred to in paragraph IX hereof, except as to matters specifically alleged in this amended complaint." The "by-laws referred to in paragraph IX" are the by-laws adopted in 1864 and later.

Plaintiffs then allege in said final complaint the existence of an actual controversy between plaintiffs and defendants relating to the legal rights of the parties in the defendant corporation. The alleged claims of the parties are set forth at length and in some detail. Suffice it to state that it is alleged that plaintiffs claim the rights of a member in the present membership corporation as the successors in interest of Michael Maguire and further claim the defendants are not members and it is further alleged that these claims of plaintiffs are denied by defendants. The prayer of the complaint is that the court enter its judgment "declaring the rights and duties of plaintiffs and defendants in said defendant corporation."

Plaintiffs contend that the trial court erred in sustaining defendants' demurrer to said first count of the final complaint but in our opinion said contention cannot be sustained. Plaintiffs' claim of membership in the membership corporation incorporated in 1864 is based upon the several facts alleged in said first count of the final complaint. We believe the facts alleged therein are insufficient to sustain such claim. It may first be noted that there is no allegation that plaintiffs or their predecessors ever complied or offered to comply with any of the requirements of the by-laws of said membership corporation adopted in 1864 and later relating to membership. In fact, plaintiffs allege that plaintiffs and their predecessors "have not performed the conditions and requirements of alleged by-laws referred to in paragraph IX hereof. * * *" In other words, plaintiffs are not claiming membership under any by-law relating to membership adopted by the membership corporation incorporated in 1864 but are claiming membership therein solely because of the claimed status of Michael Maguire, their predecessor, as an alleged "member" of the corporation incorporated in 1859. As we view the contentions of the plaintiffs, it is conceded that the corporation incorporated in 1859 was formed under the act of 1853 which provided only for the formation of corporations having a capital stock and that the certificate of incorporation of 1859 and by-laws of said corporation provided for a capital stock. It is nevertheless contended that because of the claimed "plan and intention" and acts of the incorporators of 1859 and those associated with them from 1859 to 1864, a de facto membership corporation existed in 1864 immediately prior to and at the time of the reincorporation in that year; that Michael Maguire, plaintiffs' predecessor was a "member" and as such "member" was one of the "owners, proprietors and constituents" of said de facto membership corporation at that time; and that therefore Michael Maguire became ipso facto a "member" of the de jure membership corporation incorporated in 1864 without complying with any of the by-laws of said last mentioned corporation with respect to membership therein.

[2] While much is said in the briefs regarding the meaning of the word "member," as used in the by-laws and rules of order adopted in 1859, it appears unnecessary to discuss the contentions of the parties concerning the meaning of that word as so used or the contentions of the parties with respect to the legal effect of the alleged plan, intention and acts of the incorporators of 1859 and of those associated with them from 1859 to 1864. These questions and many others are not free from difficulty as appears from the exhaustive discussion of said questions by able counsel in presenting their conflicting views. As we see the situation, the striking feature of plaintiffs' contention is that it is entirely apparent therefrom that an investigation of the alleged facts upon which plaintiffs' theory is based would involve an investigation, in this action commenced in 1934, of the plan, intention and acts of persons in the year 1864 and prior thereto; and that there is nothing alleged in said complaint to show the reason for

the failure of plaintiffs and their predecessors to institute such investigation at an earlier date through some appropriate proceeding. There is nothing in the complaint to show that plaintiffs or their predecessors ever claimed the right of membership in the corporation as reincorporated in 1864 or that they were ever willing to accept membership therein, with the obligations as well as rights incident thereto, at any time before said corporation had accumulated an alleged reserve fund of approximately $8,000,000. If they had claimed such right of membership after the reincorporation of 1864 and if that right had been denied them, the alleged facts now presented for investigation could have been investigated at that time and the issues of fact and law could have been determined many years ago when evidence relating to any material issues of fact would have been readily available. To ask a court for the first time in this action commenced in 1934 to investigate such claims, constitutes an attempt on the part of plaintiffs to secure an investigation by a court of equity of stale claims.

[3-6] The defense of the staleness of plaintiffs' claims is a defense which exists independently of any statute of limitations and it does not rest alone upon the doctrine of laches. United States v. Beebee, C.C., 17 F. 36, affirmed 127 U.S. 338, 8 S.Ct. 1083, 32 L.Ed. 121. In 30 C.J.S. 521, Equity, § 112, it is said: "A stale demand or claim in its proper sense is one that has for a long time remained unasserted; one that is first asserted after an unexplained delay of such great length as to render it difficult or impossible for the court to ascertain the truth of the matters in controversy and do justice between the parties, or as to create a presumption against the existence or validity of the claim, or a presumption that it has been abandoned or satisfied. Strictly speaking, laches and staleness of demand are distinct conceptions; staleness of claim necessarily implies great lapse of time, while to constitute laches, the delay need not necessarily be long continued. Another point of distinction lies in the fact that, to constitute laches a change in conditions must have occurred that would render it inequitable to enforce the claim, while no such change need have occurred in order to render the demand stale."

[7] This defense has long been recognized in this state. Garrity v. Miller, 204 Cal. 454, 268 P. 622; Emerson v. Kennedy, M. & M. Co., 169 Cal. 718, 147 P. 939; Bell v. Hudson, 73 Cal. 285, 14 P. 791, 2 Am.St.Rep. 791; Elliott v. Bunce, 10 Cal. App. 741, 103 P. 897. The language used by the court in United States v. Beebee, C. C., 17 F. 36, is quoted with approval in Emerson v. Kennedy, supra, 169 Cal. at page 722, 147 P. at page 941, as follows: "The authorities support the proposition that lapse of time may be a good defense in equity, independently of any statute of limitations, and they show that the doctrine rests not alone upon laches; it is often put upon one or all of the following grounds, namely: First, that courts of equity must, for the peace of society and upon grounds of public policy, discourage stale demands by refusing to entertain them; second, that lapse of time will, if long enough, be regarded as evidence against the stale claim equal to that of credible witnesses, and which, being disregarded, would, in a majority of cases, lead to unjust judgments; third, that, after the witnesses who had personal knowledge of the facts have all passed away, it is impossible to ascertain the facts, and courts of equity will, on this ground, refuse to undertake such a task." Said language is again quoted with approval in Garrity v. Miller, supra, 204 Cal. at page 459, 268 P. at page 624.

[8] It has been held further that the defense of the staleness of a claim is available upon demurrer whenever the staleness of the claim appears upon the face of the complaint. In Bell v. Hudson, 73 Cal. 285, at page 289, 14 P. 791, at page 793, 2 Am.St. Rep. 791, it is said, "It is contended, however, that this question cannot be raised on demurrer. But the preponderance of authority (and we think the better reason) is to the effect that it can. Lansdale v. Smith, 106 U.S. [391], 392, 1 S.Ct. 350, [27 L.Ed. 219]; Bliss v. Prichard, 67 Mo. [181] 189, 190; Shorter v. Smith, 56 Ala. [208] 210. The defense is, in substance, that the bill does not show equity; or, in the language of our statute, that the complaint does not state facts sufficient to constitute a cause of action. This was one of the grounds of the demurrer; and if it had not been it would not have been waived, but could be taken at any time." See, also, Garrity v. Miller, 204 Cal. 454, 268 P. 622; Elliott v. Bunce, 10 Cal.App. 741, 103 P. 897.

We believe there can be no dispute here that the staleness of plaintiffs' claims appears upon the face of the first count of their final complaint and we conclude that the demurrer to the first count of plaintiffs' final complaint was properly sustained upon that ground. It therefore appears unnecessary to discuss the other grounds urged by defendants in support of the judgment of the trial court insofar as said judgment relates to said first count.

Second Count

The second count of the final complaint is based upon plaintiffs' claim to certain alleged rights as a depositor in the defendant corporation, in addition to their admitted right to receive the amount of the deposits in their account together with accrued "interest" thereon. The claim to greater rights is based upon certain by-laws adopted in 1864 and later, relating to depositors who were not members, which by-laws are treated as valid by plaintiffs for the purposes of the claims made by them in their second count.

Plaintiffs in the Maguire case allege the original deposit of $2,498 by Michael Maguire in 1862; the continued existence of a deposit to the time of the commencement of the action and the existence of a balance on deposit at that time of $135. Similar allegations are found in the final complaints in the other three actions alleging original deposits in varying amounts by predecessors of the plaintiffs therein between 1859 and 1864 and the existence of various small balances. In all other respects, the material allegations in the second counts of the four final complaints are the same and we will therefore discuss only the allegations appearing in the second count of the final complaint in the Maguire case.

In addition to the above-mentioned allegations, plaintiffs incorporate by reference several paragraphs of the first count. They then allege the adoption of certain by-laws relating to "profits" and "dividends" adopted in 1864 and later. It is plaintiffs' claim that by reason of these laws, plaintiffs as depositors, have the "same rights in the reserve fund . . . as any member of said corporation." It is alleged that an actual controversy exists for the reason that defendants deny that plaintiffs have such rights in the reserve fund or in any distribution thereof upon dissolution.

It is appropriate, before proceeding to a consideration of the alleged by-laws, to refer to some of the provisions of the act of 1862 as amended, under the authority of which act defendant corporation was reincorporated in 1864 and under the authority of which act said by-laws of 1864 and later were adopted. Said act made numerous references to "dividends," "earnings," "interest" and "profits." It first made provision for the formation of corporations "for the purpose of aggregating the funds and savings of the members thereof and others. * * *. § 1. It gave a corporation so formed the power to receive deposits, invest its funds "and to repay such deposits without interest, or with so much of the earnings and interest as the by-laws of the corporation may provide" and to make by-laws prescribing "the conditions on which deposits shall be received, the time and manner of dividing the profits." § 4, as amended by St. 1863–64, p. 159. It also provided "It shall not be lawful for the corporation, or the directors, to make any dividend, except from the surplus profits arising from the business of the corporation; and the directors shall, at such times and in such manner as the by-laws shall prescribe, declare and pay dividends of so much of the profits of the company, and of the interest arising from the capital stock and deposits, as may be appropriated for that purpose by the provisions of the by-laws." § 10. It further provided that corporations could prescribe by by-laws "the time and conditions on which repayment is to be made to depositors. * * * And the directors of any corporation formed under this act, and having no capital stock, shall retain, on each dividend day, at least five per cent of the net profits of the corporation, to constitute a reserve fund, which shall be invested in the same manner as other funds of the corporation, * * * and the corporation may provide, by its by-laws, for the disposal of any excess in the reserve fund, over one hundred thousand dollars, and the final disposal, upon the dissolution of the corporation, of the reserve fund, or of the remainder thereof, after payment of losses." § 11. It required publication annually of a statement of "all depositors who shall have deposits, dividends, or interest, to their credit" and of whom the officers of the corporation had no knowledge for two years. § 16. It also made the directors, upon dissolution, the "trustees for the members and others interested in the corporation dissolved" and gave them "full power and authority to * * * divide among the members and stockholders, in such proportion as the by-laws shall direct, the money and other property that shall remain after the payment of all expenses. * * *" § 25.

Plaintiffs set forth in the second count of their final complaint the adoption of three by-laws following the reincorporation in 1864. The first is alleged to have been adopted in 1864 and to have read as follows: "The board of directors shall have the right to determine the terms and conditions upon which deposits will be received from persons not members of the corporation, and to make contracts in the name of the corporation with such persons for that purpose. Until otherwise provided by such contracts, depositors shall be entitled to the same share of profits as members." It is then alleged that said provision was amended in 1868 to read as follows: "The board of directors shall have the right to determine the terms and conditions upon which deposits will be received from persons not members of the corporation. Until otherwise provided, depositors shall be entitled to the same share of the profits as members." It is then alleged that said provision was repealed in 1888 and that a by-law was adopted in that year "providing that 'The board of directors shall have the right to determine the terms and conditions upon which deposits will be received' but that 'until otherwise provided by the board of directors, depositors who are not members shall get a dividend equal to that given to members.' That there has been no alteration of said last-mentioned provisions of said by-laws since October 19, 1888."

[9] In their opening brief, plaintiffs make reference to the by-laws of 1859 but it appears from their closing brief that they rely solely upon the by-laws adopted in 1864 and later to sustain the claim made in the second count. They seek to have the words "profits" and "dividend" as used in the above-quoted by-laws construed so that said provisions would mean that the depositors, who were not members, would be entitled to be paid not only the same periodical "dividend" or "interest" on deposits as that paid to members but would also be entitled to share in the reserve fund at some indefinite future time to the same extent as members. We do not believe that this construction is warranted.

The wording used in the quoted provisions of the by-laws of 1864, 1868 and 1888 differed to some extent but, in each instance, the phrase upon which plaintiffs rely commenced with the words "Until otherwise provided. * * *" The use of this phrase necessarily negatives the idea that it was intended to grant any right which would endure indefinitely and would continue until such time as there might be a dissolution of the corporation and a disposal of the reserve fund. It clearly implies that it was intended to grant a mere temporary right subject to termination. It therefore appears that the right granted must be construed as a right to share equally with members in the periodically declared "dividends" on deposits or in other words, a right to receive on the dividend days a rate of return on deposits equal to that received by members.

We believe this construction is borne out by a reading together of all of the provisions of the act of 1862 and of the by-laws adopted in 1864 and later. For example, article 15 of said by-laws of 1864, incorporated by reference into the second count, required the board of directors to ascertain the "net profits" at the meetings in January and July of each year and to set apart and credit to the reserve fund a part thereof not to exceed one-tenth and also to set apart an amount sufficient to pay a "dividend" to members and a "dividend to depositors"; and provided that "moneys withdrawn before the dividend for the current half year is due, shall be entitled to interest at the rate of one-half of one per cent per month. * * * Dividends not called for within fifteen days from the date of their being declared will be carried to the credit of whom it may concern and * * * treated in all respects as other deposits of members." A reading of said by-laws shows that the word "dividend" was used practically synonymously with "interest" as those words are commonly employed in connection with deposits in savings banks; and a reading together of all of said by-laws shows that it was equality of treatment with respect to "dividends" which was intended in the by-laws upon which plaintiffs rely.

We further believe that the above mentioned construction is borne out by a consideration of the practical difficulties which would be encountered if the portions of the by-laws upon which plaintiffs rely were given the construction for which plaintiffs contend. We have not been informed by plaintiffs of the proportions in which they believe that the reserve fund should be shared upon dissolution by the thousands of the then depositors and the thousands of former depositors in the defendant corporation. We know of no formula which could be used to determine such proportions and conclude that plaintiffs' construction would render the alleged contract between the defendant bank and its depositors incapable of being carried into effect. Such construction may not be adopted. Civ.Code, § 1643.

We further are of the opinion that any possible uncertainty which may have arisen from the use of the word "profits" in the quoted by-laws adopted in 1864 and 1868 was clarified by the adoption of the above mentioned by-law in 1888 which dropped the word "profits" and provided that depositors should get a "dividend equal to that given to members." This is the by-law which, according to plaintiffs' allegations, had been in effect for almost fifty years before this action was commenced. It is not alleged that the defendant corporation has ever given to members any "dividend" greater than that given to depositors other than members or that said corporation is threatening or intends to do so or claims the right to do so "until otherwise provided." On the contrary, plaintiffs allege that "no distribution of any dividend or share of profits has been made to any depositor or to any member" other than "interest." This allegation shows that depositors and members have been accorded the same treatment with respect to "profits" and "dividends," in the sense in which those terms were employed in the by-laws upon which plaintiffs rely. As we construe said by-laws it appears from the allegations of the final complaint that plaintiffs have been accorded their full rights, which rights will continue only while plaintiffs remain depositors and only "until otherwise provided."

We are therefore of the opinion that the second count of plaintiffs' final complaint fails to allege facts sufficient to show that plaintiffs have the rights claimed therein and we therefore conclude that the trial court properly sustained defendants' demurrer thereto. This conclusion makes it unnecessary to discuss the other grounds urged by defendants in support of the judgment of the trial court insofar as said judgment relates to said second count.

The judgments in the above entitled actions are, and each of them is, affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

Catherine N. ARNOLD, Appellant, v. The HIBERNIA SAVINGS & LOAN SOCIETY (a Corporation) et al., Respondents.

Aileen K. VAGER, Appellant, v. SAME.

WELLS FARGO BANK & UNION TRUST CO (a Banking Corporation), as Trustee, etc., Appellant, v. SAME.

Civ. 11585, 11587, 11592.

District Court of Appeal, First District, Division 2, California.

July 23, 1942.

Rehearing Denied Aug. 22, 1942.

Hearing Granted Sept. 21, 1942.

Appeals from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge Assigned.

Hearing granted; CURTIS, J., not participating.

M. Mitchell Bourquin, Keyes & Erskine, George Olshausen, Rosenshine, Hoffman, Davis & Martin, and Heller, Ehrman, White & McAuliffe, all of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Garret W. McEnerney and Tobin & Tobin, all of San Francisco, for respondents.

SPENCE Justice.

These three appeals are companion appeals to the appeals in Maguire v. Hibernia Savings & Loan Society et al., 128 P.2d 149, and related cases, which last-mentioned appeals have been considered in an opinion this day filed.

These three cases differ slightly from the Maguire and related cases heretofore considered. In these three cases, the final complaints contained but one count, which count was somewhat similar to the first count of the final complaint in the Maguire case. In other words, the complaints in these cases involved the claims of plaintiffs as alleged "members" of the membership corporation incorporated in 1864, which claims were based upon original deposits made by the predecessors of plaintiffs between 1859 and 1864. The only material difference between the allegations in the final complaints in these three cases and the allegations in the first count of the final complaint in the Maguire case is that the allegations in each of these final complaints show that there had been no continuous maintenance of a deposit.

It therefore follows that if the demurrer to the first count of the final complaint in the Maguire case was properly sustained, the demurrers to the final complaints in these three cases were likewise properly sustained. We held that the demurrer to said first count in the Maguire case was properly sustained and we therefore hold that said demurrers to the final complaints in these three cases were properly sustained for the reasons stated in the opinion in the Maguire case.

The judgments in the above-entitled cases are, and each of them is, affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

Alice G. SAUNDERS, Appellant, v. The HIBERNIA SAVINGS & LOAN SOCIETY (a Corporation) et al., Respondents.

Julia L. HAYES et al., Appellants, v. SAME.

Virginia McAran ORDWAY, Appellant, v. SAME.

Civ. 11588, 11589, 11591.

District Court of Appeal, First District, Division 2, California.

July 23, 1942.

Rehearing Denied Aug. 22, 1942.

Hearing Granted Sept. 21, 1942.

Appeals from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge Assigned.

Hearing granted; CURTIS, J., not participating.

M. Mitchell Bourquin, Keyes & Erskine, George Olshausen, Rosenshine, Hoffman, Davis & Martin, and Heller, Ehrman, White & McAuliffe, all of San Francisco, and Ross & Ross, of Redwood City, for appellants.

Garret W. McEnerney and Tobin & Tobin, all of San Francisco, for respondents.

SPENCE, Justice.

These three appeals are companion appeals to the appeals in Maguire v. Hibernia Savings & Loan Society et al., 128 P.2d 149 and related cases, which last-mentioned appeals have been considered in an opinion this day filed.

Plaintiffs' opening brief on these three appeals states: "The allegations of both the first and second counts are the same as the allegations in the Maguire-Edwards-Crilly-Crowley group. They differ only in the allegations as to deraignment of plaintiffs' title and the amounts of their deposits. Consequently, the question whether each count states a cause of action is governed by the law set forth in the Maguire-Edwards-Crilly-Crowley brief."

For the reasons stated in the opinion heretofore filed in the Maguire case, we conclude the trial court properly sustained the demurrers to the first and second counts of the final complaints in these three cases.

The judgments in the above-entitled cases are, and each of them is, affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

PEOPLE v. GUERRERO.

Cr. 2223.

District Court of Appeal, First District. Division 2, California.

July 15, 1942.

Hearing Granted by Supreme Court Aug. 13, 1942.

Criminal law ⚷878(3)

Under Penal Code providing that verdict of acquittal of one or more counts shall not be deemed to be an acquittal of any other count, acquittal upon kidnapping count in information charging separate crimes did not acquit defendant on count charging conspiracy to commit rape, based on same overt acts. Pen.Code § 954.

◆

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Paul Guerrero was convicted of conspiracy to commit rape, and he appeals.

Affirmed.

J. Bruce Fratis, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and Ward Sullivan, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Appellant was tried with six other codefendants upon an information framed in four counts—the first charging kidnaping; the second assault with intent to commit rape; the third, conspiracy to commit rape; and the fourth, rape. A fifth count charged one of the defendants alone with robbery. The jury returned its verdict finding all seven defendants not guilty on count 1; three of the defendants guilty on counts 2, 3, and 4; three of them guilty on count 3 alone; one guilty on counts 2 and 3; and the one guilty on the separate count of robbery applicable to him alone. In addition to the verdict on count 1, three of the defendants, including this appellant, were found not guilty on counts 2 and 4. A motion of this appellant for a new trial was denied, he was granted probation, and prosecutes this appeal from the judgment and the order.

The single ground urged for a reversal is that, since the overt acts alleged in the conspiracy count are identical with the acts alleged to constitute kidnaping, the acquittal of the charge of kidnaping results in an acquittal of the conspiracy charge.

Briefly the facts are that the defendants met the prosecutrix late at night on a street in the city of Salinas and took her in a truck several miles into the country where the attack was made. The only material dispute in the evidence is whether the prosecutrix accompanied the defendants of her own accord, as testified to by them, or whether she was taken forcibly and against her will as she testified. The jury apparently accepted the defendants' version and for that reason found them not guilty of the kidnaping charge. There is no conflict that a forceful and mass assault was committed without the consent of the prosecutrix, and that this appellant knew that such was the purpose of his codefendants, and that he aided them in the accomplishment of this purpose.

Though the overt acts alleged in the conspiracy count relate to the alleged forceful taking of the prosecutrix from the city of Salinas to a point outside the city upon which the count charging kidnaping is based, it is clear that two separate crimes were pleaded and that the pleader intended that the act of removing the prosecutrix into the country was for the purpose of enabling the entire group to accomplish their purpose of a combined assault.

Appellant rests his case upon Oliver v. Superior Court, 92 Cal.App. 94, 267 P. 764, and similar cases holding that where identical offenses are charged in separate counts an acquittal on one count renders the verdict of guilty on the other count void. Because of these decisions section 954 of the Penal Code was amended in 1927 to provide that: "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." Since the amendment People v. Derenzo, 46 Cal. App.2d 411, 115 P.2d 858, and People v. Amick, 20 Cal.2d 247, 125 P.2d 25, followed the clear intent of this amendment and refused to follow the earlier cases cited by appellant. He now argues that the rulings in these cases were dicta and hence not controlling. But dicta or not the cases merely follow the plain language of the code amendment, and, in the late case of People v. Kearney, 20 Cal.2d 435, 126 P.2d 612, the Supreme Court cited the Amick case as authority for the full application of the amendment.

The judgment and order are affirmed.

STURTEVANT and SPENCE, JJ., concurred.

53 Cal.App.2d 796

STATE OF INDIANA ex rel. DEPARTMENT OF FINANCIAL INSTITUTIONS OF STATE OF INDIANA v. HOFFMAN.

Civ. 13156.

District Court of Appeal, Second District, Division 3, California.

Aug. 6, 1942.

Hearing Denied Oct. 1, 1942.

1. Limitation of actions 🔑34(5)

An action to enforce bank stockholder's liability was within three-year limitation on actions against stockholders of corporations to enforce liability created by law. Code Civ.Proc. § 359.

2. Limitation of actions 🔑58(5)

Under three-year limitation on action against corporate directors or stockholders to enforce liability created by law, action is barred at expiration of three years from time when liability was created, even though no cause of action has accrued on such liability within that time. Code Civ.Proc. § 359.

3. Limitation of actions 🔑2(1)

Where California limitation on action to enforce liability of stockholder in Indiana bank began to run when such liability was created, California court would look to Indiana law to determine when the liability was created. Code Civ.Proc. § 359.

4. Banks and banking 🔑49(6)
Constitutional law 🔑34

The Indiana constitutional provision relating to bank stockholder's liability is "self-executing", and action to enforce such liability may be brought by one creditor in behalf of himself and all other creditors. Const.Ind. art. 11, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing".

5. Banks and banking 🔑47(2)

Under self-executing provision of Indiana Constitution relating to bank stockholder's liability, such liability is created as soon as debt of bank is incurred. Code Civ.Proc. § 359.

6. Banks and banking 🔑119

Under Indiana law, deposit in bank creates "debtor and creditor relationship" between bank and depositor.

See Words and Phrases, Permanent Edition, for all other definitions of "Debtor and Creditor Relationship".

7. Limitation of actions 🔑58(5)

Under self-executing provision of Indiana Constitution relating to bank stockholder's liability and Indiana statute requiring Department of Financial Institutions, rather than creditor, to sue to enforce such liability, Department's action to enforce liability of stockholder in Indiana bank for benefit of depositors, commenced in California over three years after deposits were made, was barred by California three-year limitation. Burns' Ann.St.Ind. §§ 18-301, 18-323; Const. Ind. art. 11, § 6; Code Civ.Proc.Cal. § 359.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Action by the State of Indiana, on the relation of the Department of Financial Institutions of the State of Indiana, against Fred Hoffman, to enforce defendant's liability as a bank stockholder. From a judgment for plaintiff, defendant appeals.

Reversed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellant.

Arthur Metzler, of Rochester, Ind., and Swaffield & Swaffield and Joseph E. Madden, all of Long Beach, for respondent.

SHAW, Justice pro tem.

Defendant appeals from a judgment rendered against him after a trial upon the merits. This action is brought by plaintiff to enforce the liability imposed by the constitution and laws of Indiana on defendant as a stockholder of a bank organized under the laws of that state and doing business there which has become insolvent. The deposits to payment of which any sum recovered from defendant will be applied were made before February 24, 1933, and more than three years before this action was brought, the complaint having been filed on October 28, 1936. The defense principally insisted on, both here and in the trial court, is that plaintiff's action is barred by section 359 of the Code of Civil Procedure, which requires an action "to enforce liability created by law" to be brought "within three years after * * * the liability was created."

[1, 2] It is well settled, and the parties here agree, that section 359, supra, is the statute of limitations applicable to such a case as this. Richardson v. Craig, 1938, 11 Cal.2d 131, 134, 77 P.2d 1077; Royal Trust Co. v. MacBean, 1914, 168 Cal. 642, 646, 144 P. 139; Miller v. Lane, 1911, 160 Cal. 90, 116 P. 58. As noted in Royal Trust Co. v. MacBean, supra, 168 Cal. at page 648, 144 P. 139, the language of section 359 is peculiar, and under it an action is barred at the expiration of three years from the time when the liability was created, even though no cause of action has accrued on such liability within that time. To the same effect, see Richardson v. Craig, supra, 11 Cal.2d at page 135, 77 P.2d 1077; Gardiner v. Royer, 1914, 167 Cal. 238, 139 P. 75, and cases therein cited.

[3, 4] To determine when the liability in this case was created we must look to the law of Indiana. The Indiana Constitution of 1851 contained a provision which has remained in force ever since its adoption and reads as follows: "The stockholders in every bank or banking company shall be individually responsible, to an amount, over and above their stock, equal to their respective shares of stock, for all debts or liabilities of said bank or banking company." Art. 11, sec. 6. Construing this provision the Indiana courts have held that it is self-executing, and that an action to enforce the liability therein declared may be brought by one creditor in behalf of himself and all other creditors. State ex rel. Dept. of Fin. Inst. v. Sonntag, 1935, 101 Ind.App. 557, 565, 195 N.E. 601, 605; Gaiser v. Buck, 1931, 203 Ind. 9, 13, 14, 179 N.E. 1, 3, 82 A.L.R. 1348; Rowley v. Pogue, 1932, 203 Ind. 655, 659, 663, 178 N.E. 449, 450, 181 N.E. 589, 590, 185 N.E. 273. In Gaiser v. Buck, supra [203 Ind. 9, 179 N.E. 3], the court said: "This section of the Constitution creates a definitely limited liability on the part of the appellee [bank stockholder] for the benefit of the appellant [creditor] and it is self-executing, there being a manifest intention that it should go into immediate effect and no ancillary legislation being necessary to the enjoyment of the right given or the enforcement of the duty imposed. * * * It is uniformly held that a constitutional provision imposing double liability on bank stockholders is self-executing." In support of the last quoted proposition the court cited several cases, including Western Pac. R. Co. v. Godfrey, 1913, 166 Cal. 346, 136 P. 284, Ann.Cas.1915B, 825, where it was held that the California constitutional provision then in force regarding liability of stockholders was self-executing and made every stockholder liable for his proportion of all debts of the corporation incurred while he was a stockholder—in that case, for deposits in a banking corporation. The last sentence just quoted from Gaiser v. Buck, supra, was also quoted therefrom in Rowley v. Pogue, supra (opinion denying rehearing, 203 Ind. 663, 181 N.E. 589, 590), and the court in Rowley v. Pogue added: "To this last proposition we cited a number of cases from Arizona, California, * * * in each of which a constitutional provision quite similar to section 6, art. 11 of our Constitution was involved." The California constitutional provision thus referred to imposed on stockholders a liability which accrued as soon as the debt of the corporation was incurred. This appeared from the California case which the Indiana court cited, and yet that court regarded the two constitutional provisions as "quite similar." Their language indicates that they are, indeed, similar in this respect. The California provision was that: "Each stockholder of a corporation * * * shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder * * *." Art. XII, sec. 3, repealed in 1930. The Indiana provision is: "The stockholders in every * * * banking company shall be individually responsible, to an amount, * * * for all debts or liabilities of said * * * banking company." The Indiana provision, like ours and some others presently to be mentioned, purports to impose liability absolutely, without any terms or conditions to its devolution. It does not, like the Canadian statute considered in Royal Trust Co. v. MacBean, supra, 1914, 168 Cal. 642, 649, 144 P. 139, condition the liability upon insolvency, and hence we do not regard the case last cited as authority for respondent's contention here that no liability of defendant was created when the bank became indebted.

In some of the cases cited in Gaiser v. Buck, supra, 1931, 203 Ind. 9, 15, 179 N.E. 1, 3, 82 A.L.R. 1348, similar constitutional provisions in other states were construed to impose a liability on stockholders concurrently with the incurring of a debt by the corporation. In Smith v. Olson, 1926, 50 S.D. 81, 89, 208 N.W. 585, 586, so cited, the court was considering a constitutional provision that: "The shareholders * * * of any banking corporation shall be held individually responsible and liable for all contracts, debts and engagements of such corporation * * *", and said, "by this provision the freedom from individual liability for the debts of a business as such, which is normally conferred by conducting such business by means of a corporation rather than by means of a copartnership, is removed pro tanto, * * *." In Golden v. Cervenka, 1917, 278 Ill. 409, 419, 116 N.E. 273, 277, 278, the constitutional provision was that "every stockholder in a banking corporation * * * shall be individually responsible and liable to its creditors * * * to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder." The court said: "By whatever transaction a bank becomes liable for the payment of money, whether at a fixed time or on demand, a liability has accrued. Whether a cause of action has accrued depends upon whether the creditor could then maintain a suit. Whether a liability has accrued depends upon whether an obligation to pay has arisen. The meaning of the constitutional provision was that the persons who were stockholders of the bank at the time credit was extended to it or a liability was incurred by it should be individually and personally liable, as partners, to the creditor to an amount equal to their stock." This case was approved in American Nat. Bank v. Holsen, 1928, 331 Ill. 622, 627, 163 N.E. 448, 450, which was cited by the Indiana court in Gaiser v. Buck, supra.

In a New York case, not cited by the Indiana court, under a New York statute providing that bank stockholders "shall be individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such corporation, to the extent of the amount of their stock therein" it was held that the "liability accrues, not when the company or bank is ascertained to be insolvent, but when it incurs the indebtedness for which the statute renders the stockholder liable. * * * The liability is made absolute. The enforcement of it only is postponed." Van Tuyl v. Schwab, 1916, 174 App.Div. 665, 161 N.Y.S. 323, 325, affirmed without opinion, 1917, 220 N.Y. 661, 116 N.E. 1081. See, also, Hyatt v. Anderson's Trustee, 1903, 74 S.W. 1094, 25 Ky. Law Rep. 132, where a like holding was made on a statute substantially the same as that of New York. In Miller v. Lane, 1911, 160 Cal. 90, 93, 116 P. 58, 59, the court had before it an action against a stockholder in a Colorado bank under a statute declaring that such stockholders "shall be held individually responsible for debts, contracts and engagements of said associations, in double the amount of the par value of stock owned," and said: "The right of action against the stockholder on account of his individual liability for debts of the company accrues at the same time as against the corporation."

[5] We conclude that under the Indiana constitutional provision a liability of the stockholders of a banking company is created as soon as the debt of the bank is incurred.

In opposition to this conclusion respondent calls our attention to Carey v. State, 1938, 213 Ind. 181, 12 N.E.2d 131, 134, where the court said: "When one becomes a stockholder in a bank, the law imposes upon him an obligation, in the nature of a contract of suretyship, in favor of creditors of the bank, in an amount equal to the face value of the stock." Upon this statement respondent contends that the liability of a surety is secondary and not primary and that section 359, Code of Civil Procedure, applies only to a primary liability. No authority is cited supporting this construction of section 359, and it seems inconsistent with the statement in Hunt v. Ward, 1893, 99 Cal. 612, 615, 34 P. 335, 336, 37 Am.St.Rep. 87, made in discussing that section, that: "A liability may be absolute or contingent; it may be unconditional or limited; it may be presently enforceable by action, or there may be time given for its performance; but, whatever its character, it is created by the consummation of the contract, act, or omission by which the liability is incurred." Compare, also, this statement in Miller v. Lane, supra, 1911, 160 Cal. 90, 93, 116 P. 58, 60, regarding a Colorado statute imposing a liability on bank stockholders in terms much like those of the Indiana Constitution: "Even if the liability of a stockholder under the statute of Colorado is secondary, it is nevertheless a statutory obligation which cannot be postponed, even by the corporation itself, against the will of the stockholder."

But we do not accept the statement of the Indiana court in Carey v. State, supra, as establishing the proposition that for all purposes a stockholder of an Indiana banking corporation is to be regarded as a surety of the corporation. The language quoted above and relied on by plaintiff is only an instance of argument by analogy and such an argument does not necessarily lead to the conclusion that the two things compared are alike in all respects. The court used the analogy there only for the purpose of reaching the conclusion that a bank stockholder could not evade his liability in favor of its creditors on the ground that he was induced by fraud to become a stockholder unless the creditors were parties to the fraud. It does not follow that the court would have held that there was no liability of the stockholder to creditors until the bank became insolvent or failed to pay its debts. The Indiana cases previously cited, as well as the wording of the Indiana constitution, indicate a liability accruing earlier and no Indiana case is cited holding otherwise.

After the making of the above cited Indiana decisions holding that creditors could bring suit directly against bank stockholders upon the constitutional liability of the latter, the legislature of Indiana in 1933 passed a statute, effective July 1, 1933, known as "The Indiana Financial Institutions Act" (Burns Ind.Stats.Annotated, 1933, Title 18), which set up a different scheme for enforcing the liability of stockholders of banks. This act created a Department of Financial Institutions, and gave it general power to supervise banks and other such institutions, to examine into their business and affairs and to take charge of and liquidate them when they should become insolvent or in a variety of other circumstances indicating danger to their creditors if they should continue to operate. Burns, supra, sec. 18-301. Section 63 of this act provided that: "If, at any time after the department has taken possession of the business and property of any financial institution, pursuant to the provisions of this act, * * * it shall appear to the department that such financial institution is insolvent or that the cash value of its assets is not sufficient to pay its creditors in full, the department is hereby authorized and shall have the exclusive right to enforce the individual liability imposed by law upon the shareholders of such financial institution, * * *." Burns, supra, sec. 18-323. This section further provided for a written demand for payment to be made by the department on each shareholder, setting forth the total amount required from each shareholder and his proportionate part thereof. If any shareholder does not pay as demanded, the department, it is further provided in this section, may sue him in any court of competent jurisdiction in Indiana or any other state, and in such suit the department's written statement of its determination to enforce the liability of shareholders, of the value of the bank's assets and of its liabilities are made conclusive evidence of the facts therein stated.

This statute has been held by the Indiana courts to confer on the Department of Financial Institutions an exclusive power to enforce the liability of bank stockholders, an action by an individual creditor for that purpose not being maintainable after the statute took effect. Hiatt v. Howard, 1937, 104 Ind.App. 167, 8 N.E.2d 136, 138. The court in this case further held that the statute affected the remedy only and for that reason could be and was retroactive, so as to cut off the right to maintain an action against stockholders filed by a creditor prior to its passage. In this connection the court said: "The 'right' of a creditor to maintain such an action, * * * was not a 'substantive right,' but merely a right in adjective law. Appellant's substantive rights were not and will not be impaired by the application of said act, or the denial, as to him, of the right to maintain such action. The relief afforded under said act was substantially similar to the relief which was available prior to its enactment. The act, in effect, merely modified the procedure by which appellant could prosecute his substantive rights against the stockholders of the bank." This decision was approved and followed by the Indiana Supreme Court, without further discussion, in Siegel v. Archer, 1937, 212 Ind. 599, 10 N.E.2d 626, 629. The statute in question was also held valid, against attacks on several grounds, in Carey v. State, supra, 1938, 213 Ind. 181, 12 N.E.2d 131.

Plaintiff argues that this statute is like the federal statute imposing a liability on stockholders of national banks, as to which it has been held that the statute of limitations, under section 359 of our Code of Civil Procedure, begins to run "at least as early as the order of the Comptroller fixing the amount payable by the stockholders." Johnson v. Greene, 9 Cir., 1937, 88 F.2d 683, 684. But under the federal statute it is held that the comptroller's order, usually called an assessment, is necessary to fix the liability of stockholders. 9 C.J.S. 1140, Banks and Banking, § 603. And the case last cited does not hold that the liability was not created before the assessment. It was unnecessary for the court to go into that question, for the action there was barred if the liability arose, as the court said, "at least as early as" the assessment.

We have also considered the decision in Richardson v. Craig, supra, 1938, 11 Cal. 2d 131, 77 P.2d 1077, where it was held that under the California Bank Stockholders Liability Act (Stats.1931, p. 338, Deering's Gen.Laws, 1931, Act 652a), passed after the repeal of the California constitutional provision above referred to, the period of limitation prescribed by section 359, Code of Civil Procedure, does not begin to run until an assessment is levied, and we find it distinguishable from the present case. There, the liability was imposed by the same act which provided for the assessment. The provision for liability in that act is that the stockholders "shall be held individually liable." This differs from our former constitutional provision and from that of Indiana that stockholders "shall be" liable. The provision that they "shall be held" liable manifestly contemplates some further proceeding to hold them before the liability is complete. Later provisions of the present California statute are that the superintendent of banks may, "if necessary to pay the debts of such corporation" enforce this stockholder's liability, and for that purpose may levy an assessment on the stockholders, on which he may sue them if they do not pay. No right of action is given to the creditors. Under this scheme the court held, in Richardson v. Craig, supra, that no liability of the stockholders was created until the superintendent of banks levied an assessment, saying: "The liability of the stockholder is not for the corporation debt, but for the assessment; and it is not to the creditor, but to the bank superintendent, a state administrative officer. This liability is not 'created' when the corporation incurs the debt, nor even when the corporation becomes insolvent; it does not exist at all prior to the making of the assessment." 11 Cal.2d 137, 77 P.2d 1080. In the case at bar we have the liability imposed by a constitutional provision which is self-executing and hints at no conditions to be fulfilled before liability arises. The Indiana statute which forbids the creditors to sue and requires the Department of Financial Institutions to do so does not provide for an assessment or anything of like nature. It merely requires a demand on the shareholder, and makes the department's written statement of certain important facts conclusive evidence of those facts. As far as we are advised, no decision has yet been made on the question whether this part of the statute is valid. The decisions upholding the statute in its shift of parties plaintiff do not intimate any change in the nature of the liability; in fact, those decisions are based on the proposition that the "substantive rights" of the creditors were not impaired by the change. Hence if there was under the constitution a liability of shareholders to creditors arising and existing when the debts of the corporation were incurred, the statute did not purport to remove or alter such liability; it merely placed its enforcement in other hands than those previously controlling it.

[6, 7] Indiana adheres to the general rule that a deposit in a bank creates the relation of debtor and creditor between the bank and the depositor. Peoples State Bank v. Caterpillar Tractor Co., 1938, 213 Ind. 235, 12 N.E.2d 123, 126. In this case, therefore, the liability of defendant as a stockholder of the bank in question was created when deposits in the bank were made. Under the rule above stated, our statute of limitations (sec. 359, Code Civ. Proc.) began to run against this liability as soon as those deposits were made, even though no action could possibly be brought at that time to enforce the liability. See cases already cited to this point. The fact that the deposits out of which defendant's liability in this case arose were made more than three years before this action was brought is not disputed. The action is therefore barred.

The judgment is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concur.

53 Cal.App.2d 417

HELMS BAKERIES v. STATE BOARD OF EQUALIZATION et al.

Civ. 11992.

District Court of Appeal, First District,
Division 2, California.

July 15, 1942.

Hearing Denied Sept. 10, 1942.

1. Taxation 🔑608(9)

A property owner is not necessarily entitled to injunctive relief merely because a tax demanded of him is illegal, and if taxpayer has an adequate remedy at law it is not entitled to injunctive relief.

2. Taxation 🔑608(9)

Alleged fact that State Board of Equalization did not have jurisdiction to make assessment, and that sum sought to be exacted would not constitute a tax, did not entitle taxpayer to injunctive relief on theory of inapplicability of statutory provision that no injunction shall issue to prevent collection of tax. St.1933, p. 2600, § 3; St.1939, p. 2184, § 31.

3. Taxation 🔑608(9)

Even though a taxing statute is unconstitutional and the alleged tax is void, property owner is not entitled to injunctive relief if he has an adequate remedy at law.

4. Licenses 🔑35

Where State Board of Equalization had threatened to revoke or suspend taxpayer's permit under Retail Sales Tax Act unless additional or reassessed tax was paid, injunction restraining the board from revoking or suspending the permit could not be sustained on theory that it did not enjoin the collection of tax in view of fact that resort to statutory remedy by way of action to recover tax paid under protest would not involve prohibitive expense or multiplicity of suits. St.1933, p. 2600, § 3; St.1939, p. 2184, § 31.

5. Licenses 🔑35

The Retail Sales Tax Act authorizing an action to recover tax paid under protest furnished an "adequate remedy at law" so as to preclude the granting of an injunction restraining State Board of Equalization from revoking or suspending seller's permit for nonpayment of additional or reassessed tax. St.1933, p. 2600, § 3; St.1939, p. 2184, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy at Law".

6. Licenses 🔑35

Decree enjoining State Board of Equalization from revoking or suspending taxpayer's permit under Retail Sales Tax Act for nonpayment of additional or reassessed tax could not be sustained on theory that "irreparable injury" would have been suffered if permit had been forfeited, where taxable sales involved amounted to less than three-tenths of one per cent. of taxpayer's total business and those sales alone would have been affected by suspension or revocation of its permit. St.1933, p. 2600, § 3; St.1939, p. 2184, § 31; St.1935, p. 1253, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Irreparable Injury".

7. Taxation 🔑608(8), 611(6)

Clear proof of irreparable injury is required to justify interference by court with taxing power of a branch of state government.

8. Equity 🔑46

Generally, an injury is not "irreparable" so as to authorize equitable relief when it can be adequately compensated in damages.

9. Licenses 🔑35

Where taxpayer by payment of tax under protest could have prevented threatened revocation or suspension of its permit under Retail Sales Tax Act for nonpayment of additional or reassessed tax, decree enjoining State Board of Equalization from revoking or suspending the permit could not be sustained on theory of "irreparable injury", since taxpayer would have been adequately compensated by recovery of the amount of tax with interest from date of its payment under statute authorizing action to recover tax paid under protest. St.1933, p. 2600, § 3; St.1939, p. 2184, § 31.

10. Licenses 🔑35

Where State Board of Equalization threatened to suspend or revoke taxpayer's permit under Retail Sales Tax Act for nonpayment of additional or reassessed tax, decree granting injunction against the board could not be sustained on theory that the board by its threatened action was seeking to deprive taxpayer of property right or privilege without "due process of law" in

view of fact that taxpayer had adequate remedy at law by way of action to recover tax paid under protest. St.1933, p. 2600, § 3; St.1939, p. 2184, § 31.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for injunction by Helms Bakeries, a corporation, against the State Board of Equalization and others. From a judgment granting an injunction, defendants appeal.

Reversed.

Hearing denied; CARTER, J., dissenting.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Adrian A. Kragen, Deputy Atty. Gen., for appellants.

Faries & McDowell, of Los Angeles, for respondent.

McWILLIAMS, Justice pro tem.

The defendants, constituting the State Board of Equalization, have appealed from a judgment under the terms of which they were permanently enjoined by the trial court from revoking or suspending plaintiff's "Seller's Permit." The permit referred to had been issued to plaintiff under the provisions of the California Retail Sales Tax Act of 1933, Stats.1933, p. 2599, Gen.St. Supp.1933, Act 8493. Under the provisions of that act there was imposed a tax at the rate of 2½ per cent of the gross receipts of all "retailers" from the sale of tangible personal property sold at retail from August 1, 1933, to and including June 30, 1935, § 3. In its complaint plaintiff alleged, and in their answer defendants admitted, that in May, 1940, the State Board of Equalization notified plaintiff to appear before the board to show cause why its permit should not be revoked for failure to pay certain sums claimed by the board to be due and owing by plaintiff as an additional or reassessed tax imposed under the provisions of the act. Defendants also admitted the allegation of plaintiff that at the hearing which occurred pursuant to the notice given they notified plaintiff that in the event plaintiff did not pay the amount of such additional or reassessed tax the board intended to revoke plaintiff's permit.

Plaintiff's principal contention is that it had paid all that it owed to the state and that therefore the threatened action of defendants was illegal. The basic question involved on this appeal which is argued most fully by the parties is whether or not plaintiff had paid all that it could lawfully be called upon to pay, or whether it owed the additional sum of $6,572.29 demanded by defendants.

But we are met on the threshold of a consideration of this question by the contention of appellants that, conceding that the claim of the Board of Equalization was untenable and that the amount demanded of respondent was not legally owing, plaintiff had an adequate remedy at law and therefore was not entitled to injunctive relief. This claim is based on the provisions of section 31 of the act which, say appellants, afforded respondent such a remedy. That section provides in part as follows:

"Sec. 31. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action, or proceeding in any court against this State or against any officer thereof to prevent or enjoin the collection under this act of any tax sought to be collected, and no suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed as provided in section 23 hereof.

"Within ninety days after the mailing of the notice of the board's action upon such claim, the claimant may bring an action against the board on the grounds set forth in such claim in a court of competent jurisdiction in the county of Sacramento for the recovery of the whole or any part of the amount with respect to which such claim has been disallowed. * * *" St. 1939, p. 2184.

[1] As the Supreme Court of this state pointed out at an early date, it does not necessarily follow that a property owner is entitled to injunctive relief merely because a tax demanded of him is illegal. Savings & Loan Society v. Austin, 46 Cal. 415, 488. The reason for such a doctrine had theretofore been stated by Mr. Justice Field, speaking for the Supreme Court of the United States, in the case of Dows v. City of Chicago, 78 U.S. 108, 110, 20 L.Ed. 65: "Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunc-

tion to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant before the aid of a court of equity can be invoked." This language was quoted with approval by the California Supreme Court in the case of Savings & Loan Society v. Austin, supra, and also in the more recent case of Crocker v. Scott, 149 Cal. 575, 594, 87 P. 102.

Respondent concedes that if it has an adequate remedy at law it is not entitled to injunctive relief but contends that such is not the case. However, it also advances certain preliminary arguments to avoid the effect of section 31 of the act to which we shall first address ourselves. Respondent first contends that appellants assume the very point at issue when they argue that respondent has an adequate remedy by paying the "tax" and suing for a refund under section 31. The basis for this argument is that section 31, by its terms, applies to a tax and that since appellants never had authority or jurisdiction to make the assessment involved herein the sum sought to be exacted of it would not constitute a tax and that therefore the section has no application.

[2, 3] In our opinion the argument of respondent is untenable. If it were sound it would apply with equal force to cases involving attempts to collect taxes imposed under unconstitutional statutes. But the law is settled that even though a taxing statute is unconstitutional and the alleged tax is therefore void, the property owner is not entitled to injunctive relief if he has an adequate remedy at law. Thus in the case of Shelton v. Platt, 139 U.S. 591, 11 S.Ct. 646, 35 L.Ed. 273, the law there involved provided that if a taxpayer considered the tax demanded of him to be unjust or illegal he might pay it under protest and then sue for the recovery of the amount so paid. The court held that in view of the remedy so allowed a suit for an injunction would not lie in the absence of evidence of irreparable injury or other ground for equitable interposition. To the same effect see Arkansas Building & L. Association v. Madden, 175 U.S. 269, 20 S. Ct. 119, 44 L.Ed. 159, and Bailey v. George, 259 U.S. 16, 42 S.Ct. 419, 66 L.Ed. 816. The same doctrine has been enunciated in a case in which the taxing authorities sought to collect an income tax from a property owner over his contention that the taxing authorities had no jurisdiction to assess the tax against him by reason of the fact that he was not a resident of the state. Long v. Norman, 1 Cir., 289 F. 5.

[4] The next argument advanced by respondent to avoid the effect of section 31 is that the decree of the lower court did not restrain the collection of the tax in question but merely prevented the cancellation of respondent's permit to do business. In support of this contention respondent cites Hughson Condensed Milk Co. v. State Board, 23 Cal.App.2d 281, 73 P.2d 290. That case involved the construction of a section of the California Motor Vehicle Transportation License Tax Act, Stats. 1933, p. 928, as amended in 1935, St.1935, p. 2176, which section is substantially the same, so far as the subject in which we are here interested is concerned, as section 31 of the Retail Sales Tax Act. It is true that there is certain language in the opinion in the Hughson case that supports respondent in its present contention. But there are also vital differentiating features. Thus the court pointed out that any other proceeding by the plaintiff than a suit for an injunction would have involved a multiplicity of actions and from a practical standpoint would have been almost prohibitive since the different sections of the act there involved required the payment of considerable sums of money to different departments of the state government. Thus, as the court went on to point out, under the Motor Vehicle Transportation Act the operator is required to pay an original license fee to the State Board of Equalization and to pay a certain fee to the Department of Motor Vehicles for special plates and also to pay to the State Board of Equalization each month a tax imposed upon gross receipts. As the court very properly held, in view of those circumstances a citation of authorities was not necessary to show that a multiplicity of suits would necessarily follow. Respondent in the instant case makes no serious claim that a resort to the remedy contained in section 31 of the Sales Tax Act would involve a prohibitive expense or a multiplicity of suits.

[5] In support of its position that section 31 of the Sales Tax Act does not furnish an adequate remedy at law, respond-

ent cites the opinion of the Federal District Court in the case of Printers & Publishers Corporation, Ltd., v. Corbett, 25 F.Supp. 369. It is true that the court in that case held that section 31 of the California Retail Sales Act does not furnish an adequate remedy at law. Unfortunately for respondent, since its brief was filed, the holding of the District Court in that case was reversed by the Circuit Court of Appeals. 9 Cir., 127 F.2d 195. The latter court held that section 31 of the act did afford to the plaintiff therein a plain, speedy and sufficient remedy and that therefore the District Court was without jurisdiction of a suit to enjoin the collection of a tax assessed under the Sales Tax Act. The court in its opinion cites among other authorities the case of Nevada-California Electric Corporation v. Corbett, 22 F.Supp. 951. In that case a statutory three-judge District Court held that a section of the California Use Tax Act, St. 1935, p. 1297, as amended, substantially similar to section 31 of the California Retail Sales Tax Act, afforded a property owner an adequate remedy at law and that therefore a suit to enjoin the collection of the amount claimed of the plaintiff under such act would not lie.

The decision of the court in the case last cited was followed in a three-judge District Court case decided in Iowa and involving a similar state of facts. Sears, Roebuck & Co. v. Roddewig, 24 F.Supp. 321. That case is particularly relevant because in it, as in the instant case, the plaintiff had sought, not directly to enjoin the collection of the tax claimed to be owing by plaintiff, but to enjoin the state taxing board from cancelling its sales permit. Under the laws of Iowa, unlike in California, a suit for an injunction will lie, as the court pointed out, to restrain the collection of an illegal or a void tax even though the property owner may have an adequate remedy at law. But under a federal statute, 28 U.S.C.A. § 41(1), a federal court has no jurisdiction of a suit to enjoin the collection of a tax when the taxpayer has a plain, speedy and adequate remedy at law in the state courts. The question was therefore presented to the court whether the suit brought by plaintiff could reasonably be held to be one to enjoin the collection of a tax. The question was answered in the affirmative. Said the court (24 F.Supp. at page 324): "A suit to enjoin a tax and a suit to enjoin the use of the means provided by the taxing statute for the collection of the tax would seem to be the substantial equivalents of each other." The relevancy of this language in the instant case needs no emphasis from this court.

[6] The next contention of respondent is that the doctrine invoked by appellants is not applicable because irreparable injury would have been suffered by it by the forfeiture of its permit to do business in the absence of injunctive relief. We fail to find a sufficient showing of such irreparable injury. As appellants point out, since the amendment of the Sales Tax Act § 5, in 1935, St.1935, p. 1253, exempting the gross receipts from the sale of food products from taxation, the taxable sales of respondent involved in this litigation amounted to less than three-tenths of one per cent of respondent's total business. The taxable sales referred to consisted of such items as flour sacks and barrels which, to use appellants' phrase, were in essence the residue of respondent's business of producing and selling bakery products. It is those sales alone that would be affected by the suspension or revocation of respondent's permit to do business.

[7] In attempted justification of the absence of any substantial evidence on this issue of irreparable injury respondent claims that it was unnecessary for it to introduce evidence on the subject because of the admissions in the answer of appellants and because of the recitals in the agreed stipulation of facts introduced by the parties. In our opinion there is no basis for this claim. It is true that the complaint of respondent made some far reaching although very general allegations of irreparable injury which, however, were denied by appellants. But the proof failed to measure up in any substantial degree to the allegations so made. We have not overlooked the fact that the president of the respondent company testified that the sales in question constituted a "necessary" and an "essential" part of respondent's business. No data, documentary or otherwise, was supplied by him or by respondent in support of the naked assertion so made. No further testimony on this subject of irreparable injury was offered by respondent. Clear proof of irreparable injury is required to justify the interference by a court with the taxing power of a branch of the state government. As the Supreme Court of this state has held, with respect to injunctions generally, quoting the language of a federal court, "To issue an injunction

is the exercise of a delicate power, requiring great caution and sound discretion and rarely, if ever, should be exercised in a doubtful case. 'The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction.'" Willis v. Lauridson, 161 Cal. 106, 117, 118 P. 530, 535, citing St. Louis S. F. M. Co. v. Sanitary S. F. M. Co., 8 Cir., 161 F. 725, 88 C.C.A. 585. Also see, Miller & Lux, Inc., v. San Joaquin Light & Power Corp., 120 Cal.App. 589, 603, 8 P.2d 560; Almaden Vineyards Corp. v. Arnerich, 21 Cal.App. 2d 701, 705, 70 P.2d 243; 4 Cooley on Taxation, 4th ed., § 1640. Since it is a taxing statute with which we are here concerned the showing made by the plaintiff of irreparable injury should have been correspondingly clear and specific in order to justify injunctive relief against the taxing authorities. We are constrained to hold that the showing of irreparable injury that was made by respondent was insufficient.

[8, 9] A more conclusive answer to the contention of respondent that it was entitled to equitable relief by reason of the fact that otherwise it would have sustained irreparable injury, than the insufficiency of the evidence adduced is that by the very nature of the remedy extended to it, it could have sustained no such injury. The general rule is that damage is not irreparable when it can be adequately compensated in damages. See 32 Cor.Jur., p. 53, and cases there cited. Obviously respondent, if required to pay the tax in question, would have been adequately compensated by the recovery of the amount of the tax with interest from the date of its payment as authorized by section 31 of the Sales Tax Act. As held in Dunker v. Field & Tule Club, 6 Cal.App. 524, 529, 530, 92 P. 502, 504: "The essential features, marking an injury as irreparable are: (1) That the injury is an act which is a serious change of, or is destructive to, the property it affects, either physically or in the character in which it has been held and enjoyed. (2) That the property must have some peculiar quality or use such that its pecuniary value, as estimated by a jury, will not fairly recompense the owner for the loss of it." In the case of Matthews v. Rodgers, 284 U. S. 521, at page 526, 52 S.Ct. 217, at page 220, 76 L.Ed. 447, being an action to enjoin the collection of a state tax, the court said: "It may be assumed that, if appellees do not pay the challenged tax, and in consequence of that omission they are subjected, as it is alleged they will be, to the civil and criminal penalties for nonpayment, the resulting injury to their business will be irreparable, and can be avoided only by resort to equity to prevent the threatened wrong. But appellants insist that the appellees are under no such constraint, either to expose themselves to the penalties for failure to pay the tax or to seek equitable relief against its collection, since each of them may pay the tax to the collecting officer under protest, and, under the laws of Mississippi, may maintain a suit at law for its recovery on the ground that it was exacted in violation of the Constitution of the United States." The court held with appellants in their view of the case and reversed the judgment of the trial court which had granted the injunction prayed for by appellees. Also, see, Dows v. City of Chicago, 78 U.S. 108, 112, 20 L.Ed. 65; Wells, Fargo & Co. v. Dayton, 11 Nev. 161; Loud v. City of Charlestown, 99 Mass. 208; Merchants' State Bank v. McHenry County, 31 N.D. 108, 153 N.W. 386.

[10] Respondent also suggests the point that appellants by their threatened action are seeking to deprive respondent of a property right or privilege without due process of law. We consider the point to be untenable. See Sears, Roebuck & Co. v. Roddewig, D.C., 24 F.Supp. 321, and Morrison-Knudsen Co. v. State Board of Equalization, D.C., 35 F.Supp. 553.

In view of our conclusion that plaintiff was not entitled to injunctive relief since it had an adequate remedy at law, we need not consider the further contention of appellants that subdivision 4 of section 526 of the Code of Civil Procedure deprived the lower court of any power it might otherwise have had to issue an injunction.

The judgment is reversed.

NOURSE, P. J., and SPENCE, J., concurred.

REYNOLDS v. REYNOLDS.

Civ. 12032.

District Court of Appeal, First District,
Division 1, California.

July 29, 1942.

Hearing Granted Sept. 24, 1942.

1. Divorce 🔑309

In divorce suit by wife moving for increase of allowance for support of parties' minor children, service of moving papers on defendant outside state by registered mail was ineffectual for any purpose.

2. Attorney and client 🔑76(4)

The authority of attorney for party to action ordinarily terminates with entry of judgment therein, except for purpose of sustaining and enforcing judgment or seeking to have it set aside or reversed.

3. Divorce 🔑309

Orders for support of minor children, though contained in interlocutory or final judgments of divorce are not final, in view of statutes authorizing modification or vacation thereof, but court retains continuing jurisdiction over such matter. Civ.Code, §§ 138, 139.

4. Divorce 🔑309

In wife's divorce suit, affidavits of nonresident defendant and his attorney on trial that such attorney's employment by defendant terminated on date before plaintiff moved for increase of allowance for support of parties' minor children did not conclusively show such fact and consequent ineffectiveness of service of moving papers by mail on such attorney, in view of conflict presented by statement in affidavit of service that papers were addressed to defendant's attorneys of record at their office address in state. Code Civ.Proc. § 1015.

5. Army and navy 🔑34

In wife's divorce suit against nonresident defendant, served with notice of plaintiff's motion to increase allowance for support of parties' minor children by mailing of copies of moving papers to his attorneys of record in state, section of federal Soldiers' and Sailors' Civil Relief Act, prohibiting entry of judgment against defaulting defendant until appointment of attorney to represent him, unless plaintiff files affidavit that defendant is not in military service, was inapplicable. Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A. Appendix § 520.

6. Divorce 🔑309

In divorce suit by wife, moving to increase allowance in divorce judgment for support of parties' minor children, service of moving papers on member of dissolved law firm, which represented nonresident defendant on trial, was sufficient, if either such member or firm was still defendant's counsel of record in case. Code Civ.Proc. § 1015.

7. Divorce 🔑312

In wife's divorce suit, where notice of her motion to increase allowance for support of parties' minor children was served on law firm, which represented nonresident defendant on trial, court's rejection of supplemental affidavits of defendant and member of such firm that such member was only lawyer ever employed in case by defendant and was defendant's attorney, though he used firm name in signing pleadings, and that firm was dissolved before service of notice, was not prejudicial to defendant. Code Civ.Proc. § 1015.

8. Divorce 🔑182

In domestic relations case, such as divorce suit, wife is entitled, on proper showing, to allowance of suit money to defend order, made by trial court in her favor, on husband's appeal therefrom.

9. Divorce 🔑309

In divorce suit by wife, moving for allowance of suit money to present her case on appeal from order increasing allowance in judgment for support of parties' minor children, service of moving papers on nonresident defendant's counsel of record at time of service was valid as service on defendant, though their authority on appeal was restricted to pressing of jurisdictional point presented by them at hearing on motion. Code Civ.Proc. § 1015.

Appeals from Superior Court, Los Angeles County; William S. Baird, Judge.

Action for divorce by Helene Louise Reynolds against Jacob George Reynolds. Judgment for plaintiff, and from orders increasing an allowance to plaintiff for support of the parties' two minor children, and allowing plaintiff an attorney's fee and costs for defending appeal from the order increasing allowance, defendant appeals.

Affirmed.

Freston & Files and Gordon L. Files, all of Los Angeles, for appellant.

Leonard Comegys, of Los Angeles, for respondent.

GOODELL, Justice pro tem.

Two appeals are presented upon this record, the first from an order increasing the allowance for the two minor children of the parties hereto from $55 to $116 a month, and the second from an order allowing suit money—attorney's fee and costs—to the respondent for defending the appeal from the first order.

By an interlocutory judgment of divorce dated October 24, 1933, entered in favor of respondent against appellant for extreme cruelty, appellant was ordered to pay $40 a month for the support of the children. A final judgment was entered on October 29, 1934. A few days thereafter, on November 8, 1934, the allowance was increased from $40 to $55, with respect to which no complaint is made. Six years later, on December 27, 1940, the court increased this allowance from $55 to $116, and it is this increase that gives rise to the first of these appeals, the appellant's contention being that the court had no jurisdiction to make it.

The history of this case is as follows: On June 3, 1933, respondent sued for divorce. Appellant filed an answer and with it a cross-complaint which he later withdrew. On the pleadings and on the trial appellant was represented by the firm of Loucks & Phister of San Pedro, and the order of November 8, 1934, recites that E. O. Loucks represented the defendant (appellant). Respondent's present counsel has represented her throughout. In the interval from November 8, 1934, to October 30, 1940, there were no proceedings in the case so far as the record shows.

On October 30, 1940, a notice was drawn up by respondent's counsel directed to the appellant and to Loucks & Phister, his attorneys, to the effect that on November 27, 1940, respondent would move for an increase from $55 to $116 a month for the support of the two children. An affidavit of the respondent was filed with this notice and an order to show cause was issued. On the same day counsel for respondent (whose office was, and is, in Los Angeles) mailed a copy of the notice of motion, affidavit and order to show cause to Loucks & Phister. The affidavit of service by mail deposes that these papers were "addressed to the attorneys of record for said defendant at the office address of said attorneys, as follows: Loucks & Phister * * * San Pedro, California." The appellant at that time was on military duty in Iowa and an affidavit shows that respondent's counsel on October 31, 1940, "served" a copy of the order to show cause, notice of motion and affidavit on him by mail from Los Angeles. Attached to this affidavit of service is a registry return receipt signed by appellant acknowledging delivery in Iowa on November 4, 1940. On the day appointed for hearing, a special appearance was made by appellant's counsel of record on this appeal "for the sole purpose of objecting to the jurisdiction of the court" on the grounds that appellant was not a resident of California, had not been personally served with notice of the hearing within this state, or at any time or place, and that E. O. Loucks was not, and had not been, counsel for appellant for more than three years theretofore and that the service by mail upon his firm was ineffective. At the hearing this point was presented; the court ruled that it had jurisdiction, and appellant's counsel who had specially appeared declined thereafter to participate. The hearing proceeded, the court granted the motion, and this appeal was taken.

[1] The first point presented is whether the service of the notice and order to show cause upon the attorneys who had represented the appellant in the divorce case six years before was valid as a service made upon attorneys *then* of record, and, hence, a valid service upon the appellant, § 1015, Code Civ.Proc. The "service" of the moving papers by registered mail upon appellant outside the state, this not being a case where service by publication was proper, was, of course, ineffectual for any purpose.

[2, 3] It is the general rule, as contended by appellant, that the authority of an attorney ordinarily terminates with the entry of judgment, except for the purpose of sustaining and enforcing the judgment, or seeking to have it set aside or reversed. 3 Cal.Jur., 668, § 71. On this point appellant cites Knowlton v. Mackenzie, 110 Cal. 183, 188, 42 P. 580; Frowley v. Superior Court, 158 Cal. 220, 226, 110 P. 817, and

Widener v. Hartnett, 30 Cal.App.2d 165, 168, 85 P.2d 925. Sections 138 and 139 of the Civil Code provide that orders for the support of minor children may be modified or vacated from time to time. Such orders, therefore, although contained in interlocutory or final judgments of divorce, cannot, by any means, be treated as final. Rosher v. Superior Court, 9 Cal.2d 556, 559, 71 P.2d 918; Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862. Indeed, in such cases the court retains continuing jurisdiction, the nature of which is discussed at length in Moore v. Superior Court, 203 Cal. 238, 241, 263 P. 1009. Hence, cases such as this are not within the general rule mentioned above. The appellant frankly concedes that under some circumstances, an attorney who has appeared for a party after final judgment may be presumed to continue to represent such party, and he concedes, further, that it is a question of fact whether an attorney so continues. The appellant's position is stated by his counsel as follows: "Where the evidence shows conclusively that the attorney has been discharged and no longer represents a party, service of notices upon such attorney is ineffectual for any purpose." Citing the Moore case, supra, and Smith v. Smith, 42 Cal.App.2d 19, 20, 108 P.2d 47. The real inquiry on the present appeal is whether, as claimed by appellant, the evidence does, in fact, conclusively show that E. O. Loucks or Loucks & Phister were discharged as attorneys for appellant before the proceedings in 1940 were launched, and, if so, whether in the absence of a filed substitution of attorneys or court action they nevertheless remained attorneys of record for the purpose of the service of notices designed to bring their client into court from time to time.

[4] Both sides rely upon the Moore case. Rarely are two cases more nearly parallel. In the Moore case, E. G. Ryker had represented the defendant husband in a divorce case where the judgment ordered the defendant to pay $30 a month for the support of the children and $12.50 at stated intervals for their clothing. The final judgment was entered April 12, 1915. Two years later the defendant went to reside in Portland, Oregon. On September 8, 1926, the plaintiff filed a notice of motion to increase the allowance from $30 to $60 and the clothing allowance from $12.50 to $50. Service of the notice was made by mail on said Ryker (whose office was in Oakland, while that of plaintiff's counsel was in San Francisco) and by mailing the papers to the defendant himself in Portland. The motion was resisted by a new attorney who appeared specially to question the jurisdiction and who moved to quash the service, and who, after an adverse ruling on jurisdiction declined to further participate. In presenting the jurisdictional point the defendant filed an affidavit of said Ryker showing that he had ceased to represent the defendant upon the entry of the final judgment. In each case the defendant-husband had left the state after the final judgment. In the Moore case eleven years elapsed, in this case six, between the final judgment and the new motion. In each case the motion was to increase an allowance for minor children. In each, the service was made upon the attorney whose name had appeared of record in the divorce case years before, and, in each, such service was supplemented by the mailing of the papers to the defendant himself out of the state. In each case there was a special appearance by a new attorney for the sole purpose of raising the jurisdictional question, and a declination by him to go further in the proceeding after that question had been settled. In each case the former attorney of record made a positive showing by affidavit that he had long since ceased to represent the defendant, and in each case there was an affidavit of service characterizing him as the attorney of record.

In the case at bar a very positive showing was made by the appellant. In his affidavit made in Iowa and used at the hearing, appellant deposed that E. O. Loucks never represented him after April 7, 1937, and, further, that on October 20, 1937, he wrote to Mr. Loucks from Washington, D. C., dismissing him and "terminating the authority of E. O. Loucks to longer represent" him as attorney or counsellor at law; and that since October 20, 1937, no attorney in California has represented, or had authority to represent, him in connection with this action, or in any other matter. The affidavit of Mr. Loucks fully corroborates appellant's affidavit, and states that since October 20, 1937, he had never represented, or had any authority to represent, appellant in connection with the action. It states further that on October 31, 1940 (the day upon which the notice of motion presumably was received), he had written to respondent's counsel "that this affiant's relationship as attorney for the defendant Jacob George Reynolds was officially terminated in the month of October, 1937." The only showing in this record bearing upon the continued representation of appellant by E. O. Loucks or Loucks & Phister is, first, the fact that their names appear on the pleadings and files as attorneys for appellant, that is to say, upon such as were filed or entered prior to November 9, 1934, and, second, the affidavit of service by mail, made by respondent's counsel on October 30, 1940, wherein he deposed that on that day he had served the moving papers on the defendant "by placing a true copy thereof in an envelope *addressed to the attorneys of record for said defendant* at the office address of said attorneys, as follows: *Loucks & Phister,* Attorneys at Law, 215 Bank of San Pedro Building, San Pedro, California" and mailing the same, postage prepaid. (Emphasis ours.) In other words, there was no affidavit setting forth facts to show that E. O. Loucks or Loucks & Phister were, in October, 1940, still authorized to represent appellant, or otherwise contradicting the affidavits of appellant and E. O. Loucks to the effect that the employment had been terminated on October 20, 1937, except the affidavit of service. This, however, was precisely the situation in the Moore case where the Ryker affidavit definitely stated that his representation of Moore had terminated on the entry of the final judgment, and the only affidavit that could be said to contradict it was the affidavit of service. The Moore opinion does not say, in so many words, that the affidavit of service created the conflict but it does show that in resisting defendant's motion to quash, the plaintiff "introduced the affidavit of service of the moving paper therein, wherein it was asserted that said Ryker had at all times been and still was the defendant's attorney of record in said action." 203 Cal. at page 240, 263 P. at page 1011. In the absence of such a showing in the affidavit of service in the Moore case there would have been no conflict presented by affidavit. Precisely the same may be said of the instant case. The fact that here there are two affidavits, each corroborative of the other, on the side of the appellant, as against one in the Moore case, is only a difference in the quantum of proof. If there was a conflict in the Moore case then there is a conflict in this case, for there is no distinction to be found between the facts of the two cases. In the order appealed from there is an implied finding of fact that there had been a valid service of the notice.

[5] Appellant urges for the first time on appeal that the trial court had no jurisdiction to proceed because under the terms of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A., 50, Appendix § 520, when a defendant defaults the plaintiff must file an affidavit showing defendant is not in military service, and unless such affidavit is filed no judgment shall be entered until the court appoints an attorney to represent defendant. The obvious answer to this contention is that there was no default, the trial court having held that defendant was already represented by counsel. The section has no application to this proceeding.

[6, 7] Two supplemental affidavits, tendered to the court at the hearing, were rejected. One was made by the appellant himself, wherein he deposed that the only lawyer he had ever employed in this case was E. O. Loucks, and that M. Phister had never been so employed. The other, made by Mr. Loucks, was to the same effect, and it showed also that while he had used the firm name of Loucks & Phister in signing the pleadings, *he* was the attorney for appellant; further that that firm had been dissolved on February 1, 1937, which was almost four years before the service of the notice in question. We are satisfied that although the firm had been dissolved, service upon Mr. Loucks (one of its former members) was sufficient if the firm had been, in fact, the attorneys of record, as the pleadings indicated, and service upon him was certainly sufficient if he, alone, had been the attorney of record, provided, of course, that the court found (as, impliedly, it did find) that either he or his firm still continued to be counsel of record in the case. While we think the court should have admitted these affidavits, there was no prejudice suffered by appellant because of their rejection.

In view of the language of the Supreme Court in the Moore case we are constrained to hold that the action of the lower court on the first appeal cannot be disturbed.

[8, 9] After the court had made the order just discussed a notice of appeal therefrom was filed by appellant's counsel of record on this appeal, whereupon the respondent served upon them and filed an application for the allowance by the trial court of suit money—$500 attorney's fees

and $150 costs—"to enable her to properly appear, defend herself, and present her case" on appeal. At the hearing, appellant's counsel on this appeal presented in court a special appearance challenging, as in the first instance, the jurisdiction of the court. When the court disposed of that point counsel, as in the first instance, declined to take any further part in the proceedings. The court proceeded, and granted the motion as made. In the first instance the notice of motion was addressed to the appellant and to Messrs. Loucks & Phister, as his attorneys of record, and it was served by mail on the attorneys. In the case of the second motion, the notice was addressed to the appellant and to Messrs. Freston & Files, his attorneys, and it was served upon them. The record shows, as already indicated in the discussion of the first appeal, that Freston & Files appeared specially to challenge the jurisdiction of the court on the first motion, and that their authority then was limited to that alone. They did, however, file a notice of appeal from that order, and the record shows that their authority is now limited to the carrying on of the same challenge on this appeal. Granting that such is the limitation, the fact remains that, the appeal having been perfected, the respondent is entitled, of course, to present her side on appeal, and be represented by counsel. It is well settled that in domestic relations cases a wife is entitled, upon a proper showing, to the allowance of suit money to defend on appeal an order made in her favor by a lower court. Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862, supra; Parker v. Parker, 22 Cal.App.2d 139. 70 P.2d 1003. Conceding that the authority of appellant's counsel of record on this appeal is restricted to the pressing of their jurisdictional point herein, we are satisfied that, being counsel *now* of record for appellant, a service upon them of the moving papers was valid as a service upon the appellant. § 1015, Code Civ.Proc. In so holding we are not to be understood as indicating that there was anything in the nature of a general appearance for appellant when this second notice of appeal was filed or that the door was thereby opened for the service upon appellant's counsel (of record on this appeal) under section 1015 of the Code of Civil Procedure, or otherwise of any and every notice in the future. All we do hold is that for the limited purpose of this appeal on the sole question of jurisdiction the authority of appellant's counsel of record on this appeal is broad enough to justify the service upon them of these moving papers, and that such service was valid as a service upon appellant.

For the reasons and upon the authorities discussed herein, we are satisfied that both orders appealed from should be, and each is, hereby affirmed.

PETERS, Presiding Justice (concurring).

I agree that the appeal from the order granting respondent's request for attorney's fees and costs to permit her to defend the appeal from the order increasing the allowance for the maintenance of the children should be affirmed for the reasons set forth in the main opinion. I also agree that the order increasing the allowance should be affirmed, but I arrive at that conclusion upon reasoning different from that used in the main opinion. It is there held that there was a conflict in the evidence as to whether Loucks and Phister were attorneys of record for appellant in October of 1940, so that service upon them or upon Loucks was sufficient to give the court jurisdiction over appellant. This conflict is found to exist because the affidavit of service by mail upon Loucks and Phister contains an averment that copies of the moving papers were "addressed to the attorneys of record for said defendant * * * Loucks & Phister." It is held that this averment in an affidavit of service by mail creates a conflict with the positive averments of the affidavits of appellant and Loucks that the latter had been discharged in 1937. Support for this conclusion, it is held, is found in Moore v. Superior Court, 203 Cal. 238, 263 P. 1009. Although the factual situation there presented was practically identical with that in the instant case, and although there are clear implications in that opinion in favor of the interpretation placed upon it by the author of the main opinion in the instant case, that case was a proceeding in certiorari, and the actual holding was that, even if the trial court had committed error, such error could not be corrected on certiorari.

To hold that a mere averment in an affidavit of service by mail creates a conflict with the positive averments of opposing affidavits directed to the issue involved, does violence, in my opinion, to the purposes of the conflict rule. An appellate court is not a trial court, and where there is substantial evidence to support a finding that finding should not be disturbed. But for the rule to apply, the supporting evidence must be substantial. A formal averment in an affidavit of service is frail support indeed for a finding on a vital contested issue.

In my opinion there is a more substantial reason than that given in the main opinion to support the trial court's holding. It can be assumed that the evidence shows, as a matter of law, that Loucks was discharged by appellant in 1937, so that, as between appellant and Loucks, the latter was no longer the appellant's counsel. The record also shows that this change of relationship was not noted in the record of the divorce proceeding. It must be remembered that this is a divorce action involving the custody and maintenance of minors. In such cases by virtue of statute, § 138, Civ.Code, the court retains a continuing jurisdiction over its decree. That means that when the interlocutory decree was entered in 1933, and the final decree in 1934, such decree became final only as to the divorce. As to the care, custody, and maintenance of the children, the decree was not final—the court retained jurisdiction to modify such award dependent upon changed circumstances. It is conceded that in 1933 the court secured jurisdiction over appellant, and that at that time Loucks and Phister were his attorneys and appeared as such of record. Of course, a client may discharge his attorney at any time, and between the client and his attorney such discharge is effective when notice of discharge is communicated to the attorney. But if, during the litigation, an attorney who appears as such on the records is discharged, and the court and opposing counsel have no notice of the discharge, the court and opposing counsel may continue to deal with the attorney of record. Service of papers upon him, where service upon the attorney is proper, is good service until such attorney is discharged or substituted out of the case in the manner provided by law. See §§ 284, 285, 286, Code Civ.Proc. There would be no doubt that this rule would apply to an attorney of record prior to entry of final judgment. The same rule applies, in my opinion, after entry of judgment, in cases where the trial court retains a continuing jurisdiction. The reason for this rule is made clear when the provisions of section 1015 of the Code of Civil Procedure are considered. That section provides that when a person has an attorney in the action "the service of papers, when required, must be upon the attorney instead of the party" except certain designated papers not here involved. The section also provides: "When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk * * * for him." After personal service has been secured over a defendant in a divorce action, he should not be able to nullify the continuing jurisdiction of the court by discharging his attorney and moving out of the state. If, after discharging Loucks, the fact of such discharge had been noted in the record, respondent, under section 1015 of the Code of Civil Procedure, supra, could have made a proper service by simply serving the clerk of the court. But the record showed Loucks and Phister as counsel. The court, and opposing counsel were, in my opinion, entitled to rely on the record until that record was changed in the manner prescribed by law.

The law is clear that once a judicial proceeding is commenced with jurisdiction over the person of the party concerned, it is within the power of the Legislature to provide that the court may bind such person by every subsequent order which the court retains jurisdiction to make, and this notwithstanding that the order is made after the removal from the state of the party affected by the order. Michigan Trust Co. v. Ferry, 228 U.S. 346, 33 S.Ct. 550, 57 L.Ed. 867; McSherry v. McSherry, 113 Md. 395, 77 A. 653, 140 Am.St.Rep. 428; Laing v. Rigney, 160 U.S. 531, 16 S. Ct. 366, 40 L.Ed. 525.

In my opinion, the order increasing the allowance should be affirmed on the ground here set forth.

WARD, Justice (concurring).

I concur in the affirmance of both orders. On that increasing the allowance, it is my opinion that the order should be affirmed for the reasons given by Justice pro tem. GOODELL and the *additional* reasons given by Presiding Justice PETERS. I do not agree in the concurring opinion of the latter that "A formal averment in an affidavit of service is frail support indeed for a finding on a vital contested issue." An affidavit of service may be used in evidence. Code Civ.Proc. § 2009. The weight to be given the probative effect thereof is ordinarily a question for the trial court.

53 Cal.App.2d 566

MILTON v. LOS ANGELES MOTOR COACH CO. et al.

Civ. 13364.

District Court of Appeal, Second District, Division 3, California.

July 24, 1942.

Hearing Denied Sept. 22, 1942.

1. Automobiles 🔑243(17)

In commercial photographer's action for injuries sustained when struck by bus while standing in street to take a picture, photographer's testimony of commercial photographers' custom to place a camera in the street to take pictures was inadmissible, since custom cannot make due care out of negligent conduct.

2. Automobiles 🔑243(17)

In commercial photographer's action against bus line for injuries sustained when struck by bus while standing in street to take a picture, photographer's testimony of commercial photographers' custom to place cameras in street to take pictures was not admissible to show photographer was not a trespasser or negligent as a matter of law where trial court had ruled against bus line's objection on ground that there could be no usual practice of committing a trespass on a street. Pen.Code, § 370.

3. Automobiles 🔑219

One whose duties require using a street traveled by automobiles, in the absence of warning, is not required to keep a sharp lookout from behind to see whether an automobile is approaching.

4. Automobiles 🔑219

The rule relieving one whose duties require him to use a street traveled by automobiles of the necessity of keeping a sharp lookout to see whether an automobile is approaching does not protect photographers or others occasionally using the streets to pursue their occupations, if they do so from choice and not from necessity.

5. Automobiles 🔑246(58)

In action for injuries sustained by a commercial photographer when struck by a bus while photographer was standing in a street at night to take a picture, instruction placing photographer in position of street workers whom every motorist must expect to find on the street was error where under the evidence the photographer was not entitled to the instruction upon the showing made as to his presence in the street either as it applied to his own duty to use ordinary care, or as it applied to defendant's duty to anticipate his presence.

6. Appeal and error 🔑1066

In action for injuries sustained by a commercial photographer who was struck by a bus while standing in a street at night to take a picture, an instruction placing photographer in position of street workers whom every motorist must expect to find on the streets was prejudicial where, in view of conflicting testimony as to what precautions photographer took to avoid injury, it was impossible to know to what extent the instruction influenced the verdict in favor of photographer.

7. Trial 🔑295(7)

In action for injuries sustained by a commercial photographer when struck by a bus at night while attempting to take a picture in the street, error in instruction in placing photographer in the position of street workers whom every motorist must expect to find on the streets and in receipt of evidence of custom of photographers to stand in streets to take pictures was not cured by court's further statement in instruction as to purpose in receiving evidence of such custom.

8. Automobiles 🔑246(53)

In commercial photographer's action against bus line for injuries sustained when struck by bus while standing in street beyond parked automobile to take a picture, trial court erred in refusing to instruct regarding bus line's statutory duty to drive its vehicle near the right hand curb, under evidence that bus was proceeding near the right hand curb at time of the accident. Vehicle Code § 525. St.1939, p. 2197.

9. Trial 🔑251(8)

If an instruction regarding a statute would be helpful to jury in deciding the issues of a negligence case, it should be given, though there is no charge of negligence based upon alleged violation of the law.

10. Appeal and error 🔑1067

In commercial photographer's action against bus line for injuries sustained when struck by bus at night while standing in street to take a picture, trial court committed prejudicial error in refusing defendants' offered instruction on doctrine of imminent peril under evidence that automobile ahead of bus swerved when bus was within some

50 feet of photographer, affording bus driver, at that time, a view of the street ahead.

11. Automobiles ⚷219

A photographer standing in the street to take a picture was not as a matter of law committing a "nuisance" in using the street so as to be barred from recovering for injuries sustained when struck by a bus. Pen. Code, § 370.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

12. Trial ⚷194(16)

In commercial photographer's action against bus line for injuries sustained when struck by bus while standing in street to take a picture, trial court did not err in refusing defendants' offered instruction that it would have been difficult because of darkness and color of photographer's clothes for driver to have seen him.

Appeal trom Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Donald L. Milton against the Los Angeles Motor Coach Company and another for injuries sustained when plaintiff was struck by a motor coach. From an adverse judgment, defendants appeal.

Reversed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for appellants.

Freston & Files, Gordon L. Files, August J. O'Connor, and George J. Hider, all of Los Angeles, for respondent.

SHINN, Justice.

At 9:15 p. m. December 14, 1939, plaintiff, a commercial photographer, was standing in Wilshire Boulevard in Beverly Hills three or four feet northerly of an automobile parked against the south curb and about seventy-five feet easterly from the intersection of Wilshire and Bedford; he had a black hood over his head and was viewing through his camera, which rested on a tripod placed against the automobile, a store window on the south side of the boulevard, which was the subject of a picture he intended to take. There was testimony to the effect that he had with him as a temporary assistant a young man named Kirst, who stood in the street eight or ten feet westerly of the location of the camera, using a flashlight in directing traffic away from plaintiff. While so occupied plaintiff was struck by a motor coach moving easterly, operated by defendant Los Angeles Motor Coach Company, driven by its employee Koonse. In an action against the motor coach company and its driver plaintiff recovered judgment after jury trial and defendants' appeal. Errors are assigned in the giving of some of the instructions, in the refusal of others and in the admission of evidence.

Plaintiff testified that he had been doing commercial photography since 1914 and had taken at least 500 pictures in Beverly Hills. Over defendants' objection he testified as follows:

"Q.: Mr. Milton, in your experience as a photographer do you know whether the placing of a camera in the street as your camera was placed on the night of the accident was the usual and customary practice?

"Mr. Collins: Which is objected to as incompetent, irrelevant and immaterial for the reason there can be no usual practice of committing a trespass on a street.

* * *

"The Court: So far as the question of nuisance is concerned, or obstruction, I don't see there is anything to the objection. On the question as to whether the custom is admissible that would be a different question. * * *

"By Mr. Files (continuing): Q. I will ask this question. From your experience as a commercial photographer in Beverly Hills do you know whether or not there was a custom in 1939 in the performance of the work of commercial photography to place the camera in the street in the taking of such pictures? A. There was.

"Mr. Collins: I move that the answer be stricken. Same objection. It is incompetent, irrelevant and immaterial. No proper foundation has been laid and it calls for a conclusion of the witness.

"The Court: I have forgotten for the moment whether there was testimony prior to the recess that he had knowledge of the custom.

"Mr. Collins: All he has testified to was what he did himself.

"Mr. Files: The question I am asking is whether he knows if there was such a custom.

"The Court: Overruled.

"By Mr. Files (continuing): Q. What is your answer? A. Yes, sir.

"Q. What was the custom in Beverly Hills at that time with respect to the presence of the camera temporarily in the street for the taking of commercial photographs? A. If I had to take a picture of a building I had to place the camera wherever it was necessary for me to place it to take this photograph whether it was in the center or the edge. Naturally, we never went out to the center unless we had to, but we had to take the picture from where it was necessary to take it from according to our lens we were using.

"Q. Was that the custom in Beverly Hills at that time? A. Yes, sir.

"Mr. Collins: We object to that on the ground no proper foundation has been laid.

"The Court: Overruled."

Even though it might be proper in some situations to show the existence of customary practices or conditions which were known to the parties or were of such notoriety as to be presumptively within their knowledge and the existence of which would reasonably have influenced their conduct, we have no such situation here nor anything approaching it.

No evidence was offered to prove knowledge on the part of either defendant of the alleged custom and the evidence received fell far short of establishing the existence of a condition so common and notorious as to warrant an inference that it was known to the defendants. In the latter connection conspicuous deficiencies in the proof are to be noted. Beverly Hills is a large city with extensive residential areas. It has a business section traversed for a number of blocks by Wilshire Boulevard, a busy, congested traffic artery. From the testimony of plaintiff it cannot be ascertained whether the alleged custom was a general one, commonly and extensively followed by the profession, or only a practice that was resorted to upon rare and exceptional occasions, whether it was followed in the residential districts or in the heavy traffic of Wilshire Boulevard, whether it was the custom of photographers using the streets to hold their cameras in their hands and to be prepared to move out of danger or to use tripods with their heads covered with black cloths, whether it was customary to take pictures from the streets after dark as well as in the daytime and what, if any, precautions were usually taken to prevent injuries by automobiles. And in addition to this, it is somewhat difficult to see that plaintiff was testifying to anything more than what his own practices were.

[1] Regardless of any question as to the sufficiency of the evidence of custom, it was inadmissible.

The law is well settled that mere custom or usage cannot make due care out of conduct that is in fact negligence under circumstances disclosed by the evidence. Phoenix Assur. Co. v. Texas Holding Co., 1927, 81 Cal.App. 61, 74, 252 P. 1082; Rudd v. Byrnes, 1909, 156 Cal. 636, 642, 105 P. 957, 26 L.R.A.,N.S., 134, 20 Ann. Cas. 124; Anstead v. Pacific Gas & Elec. Co., 1928, 203 Cal. 634, 638, 265 P. 487; Perry v. Angelus Hospital Association, 1916, 172 Cal. 311, 315, 156 P. 449; Robinet v. Hawks, 1927, 200 Cal. 265, 273, 252 P. 1045; Carroll v. Central Counties Gas Co., 1929, 96 Cal.App. 161, 165, 273 P. 875, 274 P. 594.

[2] The introduction of the evidence as to custom is sought to be justified upon the ground that the use of the streets in a customary and lawful manner without unlawfully obstructing their use by others does not constitute a public nuisance under section 370 of the Penal Code, which was one ground of defendants' objection, and that therefore plaintiff was not a trespasser or guilty of negligence as a matter of law. Citing Fisher v. Los Angeles Pac. Co., 1913, 21 Cal.App. 677, 682, 132 P. 767, and Katz v. Helbing, 1928, 205 Cal. 629, 633, 271 P. 1062, 62 A.L.R. 825. But as appears from the portions of the record quoted above, before the evidence of custom was admitted, the court had ruled against defendants' objections to the evidence of custom upon the stated ground that "there can be no usual practice of committing a trespass on a street" the court stating, "So far as the question of nuisance is concerned, or obstruction, I don't see there is anything to the objection."

Plaintiff availed himself of the evidence not as supporting his position upon the strictly legal question whether he was committing a trespass or maintaining a nuisance but as establishing a fact having a vital bearing upon the issues of negligence and contributory negligence. This was accomplished by means of an instruction given at plaintiff's request, reading as follows: "While sidewalks are for the use of pedestrians and not at all for the use of automobiles, busses, or other vehicles, a street, on the other hand, is for the use of automobiles, busses, vehicles, pedestrians, workmen and others having need for using the street. However, even though the street is for the use of both vehicles and persons on foot, that fact does not give license to anyone, whether operating a vehicle or on foot, to fail to use ordinary care for his own safety or for the safety of the other. The law imposes on each the duty of ordinary care. That duty of care is that care which persons of ordinary prudence would exercise under similar circumstances; that is to say, the circumstances as they arose in this case, as disclosed by the evidence. When a person is engaged in work of a customary nature, that requires him to be in a portion of the street for a temporary period, he occupies a somewhat different category from that of a pedestrian. The law recognizes, for instance, that what would be ordinary care for one engaged in the performance of work on the street, would not necessarily be the ordinary care that a pedestrian merely crossing the street should exercise. While engaged in work, one is not required to maintain a constant watch for traffic on the street, but such a watch, or regard thereto, or protection therefrom, as under the circumstances a reasonably average prudent person would have exercised while engaged in the work which the plaintiff was doing."

[3] The principle of law thus declared is well recognized as applying to those whose work has to be done in the streets. It was stated in State, etc., Ins. Fund v. Scamell, 1925, 73 Cal.App. 285, 290, 238 P. 780, 781, where the plaintiff, employed as a street sweeper, had been run down by an automobile, as follows: "One using a street traveled by automobile, in the absence of warning, is not required to constantly keep a sharp lookout from behind to see whether a machine is approaching [citing cases]; and his failure so to do does not constitute negligence as a matter of law. [Citing cases.] Much less so is a laborer whose duties require him to be in the street in the performance of his occupation. Pedestrians are not continuously in the street, and their attention is devoted to a safe passage, while the attention of a street laborer must be to a considerable extent devoted to his task. There can be and there is no duty imposed on a workman to be constantly on the lookout for motor vehicles; on the contrary, it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them. It is not negligence as a matter of law for a workman to keep his mind on his work or to fail to look and listen for approaching vehicles. He may properly assume that the automobilist will not be guilty of negligence in running him down without warning. (King v. Green, 7 Cal.App. 473, 94 P. 777), and especially is this true where he remains within a space established for the parking of cars. (Medlin v. Spazier, 23 Cal.App. 242, 137 P. 1078.)" Other similar cases are Milosevich v. Pacific Electric Ry. Co., 1924, 68 Cal.App. 662, 230 P. 15; Driscoll v. California St. Cable R. Co., 1926, 80 Cal.App. 208, 250 P. 1062; Woods v. Wisdom, 1933, 133 Cal.App. 694, 24 P.2d 863, and Mecham v. Crump, 1934, 137 Cal.App. 200, 30 P.2d 568, in all of which injuries had been sustained by workmen engaged in the performance of labor on public streets either as employees of cities, street railway companies, gas and electric companies or construction companies engaged in public work.

[4] Plaintiff's testimony that it was customary for photographers in Beverly Hills to use the streets in the taking of pictures and that it was necessary for him to place his camera in the street in order to get the particular picture he wished to take with the lens he was using, was evidently intended to bring him within the rule stated in the instruction, but that rule cannot be exended to protect photographers or others who may occasionally use the streets in the pursuit of their occupations if they do so from choice and not from necessity. In Carlsen v. Diehl, 1922, 57 Cal.App. 731, at page 737, 208 P. 150, it was held that a truck driver who was loading his truck in a hazardous position alongside a driveway and who was not forced to remain in that particular place as a matter of duty, although he had a right to be there, was not to be classed with laborers engaged in street work; an instruction in less objectionable form than the one in the instant case was held to be erroneous.

There was no proper factual basis for the application of a rule which affords an unusual measure of protection to those whose work cannot be done except in the streets. Reduced to its essentials the testimony was that if plaintiff wished to take a particular picture, using a particular lens, he had to stand in the street in order to get the desired result. There is nothing in this testimony to suggest, much less to prove, that substantially the same result could not have been reached by the use of a different lens, with the camera placed in another location. While it was shown to be desirable, in some cases, to take a picture from a location in a street, it was not shown to be necessary to do so in order to carry on the business of commercial photography.

[5, 6] A careful study of the instruction convinces us that it would naturally have been understood by the jury as warranting them in assuming, upon the basis of the evidence of custom, that plaintiff was "engaged in work of a customary nature that require(d) him to be in a portion of the street for a temporary period," thus placing him in the category of workers in the street whose rights and duties are measured by a rule of conduct which fits their own peculiar situation. The jury was told in substance that it was not necessary for plaintiff in the work he was doing to maintain a constant watch for traffic on the street, and the instruction went far to place upon defendants responsibility for the accident. It is not contended that plaintiff himself was paying any attention to the traffic; obviously he was in no position to do so. There was a sharp conflict in the evidence as to whether the witness Kirst was directing traffic around plaintiff with a flash light. Two eyewitnesses testified that no one was standing westerly of plaintiff, that a young man was standing toward the east but that there was no one using a flash light. An officer of the State Highway Patrol, in making an immediate investigation of the accident, talked with the witness Kirst and testified that the latter had stated at the time that he had not been using a flash light. This officer and another talked at that time with a spectator, one Nagle, who testified at the trial that Kirst had used a flash light. The officers testified that Nagle had told them that Kirst was not using a flash light. Defendant Koonse denied having seen Kirst before the accident. In view of the conflicting testimony as to what precautions plaintiff did take to avoid accidental injury it is impossible to know to what extent the instruction influenced the verdict. It placed plaintiff in the position of street workers whom every motorist must expect to find on the streets and highways and thus placed defendants under the same duty to anticipate plaintiff's presence in the street as they were under to anticipate the presence of highway workers. The dissimilarity of the two situations that were treated as essentially the same is obvious. If the rule stated in the instruction was applicable to plaintiff's case it would be applicable to anyone who found it desirable or advantageous to do some of his work in the streets.

We do not think it can be said that the jury could not have believed from all of the evidence in the case that plaintiff, while engaged in taking pictures at night, on a busy highway, with a black cloth over his head, was in at least as great danger of injury as a pedestrian usually is when crossing the highway. The jury also could have believed that ordinary prudence would have demanded that a constant watch for vehicles be maintained by plaintiff or someone acting for him, that neither plaintiff nor his alleged helper and agent, Kirst, maintained such watch, and that responsibility for the accident rested upon plaintiff and not upon defendants. Plaintiff was not entitled to the instruction, upon the showing made as to his presence in the street, either as it applied to his own duty to use ordinary care or as it applied to the duty of defendants to anticipate his presence in the street. The principle of law stated in the instruction, insofar as it relates to the conduct of those who are obliged to make temporary use of the streets for purposes other than travel, is, as we have stated, well established, and the rule of conduct which it declares is so manifestly right and salutary as to admit of no modification or relaxation in situations where it applies. Those situations are necessarily numerous and we undertake to place no limitations upon the application of the rule except with relation to the facts of the case before us. The factual foundation which called forth the instruction was not only insufficient but its corner stone was the improper testimony as to custom.

[7] The vice of the instruction was not removed nor was the error in receipt of evidence of custom cured by general statements in the instruction or by a further instruction which the court gave, reading as follows: "The Court has permitted testimony to be given as to the custom and practice of photographers in Beverly Hills where the accident occurred in respect to taking pictures from the street where it is necessary to do so in order to get a

picture of an entire building. This evidence was not received as showing that the plaintiff was or was not negligent. It was received simply as an evidential matter of fact, if it be a fact, which is for you to determine, and in order that you might have information as to the custom and practice prevailing in Beverly Hills. The mere fact, if it be a fact, that the photographers in Beverly Hills operate in a certain manner or in the same manner is not proof that they do or do not operate in a proper manner. The standard for determining what is proper practice is to be ascertained by you by determining what an average reasonably prudent person would or would not have done under the circumstances as you find the circumstances to exist." This statement had to be read with the instruction we have quoted, which invaded the province of the jury in its statement that plaintiff would not have been negligent in failing to maintain a constant watch for approaching vehicles; it implied that defendants should have anticipated his presence in the street, and it again definitely linked the evidence of custom with the issues of negligence.

[8,9] Defendants requested and the court declined to give an instruction reading as follows: "Section 525 of the Vehicle Code of the State of California [St. 1939, p. 2197], in force and effect on the 14th day of December, 1939, reads in part as follows: 'Upon all roadways of sufficient width a vehicle shall be driven upon the right half of, and as close as practicable to the right-hand curb or edge of, such roadway.'" In Christiansen v. Hollings, 1941, 44 Cal.App.2d 332, 112 P.2d 723; Skulte v. Ahern, 1937, 22 Cal.App.2d 460, 71 P.2d 340, and Casalegno v. Leonard, 1940, 40 Cal.App.2d 575, 105 P.2d 125, it was held proper to instruct the jury as to the provisions of this section where negligence was charged consisting in part of a violation of its provisions. While we have a different case, we think it was error to refuse the instruction. We do not know that the members of the jury or some of them did not believe the bus driver to have been negligent in driving so close to the parked cars. The law should have been stated in order to remove any possible uncertainty in their minds as to the right and duty of the bus driver in that respect and also as to the duty of plaintiff in taking his station in the street to have in mind the fact that east-bound vehicles were required to travel as close as practicable to the southerly curb. Where an instruction as to the provisions of a statute would be helpful to the jury in deciding the issues in a negligence case it should be given, even though there is no charge of negligence involved, based upon alleged violation of the law.

[10] Defendants offered an instruction in standard form on the doctrine of imminent peril which the court declined to give. We believe that this instruction also should have been given. Defendant Koonse, driver of the bus, testified that he was traveling easterly three or four feet from the parked cars; that he had stopped at Bedford and Wilshire and that the accident happened when he had traveled about seventy-five feet easterly from the intersection at a speed of between twenty and twenty-five miles per hour; that he saw plaintiff's tripod and camera just as a car in front of him traveling easterly swerved around plaintiff to the left; that he saw plaintiff looking through the camera but that he did not see a man with a flashlight; that the bus was fifteen or twenty feet to the rear of the car ahead when it swerved to the left. He estimated that plaintiff was about fifteen feet away from the front end of the bus when he first saw him and testified that he swung his bus to the left and tried to put on the brakes as soon as he saw plaintiff. Plaintiff's witness Kirst, who had testified to having directed traffic away from plaintiff by use of a flash light, testified that an automobile preceded the bus; that he directed it around plaintiff; that he saw the bus approaching and that the bus driver wasn't looking ahead; that he, Kirst, jumped out of the way, yelled at plaintiff just before the bus hit him and that the bus was traveling about fifteen feet behind the car ahead of it. He further testified that the bus did not change its direction from the time it crossed Bedford to the time it struck plaintiff; that he tried to direct the bus around plaintiff until it was within about three feet of him, when he jumped aside, and that the speed of the bus was not decreased up to the time of the accident. There was also testimony that when the car swerved out, the bus was about forty-five feet from where plaintiff was standing. The jury could well have believed that if the bus driver was negligent his negligence occurred in the interval between the turning out of the

car and the contact of the bus with plaintiff. Plaintiff contends that the instruction should not have been given because the bus driver did not see him until it was too late to avoid the accident and that therefore the rule would have been inapplicable to the case on the theory that the driver was not confronted with a situation of peril until he actually saw plaintiff. This is too narrow a view of the situation. As long as the car ahead of the bus was proceeding in an uninterrupted course and at an unvarying speed, and in the absence of anything to alarm him, the bus driver would have been justified in assuming that the highway ahead of the car was clear. The swerving of the car to the left might have warned him that there was some obstruction in the street which caused the car to turn. We think it could reasonably have appeared to the jury that a situation of imminent peril arose when the car which had been obstructing the view of the bus driver turned aside so as to afford him a view of the street ahead. The conduct of the driver should have been considered by the jury with an understanding of the imminent peril doctrine and we cannot say that the jury, knowing the rule, would not have found that it had application to the facts proved and that the bus driver was not negligent. The failure to give this instruction, alone, would warrant a reversal of the judgment.

[11] Several instructions were requested by defendants to the effect that plaintiff was committing a nuisance in using the street as he did and was therefore guilty of negligence which would bar recovery. No authority is cited in support of the argument except a single case from another state which turned upon the violation of a city ordinance and which obviously is not in point here. The court properly declined to give the requested instructions. Section 370 of the Penal Code, insofar as its provisions are pertinent, provides that anything which unlawfully obstructs the use of a public street is a public nuisance. Plaintiff's temporary use of the street was not a violation of any law to which our attention has been called nor did it amount to negligence as a matter of law. Fisher v. Los Angeles Pac. Co., supra, 1913, 21 Cal.App. 677, 682, 132 P. 767; Katz v. Helbing, supra, 1928, 205 Cal. 629, 633, 271 P. 1062, 62 A.L.R. 825; Wright v. Salzberger & Son, 1923, 63 Cal.App. 450, 452, 218 P. 785.

[12] The court did not err in refusing defendants' instruction on negligence calling attention to the darkness of the night and the color of plaintiff's clothes and in effect stating that it would have been difficult under the circumstances for the bus driver to have seen plaintiff.

In view of the conflicting evidence upon material issues and the relevancy of the legal principles stated in the instructions which were refused, we are unable to say that the result would not have been different had the trial been free from the errors we have discussed.

The judgment is reversed.

PARKER WOOD, J., concurred.

SCHAUER, P. J. (concurring).

I concur in the judgment.

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53 Cal.App.2d 375

GAMALIA et al. v. BADILLO et al.

Civ. 11964.

District Court of Appeal, First District,
Division 1, California.

July 13, 1942.

1. Automobiles 🔑245(49)

Evidence that defendant's automobile, after a wheel flew off causing automobile to turn sharply to the left, struck the side of plaintiff's automobile, which was approaching from the opposite direction in its proper lane, notwithstanding defendant's efforts to stop or stay on his side of the highway to avoid plaintiff and a dangerous drop to defendant's right, raised question of fact for the trier of facts whether defendant acted reasonably in the face of sudden peril.

2. Negligence 🔑12

One who, without negligence on his part, is suddenly confronted with an unexpected imminent danger is not required to exercise the same quantum of care imposed upon one acting after careful deliberation, the test being, whether he acted as a reasonably prudent man would under similar circumstances.

3. Negligence ⊂⇒12

Where a person in a sudden emergency is presented with an immediate choice between alternative courses of conduct, he is not necessarily negligent if he makes an unwise choice, if a reasonable man under identical circumstances would have made a similar choice.

4. Negligence ⊂⇒136(2)

Where one is suddenly confronted, without negligence on his part, with an unexpected imminent danger, whether the person acted reasonably is a question of fact.

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Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Demetrio Gamalia and others against Louis G. Badillo and others for injuries and damages sustained in an automobile collision. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Morris Oppenheim, of San Francisco, for appellants.

Phillips & Munck, of Oakland, and Sandford, Barry & Spencer, of San Francisco, for respondents.

PETERS, Presiding Justice.

Plaintiffs appeal from a judgment in favor of defendants rendered by the court sitting without a jury, and in which findings were waived. The sole contention of appellants is that the judgment is totally unsupported by the evidence, and that, under the evidence, defendant Louis G. Badillo, as a matter of law, was guilty of negligence proximately causing the accident out of which the injuries complained of arose. Appellants have filed a six and one-half page opening brief, in which not one authority is cited, and have not filed a reply brief. A reading of the transcript demonstrates that there is no merit to the appeal; in fact, the point urged approaches the frivolous.

The action arose out of an automobile accident that occurred on the main highway south of San Rafael at about 7:30 a. m. on September 30, 1939. Defendant Louis G. Badillo, accompanied by his wife and another passenger, was driving his car northerly toward San Rafael at a speed of about 35 miles per hour. Plaintiff Demetrio Gamalia, accompanied by his wife, was driving on the same highway in a southerly direction, that is, towards San Francisco. The highway is a three-lane highway, and, immediately preceding the accident, each of the automobiles was in its proper outside lane. As defendants' car approached within several hundred feet of the Gamalia car, the axle on defendants' car broke alongside the left rear wheel, causing that wheel to fly off, and causing the car to fall onto the brake shield. When this occurred the Badillo car was proceeding down a rather steep grade. Badillo testified that the effect of the accident was to cause his car, equipped with four-wheeled mechanical brakes, to lose its braking power. He tried both the foot brake and the emergency brake, but neither would stop the car. The car was zigzagging back and forth, and he tried to manipulate the steering wheel so as to keep the car on his side of the highway. After his car had proceeded about 160 feet, it turned sharply to the left and crashed into the side of the Gamalia car that was coming up the grade. The accident occurred in the lane of the highway in which Gamalia was properly driving. As a result of the collision, Mrs. Gamalia sustained injuries from which she died, Mr. Gamalia incurred minor injuries, and the Gamalia car was damaged.

The evidence shows that as the Badillo car was proceeding down the grade, to its right, and just beyond the shoulder of the highway, was a steep drop of some three or four hundred feet. On the left of the highway there was a steep embankment. Neither in the pleadings nor at the trial did plaintiffs attempt to raise any issue as to the negligent maintenance of the car by defendants. The sole contention then, and now, made is that Badillo negligently handled the car after the wheel broke off. Appellants urge that in the exercise of care Badillo should have refrained from applying the brakes and should have concentrated solely upon steering his car in a straight line. This contention is predicated upon the testimony of an auto mechanic that, after the wheel flew off, whatever braking power was left would tend to concentrate in the left front wheel, and that the application of the brakes would tend to force the car to the left. This same mechanic testified that the breaking of the axle was due to crystallization; that such axle breaks are unforeseeable; that generally such breaks occur towards the center of the axle; that in such a break the wheel does not come off and the brakes may be applied; that this break was about flush with the wheel; that when the wheel flew off it interfered with the operation of the mechanical brakes because it removed the equality of pressure which must be applied to each wheel in order to have mechanical brakes operate properly.

[1] From this brief resumé, it must be apparent that the question of whether Badillo acted reasonably, in the face of the sudden peril with which he, through no fault of his own, was presented was a question of fact for the trier of the facts. The situation is simply one where Badillo was driving down a three-lane highway on his own side of the road at a lawful speed when, without fault on his part, his left rear axle broke and the wheel flew off. He was immediately confronted with a sudden, serious and unexpected emergency. There was a dangerous drop to his right, the Gamalia car was approaching up the hill to his left, he was going down hill, his brakes were gone, the left rear side of his car was bumping along on the brake shield, and the car was swerving out of control. He tried to keep the car in a straight line and tried to stop it. He was unsuccessful, but that does not mean that, as a matter of law, he was negligent.

[2-4] The law is clear, of course, that one who, without negligence on his part, is suddenly confronted with an unexpected imminent danger, is not required to exercise the same quantum of care imposed upon one who acts after careful deliberation. The test is, Did he act as a reasonably prudent man would act under similar circumstances? Where a person, in such sudden emergency, is presented with an immediate choice between alternative courses of conduct, he is not necessarily negligent if he makes what turns out to be an unwise choice, if a reasonable man, under identical circumstances, would have made a similar choice. The conduct of a person in such sudden emergency must be viewed in the light of the confusion and excitement of the moment, and not judged by what a person would have done had time existed deliberately to plan a course of conduct. In each case, whether the person acted reasonably is a question of fact for the trier of the fact. These principles are well settled. Dewees v. Kuntz, 106 Cal.App. 665, 289 P. 912; Miller v. Geary, 113 Cal.App. 573, 298 P. 843; see annotation and cases collected 79 A.L.R. 1277; see cases collected 19 Cal.Jur. 598, § 36.

In the instant case it is obvious that the implied finding that Badillo acted reasonably and was not negligent finds ample support in the record.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concurred.

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53 Cal.App.2d 504

EDWARD BROWN & SONS v. McCOLGAN, Franchise Tax Com'r.

Civ. 12015.

District Court of Appeal, First District, Division 1, California.

July 23, 1942.

Hearing Denied Sept. 21, 1942.

1. Taxation 🔑1

The character of a tax must be ascertained by its incidence and from the natural and legal effect of language in the statute.

2. Licenses 🔑19(3)

A privilege tax is not a "property tax" within meaning of constitutional provision that gross premiums tax on insurance companies shall be in lieu of all other taxes on companies or their property, merely because apportioned in amount to value of the property used in connection with the privilege which is taxed. Const. art. 13, § 14; Pol. Code, § 3664b.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Tax".

3. Taxation 🔑200

Under constitutional provision that gross premiums tax against insurance companies shall be in lieu of other taxes, exemption from liability for other taxes is predicated on the theory that gross premiums tax has been paid. Const. art. 13, § 14; Pol. Code, § 3664b.

4. Taxation 🔑200

A California corporation which did business as insurance agent and paid no gross premiums tax was not exempted from paying tax on privilege of exercising corporate franchises, by constitutional provision that gross premiums tax should be in lieu of other taxes. St.1935, p. 1246, § 4(3); Pol.Code, § 3664b; Const. art. 13, § 14.

5. Taxation 🔑117

The tax on privilege of exercising corporate franchises is not an "occupational tax" and is not imposed on the doing of business, though phrase "doing business" is used to describe the group intended to be taxed, but is imposed on the privilege of doing business as a corporation, and using the corporate mechanism with its advantages over other forms of doing business in the state. St.1935, p. 1246, § 4(3); Const. art. 13, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business" and "Occupational Tax".

Appeal from Superior Court, City and County of San Francisco, C. J. Goodell, Judge.

Action by Edward Brown & Sons against Charles J. McColgan, as Franchise Tax Commissioner, to recover franchise tax paid, claim for refund having been denied. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hearing denied; SHENK and EDMONDS, JJ., dissenting.

Long & Levit, of San Francisco, for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and James E. Sabine, Deputy Atty. Gen., for respondent.

WARD, Justice.

This is an action to recover taxes paid by plaintiff in 1935 under the California Bank and Corporation Franchise Tax Act (Gen.Laws Supp.1935, Act 8488; California Const. art. XIII, § 14, as amended in 1933) after claim for refund therefor was denied by the Franchise Tax Commissioner.

Plaintiff and defendant entered into a written stipulation that certain of the material allegations of the complaint, among which were the following, were true: "* * * plaintiff was and now is an insurance agent doing business in California and representing insurance companies as their agent; that during the said calendar years 1934 and 1935 the insurance companies represented by plaintiff as agent were: [the names of eighteen insurance companies are set forth]; * * * that each of said insurance companies was at all times herein mentioned authorized to transact an insurance business in and by the State of California; that plaintiff's entire income during the said period was derived from its said insurance agency business, and plaintiff engaged in no other business activity during said period. That plaintiff is informed and believes and therefore alleges that at all times herein mentioned each of said above-mentioned insurance companies paid to the State of California the full amount of the gross premium tax required of each of them under and by virtue of the provisions of section 14, Article XIII of the California Constitution"; that a franchise tax return was filed for the year 1935, and the tax indicated thereon paid, following which a claim for refund of the entire amount was filed, based upon the contention that under the provisions of said section 14 of article XIII of the Constitution, the corporation, engaged in business as an insurance agent for the designated eighteen companies doing business in the State of California, was not subject to the tax; that the claim for refund was denied and that plaintiff has not appealed to the State Board of Equalization from the action of the Franchise Tax Commissioner in denying the refund. The findings follow the stipulation. After the entry of a judgment for defendant, a new trial was granted and the matter resubmitted upon the same stipulated facts and reargued. Again judgment was entered for defendant, from which plaintiff corporation appeals.

Subdivision (3) of section 4 of the Bank and Corporation Franchise Tax Act (Stats. 1935, ch. 353, p. 1246, Deering's Gen.Laws, 1935 Supp. Act 8488) provides: "with the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided * * *." Political Code section 3664b provides that every insurance company doing business in this state shall pay a designated percentage upon the amount of gross premiums received upon business done in this state and further provides: "This tax shall be in lieu of all other taxes and licenses, State, county and municipal, upon such companies or their property, except taxes upon their real estate." (Art. XIII, § 14 of the California Const.)

Appellant contends that a tax on an insurance agent for the privilege of doing business is a direct tax on the insurance companies it represents and hence is forbidden by the "in lieu" provision above referred to requiring every insurance company to pay a percentage of its gross premiums as an annual tax. In support of such contention it relies principally on Hughes v. City of Los Angeles, 168 Cal. 764, 145 P. 94, 95. In that case a revenue ordinance in the nature of an occupational tax providing for the payment of a designated license fee "whether the insurer be a corporation, mutual company, or individual," was declared to be in violation of article XIII, § 14 of the Constitution of this state. The court there said: "Under the authority of Los Angeles Trust & Savings Bank v. City of Los Angeles, 168 Cal. 762, 145 P. 94, this day decided, no doubt can be entertained but that if this privilege tax were imposed upon the insurance companies themselves it would be invalid. The distinction sought to be drawn in this case is that this particular license fee is not imposed upon the companies but upon the agents of the companies. This is true, but upon the other hand it is equally true that every insurance corporation must act through agents and can act only through agents, and that, therefore, in a direct and immediate sense a tax upon such agents for the right to do business is a tax upon the corporation's right to do business."

Certain tax statutes have been held to tax the mere privilege of being a corporation; that is, the enjoyment of the right to do business (Stats.1929, ch. 13, § 5, p. 20) or, as later declared, the right of exercising a corporate franchise in this state. (Stats. 1931, ch. 1066, § 5, p. 2225; Oliver Cont. Filter Co. v. McColgan, 48 Cal.App.2d 800, 805, 120 P.2d 682).

[1, 2] The character of a tax "must be ascertained by its incidents and from the natural and legal effect of the language employed in the statute." (Ingels v. Riley, 5 Cal.2d 154, 159, 53 P.2d 939, 942, 103 A.L.R. 1.) A privilege tax is not a property tax within the meaning of the constitutional provisions. (Brunton v. Superior Court, 20 Cal.2d 202, 124 P.2d 831.) The tax in question "does not become a property tax simply because it is proportioned in amount to the value of the property used in connection with the privilege which is taxed." (Ingels v. Riley, supra, 5 Cal.2d page 160, 53 P.2d page 942, 103 A.L.R. 1; Carpenter v. Peoples Mut. Life Ins. Co., 10 Cal.2d 299, 74 P.2d 508; Camden Fire Ins. Ass'n v. Johnson, 42 Cal.App.2d 528, 109 P.2d 447.) In Consolidated Title Securities Co. v. Hopkins, 1 Cal.2d 414, 419, 35 P.2d 320, 323, the court said: "The gross premiums tax required to be paid by insurance companies, although in lieu of certain taxes upon property, is not, like the public utilities gross receipts tax, by the terms of the constitutional provision itself a tax *upon* property. Rather, it is a franchise tax exacted for the privilege of doing business in this state * * *."

[3, 4] The Hughes case is not controlling herein. It held that an occupation tax on the insurance agent because he was an agent of an insurance company was invalid. But this tax (franchise tax) is on all corporations doing business in this state "on the privilege of doing business as a corporation." The Hughes case decided that an occupation tax aimed at insurance agents hit insurance companies directly. This holding was necessary because the "in lieu" provision applies to direct taxes on insurance companies, and does not apply to indirect taxes imposed on other persons or corporations and passed on to the insurance company. The privilege of exemption from liability for other taxes is predicated on the theory that a gross premiums tax has been paid. Appellant, of course, pays no gross premiums tax. It follows that unless the franchise tax on Edward Brown & Sons is a direct tax on the insurance companies it represents, appellant must pay the franchise tax.

It is apparent that any effect that the payment of a franchise tax by Edward Brown & Sons may have on the insurance companies it represents is at most indirect. So far as the payment of the tax by appellant is concerned, it has no more effect on the insurance companies than the payment by appellant of automobile or personal property taxes.

[5] The franchise tax act does not single out the business of insurance agents and levy a tax on that business. It does not tax such business at all. It is not an occupational tax such as was involved in the Hughes case. While the tax is imposed only on companies doing business in California, the phrase "doing business" merely describes the group intended to be taxed—the tax is not imposed on the *doing* of busi-

ness. If it were, it would be an occupational tax and including only corporations and excluding partnerships and individuals doing business might well render the tax invalid. The tax by express language is imposed on the privilege of doing business as a corporation. It is imposed on the privilege of using the corporate mechanism, with its consequent advantages over other forms of doing business in this state.

In Anglo-Chilean, etc., Corp. v. State of Alabama, 288 U.S. 218, 228, 53 S.Ct. 373, 376, 77 L.Ed. 710, strongly relied upon by appellant, it was held "that the power of the state to withhold from a foreign corporation permission to exercise its franchise to do business therein does not enable it, when granting the privilege, to burden by taxation interstate commerce carried on by such corporation within the state." The court there was dealing with an interference with interstate commerce. The facts of the present case are essentially different. Appellant is a California corporation entitled to the privilege and actually doing business within the state without the payment of tax measured by its net income.

The trial judge, the Hon. C. J. Goodell, rendered a written opinion in which he reviews certain cases bearing upon this question. We are in accord with his understanding and interpretation of those cases as set forth in the following excerpt from that opinion (emphasis being as therein employed unless otherwise indicated):

"In Pacific Co., Ltd., v. Johnson, 212 Cal. 148, at page 154, 298 P. 489, at page 492, affirmed in 285 U.S. 480, 52 S.Ct. 424, 76 L. Ed. 893, the court says: 'A franchise tax is a tax imposed upon a corporation *for the right or privilege of being a corporation or of doing business in a corporate capacity.* * * *' (* * * and note the similarity of this language to that cited from the Constitution, art. XIII, § 16, subd. 2(a).

"In Memphis Dock & Fwd. Co. v. Fort (Supreme Court of Tennessee, 1936), [170 Tenn. 109], 92 S.W.2d 408, 409, the court enlarges somewhat upon our own Supreme Court's statement just quoted, when it says: 'The [excise] tax is not laid upon a particular corporate business or upon a particular transaction; it is upon the privilege of doing business as a corporation and exercising the corporate powers for the purpose of producing a profit. *The source of the profit and the character of business carried on in the corporate name is immaterial.* The tax is measured by net earnings that result from whatever business may be done by the corporation in the exercise of powers conferred by the charter. * * * (Citing cases.)'

"In Missouri Athletic Ass'n v. Delk Inv. Corporation (Supreme Court of Missouri, 1929), [323 Mo. 765], 20 S.W.2d 51, 55, the court quotes from an earlier decision of their own ([State v. Pierce Petroleum Corp.], 318 Mo. [1020], 1027, 2 S.W.2d 790, 794), as follows: 'The tax is not a property tax but an excise levied upon the privilege of transacting business in this state *as a corporation.*' (Citing [State ex rel. Marquette Hotel Inv. Co. v. State Tax Comm.], 282 Mo. 213, 221 S.W. 721; emphasis the court's.)

"The Missouri Court then cites 37 Cyc. 817 and City of Chicago v. Chicago City Railway Co., 245 Ill.App. 473, which case, in turn, refers to Flint v. Stone Tracy Co., 220 U.S. [107], 108 [31 S.Ct. 342, 55 L.Ed. 389, Ann.Cas.1912B, 1312], quoting: 'it is a tax upon the doing of business with the advantages which inhere in the peculiarities, of corporate or joint stock organizations' and further quoting: 'The tax is laid upon the privileges which exist in the conducting of a business with the advantages which inhere in the corporate capacity of those taxed. * * * *It is this distinctive privilege which is the subject of taxation.* * * *'

"In Diamond Match Co. v. State Tax Commission (Court of Appeals, Maryland, 1938), [175 Md. 234], 200 A. 365, 369, appears the following: 'Again, the franchise tax imposed conferred on the corporation no more than the privilege of *juristic personality* and limited corporate liability * * *.'

"In State v. Clement Nat. Bank (Supreme Court of Vermont, 1911), [84 Vt. 167], 78 A. 944, at 949 [Ann.Cas.1912D, 22] it is said: 'A "franchise tax" is a tax upon the privilege of doing business *under corporate organization* * * *.'

"See also In re Stevens, 1905, [46 Misc. 623], 95 N.Y.S. 297, at page 313.

"Many other authorities could be cited to the same general effect. * * *

"Carpenter v. Peoples Mutual Life Ins. Co., 10 Cal.2d 299, 74 P.2d 508, is cited by the plaintiff to the point that 'This tax is a franchise tax exacted for the privilege of conducting an insurance business in the state.' * * * That is true in the case of an insurance company itself because it comes under these very provisions of the Constitution. Corporations other than insurance companies come under the other provisions and as to them all that can be said is that they are taxed for the privilege of doing business, not as an insurance corporation, but simply as a corporation.

"Hartford Fire Ins. Co. v. Jordan, 168 Cal. 270, 142 P. 839, held that the gross premium tax on insurance companies was in lieu of all taxes including a corporation franchise tax. It does not hold that an incorporated insurance agent has the same immunity.

"City Investments, Ltd., v. Johnson, 6 Cal.2d 150, 56 P.2d 939, and Fore River Shipbuilding Corp. v. Commonwealth, 248 Mass. 137, 142 N.E. 812 (cited by McLaren and Butler in 'California Tax Laws of 1929') hold that a corporate franchise tax is a tax on the right of a corporation to do business in this state. Nothing herein is inconsistent with those cases. * * *

"In Commissioner of Corporations and Taxation v. Bristol County Kennel Club, Inc., [301 Mass. 27], 16 N.E.2d 43 (Supreme Judicial Court of Mass., 1938), it was held that a statute requiring a license fee of a person or corporation to conduct meetings for the racing of horses or dogs and requiring that no other license fee or excise shall be assessed or collected from the licensee by the state or any political subdivision thereof does not exempt a domestic business corporation licensed to conduct dog races from the payment of an excise tax imposed on domestic business corporations.

"At first blush the Massachusetts case might seem to be distinguishable in that the court strictly construed the exemption provision against the taxpayer, whereas our courts have held that the rule of strict construction does not apply to the 'in lieu' provision in question. ([City and County of] San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 248, 135 P. 971, 973.)

"However, the rule of liberal construction spoken of in the case last cited only applies 'in favor of the person required to pay taxes in the substituted license form.' Thus it would seem to apply only in favor of the insurance companies who pay the gross premium tax, and not in favor of their agents. If the tax were imposed 'in a direct and immediate sense' (Hughes case) upon the insurance companies, then the tax would be invalid by virtue of the liberal construction given to the 'in lieu' provision. But since the tax in question is not an occupation tax, nor imposed as a condition to entering or remaining in, the insurance business, it is not 'in a direct and immediate sense' upon the insurance companies themselves. As stated by the Massachusetts court (supra), 'but that it was meant to exempt a licensee as well from an excise that has no relation to acts done as licensee, but arises from doing business as a corporation, we cannot believe.'

"The Massachusetts case, supra, [301 Mass. 27, 16 N.E.2d 44], holds that the in lieu provision or exemption 'has no certain or plainly intended application to a corporation excise tax, for an individual as well as a corporation may be granted a dog racing license.' Paraphrasing that, it is clear that plaintiffs may, if they choose, carry on the business of insurance agents individually or as a copartnership foregoing the advantages derived from incorporation and thereby legally escape the payment of the tax in question. In other words, the reasons given in the Massachusetts decision seem to answer the plaintiff's contention herein. There it is said that if a licensee by reason of the exemption provision does not have to pay a corporation tax, 'It would be as reasonable to hold that a * * * licensee * * * is freed from liability to pay a legacy tax. * * * a stock transfer tax * * * a motor vehicle excise tax * * *.' etc."

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

BACICH v. BOARD OF CONTROL et al.

Civ. 10844.

District Court of Appeal, First District,
Division 1, California.

July 16, 1942.

Rehearing Denied Aug. 15, 1942.
Hearing Granted Sept. 11, 1942.

1. Constitutional law 🔑32

The constitutional provision that private property shall not be taken for public use without just compensation confers a right of action against the state when property is taken for public use without compensation, and the provision is "self-executing" and constitutes consent of the state to be sued in such proceedings. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing".

2. Eminent domain 🔑289

The State Board of Control was not a "proper party defendant" in property owner's action in inverse condemnation to recover damages for decrease in market value of owner's property claimed to have been caused by construction of approaches to a bridge, where complaint did not allege that board was liable for acts causing damage. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party Defendant".

3. Eminent domain 🔑293(1)

In property owner's action in inverse condemnation to recover damages for decrease in market value of an apartment house claimed to have been caused by construction of approaches to a bridge, a complaint alleging that defendants had constructed the approaches as agencies for the state and had cut off access to house from one direction, that value of house was reduced as result of defendants' acts, and that a verified claim for damages was filed with State Board of Control within two years after claim accrued but was denied, stated a cause of action against the state. Const. art. 1, § 14.

4. Eminent domain 🔑289

Where complaint in property owner's action in inverse condemnation against the California Toll Bridge Authority, the State Department of Public Works and the State Board of Control stated a cause of action against the state, and any judgment against defendants would be paid out of state treasury, although the state was the "proper party defendant", it was not error to sue the state through the Authority and the Department of Public Works, and refusal to permit owner to amend by substituting the state as the real party defendant was error. Const. art. 1, § 14.

5. Eminent domain 🔑277

The statute requiring any person having a claim against the state on express contract or for negligence to present the claim to the State Board of Control did not apply to property owner's action in inverse condemnation based upon self-executing provisions of the Constitution. Pol.Code, § 688; Const. art. 1, § 14.

6. Eminent domain 🔑293(3)

Even if statute requiring a person having a claim against the state, the settlement of which is not otherwise provided for, to present claim to the State Board of Control at least four months before meeting of Legislature was applicable in property owner's action in inverse condemnation, refusal to permit owner to amend complaint to show why he had been unable to file his claim within four months of convening of Legislature was an abuse of discretion. Pol.Code, § 667; Const. art. 1, § 14.

7. Eminent domain 🔑106, 112

That other property in neighborhood of plaintiff's apartment house was condemned by defendants in constructing approaches to a bridge, that plaintiff was required to pass under an approach to bridge to obtain access to house, there being no allegation of impairment of any easement of light and air, and that a street car line near house had been diverted to another street by defendants' acts did not give plaintiff cause to complain in action in inverse condemnation to recover damages for decrease in market value of house as result of construction of approaches. Const. art. 1, § 14.

8. Eminent domain 🔑106
Property 🔑1

A landowner has no "property right" in the continuation or maintenance of the flow of traffic past his property, and diversion of traffic caused by a public improvement impairs no property right of the property owner.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right".

9. Easements ⚿2
Eminent domain ⚿106
Municipal corporations ⚿669
Property ⚿1

A property owner has a right of access, a right of ingress and egress to and from his property, along the street upon which his property faces, and this right of access is an "easement", a "property right", and any damage to that right is compensable, and if the street immediately in front of, or immediately adjacent to, the property is narrowed so that access to property is materially impaired, a property right has been infringed entitling property owner to compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

10. Eminent domain ⚿106

If, by the vacation or closing of a street, access to property by the general system of streets in that direction is prevented, and the property is left fronting on a cul-de-sac, the owner may recover damages.

11. Eminent domain ⚿106
Municipal corporations ⚿669

A property owner's "right of access" extends beyond the mere physical right to get into the street in front of his property and includes the right of reasonable use of the street fronting the property in either direction to next intersection and the right to adequate access to property from either direction, and any material impairment of that right, if it causes damage, is compensable.

See Words and Phrases, Permanent Edition, for all other definitions of "Right of Access".

12. Eminent domain ⚿90

A private property owner's constitutional right not to have his property taken for public use without just compensation extends to freedom from damage as well as from a taking. Const. art. 1, § 14.

13. Eminent domain ⚿100(6)
Municipal corporations ⚿692
Property ⚿1

The public generally has a right to pass over public streets, and that right is "impaired" by the closing of a street, and damage to that right by closing of a street is not compensable, but such right is not a "property right".

See Words and Phrases, Permanent Edition, for all other definitions of "Impair".

14. Eminent domain ⚿221

The amount of damage, if any, to each property owner within the block as result of the creation of a cul-de-sac in connection with construction of a public improvement is a "question of fact" to be determined by jury according to usual rules applied in such cases.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

15. Eminent domain ⚿106

Where construction of approaches to a bridge resulted in closing one end of street on which plaintiff's apartment house was located thereby depriving plaintiff of access to house from one direction, plaintiff's "right of access" was "impaired", and depreciation in value of building caused by closing of end of street was compensable. Const. art. 1, § 14.

◆

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action in inverse condemnation by George Bacich against the Board of Control of the State of California and others. From a judgment for defendants entered after sustaining of demurrers to the original complaint without leave to amend, plaintiff appeals.

Reversed with instructions.

Hubbard & Hubbard, John J. Batistich, and J. C. Miller, all of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John J. Dailey, Deputy Atty. Gen., Heller, Ehrman, White & McAuliffe, F. M. McAuliffe, Albert M. Monaco, and Keyes & Erskine, all of San Francisco, and C. C. Carleton and Robert E. Reed, both of Sacramento, for respondents.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment for defendants entered after sustaining of demurrers to the original complaint without leave to amend. The defendants are the Board of Control of the State of California, California Toll Bridge Authority and the Department of Public Works of the State of California. Each defendant filed a separate demurrer, that of the Authority being general and special, while those of the other two defendants were general only.

The action is one in inverse condemnation brought by plaintiff, a property owner, to recover damages for the decrease in the market value of his property alleged to have been caused by the construction of the San Francisco approaches to the San Francisco-Oakland Bay Bridge. The complaint alleges that plaintiff is the owner of a three-story apartment house, used exclusively for residential purposes, located on the southwesterly side of Sterling Street between Harrison and Bryant Streets; that the defendants Toll Bridge Authority and Board of Public Works, pursuant to statutory authority, constructed the approaches to the bridge; that in so doing these defendants acquired and demolished all residential property except plaintiff's in the general area; that in constructing the approaches these defendants lowered the level of Harrison Street 50 feet below the level of Sterling Street; that the only way to reach plaintiff's property now is from Bryant Street; that in approaching plaintiff's property from Bryant Street it is necessary to pass under one of the approaches to the bridge; that as a result of closing the Harrison Street-Sterling Street intersection the street cars were removed from Sterling Street; that as a result of these acts the value of the plaintiff's property has been reduced from $20,000 to $6,000. The complaint also alleges that within two years after the claim accrued a verified claim for the damages suffered was filed with the Board of Control, which claim was denied October 22, 1936; that duplicate originals of the claim were filed with the Department of Public Works, the Toll Bridge Authority, and the California Highway Commission.

[1] The main question presented on this appeal is whether the complaint alleges any damage for which the state or its agencies are liable. Before answering that question, certain preliminary matters must first be mentioned. In the trial court defendants successfully urged, and on this appeal they contend, that there is no cause of action in this state for damage to, as distinguished from the taking of, property by public agencies for a public use. In this connection it is urged that the eminent domain section of the Constitution (Art. I, § 14), prohibiting the taking or damaging of property without compensation, is not self-executing; that although the section provides that private property shall not be taken or damaged for public use without just compensation having been made to, or paid into court for the owner, nevertheless the owner may not sue the state or its agencies when his property has been damaged for the reason that the Legislature has not provided a form of remedy to recover such damage. This identical argument that the constitutional provision required further legislative action to make it effective was presented to, and squarely rejected by, the Supreme Court in Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505. The court held in that case that the constitutional provision itself confers the right of action, is self-executing, and constitutes the consent of the state to be sued in such proceedings. The submission of the instant appeal has been held up to await the decision of the Supreme Court in that case. That decision having now become final, the holding therein is conclusive on this court on this point in the present case.

All defendants urge, in support of their general demurrers, that all three of defendants are merely state agencies, and therefore are not the proper defendants; that the state alone is liable for the damage suffered, and is the only proper defendant. After the demurrers had been sustained, the plaintiff requested leave to amend, and formally offered either to make the state a party, or, if the trial court believed the state should be the sole defendant, to substitute the state for the named defendants. The request for leave to amend was denied.

[2-4] So far as defendant State Board of Control is concerned, this contention is sound. The only allegation in the complaint concerning that defendant is that it denied the claim. There is no allegation that it participated in the acts causing the alleged damage or that it is liable therefor. The demurrer of this defendant was properly sustained. But the position taken by the other two defendants is unsound. These defendants are admittedly state agencies, and according to the allegations of the complaint, were acting as such in performing the work causing the damage of which complaint is made. The state can act only through its agencies and, according to the allegations of the complaint, these two defendants were the two agencies through which the state acted. An analysis of the complaint discloses that it contains every allegation necessary to state a cause of action against the state. If a judgment is secured against these defendants it would be paid out of the state treasury. Under such circumstances, although undoubtedly

the state is the proper party defendant, it was not error to sue the state through its official agencies. (California Securities Co. v. State, 111 Cal.App. 258, 295 P. 583), and it was error to refuse to permit plaintiff to amend by substituting the state as the real party defendant.

[5, 6] The demurrer of the Toll Bridge Authority urges that the cause of action, if any, alleged in the complaint is barred by §§ 667 and 688 of the Political Code. Section 688 has no reference to this proceeding. By express terms that section only applies to claims predicated "on express contract or for negligence." This is a suit in inverse condemnation based upon a self-executing provision of the Constitution, and such proceeding is predicated neither on express contract nor on negligence. Rose v. State of California, supra, 19 Cal.2d at page 724, 123 P.2d 505. Section 667 requires a person having a claim against the state, the settlement of which is not otherwise provided for by law, to present it to the Board of Control "at least four months before the meeting of the legislature." The complaint, it will be remembered, alleges that a claim was filed as required by this section, but the date it was filed is not alleged. Inferentially, however, it appears that it was not filed until after September 19, 1936, since it appears from a copy of the claim attached to the complaint that it was sworn to on that day. Since legislative sessions open on the first Monday after the first day of January in odd numbered years, a claim filed after September 19, 1936, would not be filed within four months of the convening of the 1937 Legislature in January of that year. Thus, if the section is applicable to such an action, it inferentially appears from the complaint that the claim may have been filed too late. But in his request for leave to amend after demurrers sustained, plaintiff offered to amend by alleging that the work on the approaches was not finished until September 20, 1936, and, hence that he was unable to file his claim within four months of the convening of the 1937 Legislature in January, 1937. Obviously, if the work was not completed within four months of the convening of the next session of the Legislature, the claimant is not required to do the impossible. As long as it is filed within four months of the convening of the Legislature which convenes next at least four months after the work is completed, the claim was filed in time. Under such circumstances, even if the section is applicable to such a proceeding, the trial court abused its discretion in refusing permission to amend as to this issue.

[7-9] The major problem presented in this case is whether the complaint alleges any elements of damage that are compensable under Article I, section 14 of the Constitution. An analysis of the complaint discloses that plaintiff has alleged four elements of damage which he claims are compensable: (1) that because of the lowering of Harrison Street, the Sterling Street-Harrison Street intersection has been closed so that plaintiff's property is now located on a dead-end street, thus making the property less accessible, and interfering with a claimed right of ingress and egress; (2) that because of the lowering of Harrison Street the street cars formerly operating on Sterling Street have been removed; (3) that the only access to the property is from Bryant Street, and in order to reach the property from that direction it is necessary to pass under the bridge approach; (4) that in the immediate vicinity of plaintiff's property all residential property except plaintiff's was acquired and demolished by defendants in constructing the approaches. It seems quite clear that because other property was condemned (item 4), and because plaintiff must pass under the bridge approach (item 3), there being no allegation of impairment of any easement of light and air, plaintiff has no legal cause to complain. Such factors in no way interfere with any property right of plaintiff. The same can be said as to the diversion of the street car line to another street—item 2. It is well settled in this state that a landowner has no property right in the continuation or maintenance of the flow of traffic past his property. The diversion of traffic caused by the improvement impairs no property right of the property owner. Rose v. State of California, supra, 19 Cal.2d at page 736, 123 P.2d 505. Thus, the only element of damage alleged and left for consideration is item 1, supra. The problem here presented is whether depreciation in value caused by closing one end of the street on which plaintiff's property is located, so that the property is now located on a cul-de-sac, is compensable. This depends upon the nature and extent of the legal rights of an abutting property owner in the streets upon which his property abuts. It is now too well settled to require extended discussion that the property owner has a right of access, a right of ingress and egress to and from his property,

along the street upon which his property faces. This right of access is an easement, a property right, and any damage to that right is compensable. Rose v. State of California, supra, 19 Cal.2d at page 727, 123 P.2d 505; McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139; Lane v. San Diego Elec. Ry. Co., 208 Cal. 29, 280 P. 109; Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750; Williams v. Los Angeles Ry. Co., 150 Cal. 592, 89 P. 330; Eachus v. Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147; Brown v. Board of Supervisors, 124 Cal. 274, 57 P. 82; Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570; Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149; Zobelein Co. v. City of Los Angeles, 6 Cal.App.2d 29, 43 P.2d 818. There can be no doubt, in this state, that, if the street immediately in front of, or immediately adjacent to, the property is narrowed so that access to the property is materially impaired, a property right has been infringed entitling the property owner to compensation. That was one of the problems discussed in Rose v. State of California, supra. (See, also, the other cases above cited.) Whether this right of access, this right of ingress and egress, is impaired by infringements not occurring immediately in front of or adjacent to the property, is a problem on which there is a hopeless diversity of opinion. The solution of this problem turns upon whether the right of access is something more than the mere right to get from the property into the street fronting the property. Can the property owner complain if the public improvement affects his right of access by closing the street in one direction so that access to his property is completely cut off in one direction? California, apparently, has not yet chosen between the two lines of authority, although there are some intimations in Rose v. State of California, supra, implying that the impairment of the right need not occur directly in front of or adjacent to the property. In that case the court found the law of California to be that depreciation to be recoverable must arise from "infringement of some right which the owner of land possesses in connection with his property." 19 Cal.2d at page 739, 123 P.2d at page 520. It was held that the property owner has an easement of access which is a property right, "private easements in the street in front of or adjacent to the lot—distinguished from the public easements therein—which are a part and portion of his property and are the private property of the lot owner as fully as the lot itself." 19 Cal.2d at page 727, 123 P.2d at page 514. The rights of the abutting owner are the rights of access and the right of light and air. The opinion indicates that the right of access is an easement for the purposes of ingress and egress from the owner's property to the abutting street. The court was of the view that the evidence that the plaintiff's property in the Rose case was left on a 14-foot lane for vehicular traffic, too narrow for two vehicles to pass each other, where before the improvement it had been on a main highway, sustained a finding of unreasonable interference with the easement of access. Whether the court merely intended to hold that the right of access was interfered with because the abutting street was too narrow for comfortable vehicular access, or whether the court meant that the plaintiff could recover for the increased difficulty of getting into the main traveled portion of Jackson Street on which his property formerly fronted, is not absolutely clear from the opinion. That the court meant the latter may be indicated by the following language:

"Defendants contend that this court should hold as a matter of law that there was no interference with plaintiffs' easement of access or right of ingress and egress in this case, and also that the evidence does not sustain a finding of such interference. The former contention is based upon the theory that plaintiffs' easement merely entitles them to cross from their own property onto the street or highway on which it abuts. It is also claimed by defendants that whatever circuity of travel is caused thereafter is merely an inconvenience suffered after reaching the street or highway. These contentions cannot be sustained. * * *

"The issues before the trial court in the case at bar were, whether plaintiffs' right of access to Jackson Street was substantially and unreasonably impaired by the construction of the subway, and, if so, the amount of damage suffered as the result of such interference." 19 Cal.2d at pages 728, 729, 123 P.2d at page 514.

The court discussed the legal effect of the closing of a street crossing, although that was not the precise problem involved in that case. It said:

"Relying very strongly upon the cases which have held that the closing of a street crossing by the railroad commission is damnum absque injuria as to nonabutting property owners, defendants maintain that plaintiffs certainly cannot complain because they must travel a narrow side lane to reach the main traveled portion of the street when they could not recover if the street were closed entirely.

"Briefly, we may observe that recovery has been denied in those cases upon the ground that the injury is one suffered in common with the public, is not special or peculiar to the particular property involved, and the difference in damage is one of degree and not of kind depending upon the property owner's proximity to the closed crossing. Compensation has also been refused on the ground that the landowner's easement of access is not in fact impaired, that convenient and reasonable means of ingress and egress is afforded, although not the quickest and closest route to traveled thoroughfares. We have observed also that a growing number of decisions denying recovery for damages to nonabutting owners of property on closed streets are prompted by the economic factors involved. Since every property owner for a great distance therefrom is somewhat inconvenienced by the closing of a street, the question of where to stop awarding damages is not only difficult to ascertain, but the payment of damages in every case of this character would place a great burden upon the public whenever such closings are ordered.

"The cases determining what does and what does not constitute a compensable damage when a street is ordered closed are in considerable confusion, and this decision will not be benefited by a lengthy consideration of the authorities cited by defendants on this proposition. Defendants contend that the case of City of San Mateo v. Railroad Comm., 9 Cal.2d 1, 68 P.2d 713, 718, decides conclusively that the closing of a grade crossing is under the police power and any injury resulting therefrom is damnum absque injuria. The court therein stated that in the absence of facts to the contrary it would assume that none of the plaintiffs' property directly abutted on the area to be closed, and that the private property in question was contiguous to either county or state highways connected by public crossings. The court then held that the nature of abutting owner's right is 'an easement in the street fronting upon his lot, for the purposes of 'ingress and egress,' and concluded that no such right had been taken away in the case before it.

* * *

"We are not here called upon to determine whether a property owner may recover damages in a case where his property is situated on a street created into a cul de sac as the result of the closing of the street on either side of his property without interfering with his right of access to the street on which his property abuts, as this is not such a case." 19 Cal.2d at page 731, 123 P.2d at page 516.

[10] It would appear from the foregoing that the court in the Rose case, although expressly refraining in the last paragraph above quoted from passing on the question here involved, intimated that the right of access extends beyond the mere physical right to get into the street in front of the property. This intimation is in accordance with reason, and with the weight of authority elsewhere. This exact problem is the subject of an exhaustive annotation in 49 A.L.R. 330, 351. Cases from many states are there collected and commented upon. At page 351, under the heading "Cul-de-sac," the rule is stated as follows: "The weight of authority supports the proposition that if, by the vacation or closing of a street, access to property from the general system of streets in that direction [is prevented], and the property is left fronting on a cul-de-sac, the owner may recover damages." Cases from Connecticut, Indiana, Kentucky, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas and Canada are then cited and discussed as supporting that rule. Later cases are collected in a supplementary annotation in 93 A.L.R. 639, 642. In this annotation at page 642 it is stated: "As indicated in the earlier annotation, generally the owner has been held entitled to damages where, by the vacation or closing of a street, access to his property from the general system of streets in that direction is cut off and the property is left fronting on a cul-de-sac." Cases from the federal court and from Georgia, Kentucky, Nebraska, Oregon, and Pennsylvania are cited in support of the text. See, also, Atchison, T. & S. F. Ry. Co. v. Terminal Oil Mill Co. 180 Okl. 496, 71 P.2d 617, a particularly well-reasoned case.

[11] The general theory running through these many cases is that the right

of access is something more than the mere right to get into the street immediately in front of the property; that such right is that of reasonable use of the street fronting the property in either direction to the next intersection; that any material impairment of that right, if it causes damage, is compensable. This rule is predicated on what we consider to be sound considerations. The rule which limits the right to the mere right of access to the street immediately in front of the property is artificial. Obviously, if the street is closed at both ends, the right to get into the street immediately in front of the property is of no practical value. No one denies that where the street is thus completely closed compensation for impairment of the right of access must be paid. Bigelow v. Ballerino, supra. When the street is closed at one end, situations can be imagined where the right to go in the opposite direction would be of no practical value. Thus, where the property is located on a highway with no intersections for several miles, and in one direction lies the city and the other the country, and the highway is closed towards the city, the right to proceed several miles into the country before coming to an intersection would be of little practical benefit to the land. When, by reason of the closing of one end of the street the property becomes situated on a cul-de-sac, so that the property owner is cut off from travel in one direction, he has suffered a damage of the same kind, differing only in degree, from the imagined situation. In our opinion, the better reasoned cases hold that the right of access includes the right to adequate access to the property from either direction. It includes the right of ingress and egress to and from the property in either direction and the use of the street in either direction, to the next intersection.

[12] It is true that there are a respectable number of cases that hold that in a cul-de-sac situation the property owner has not been damaged. Those cases are collected in the two annotations to which reference has been made. Many of them were decided in states where the constitutional or statutory provisions allowed recovery only for the taking of property, no recovery being allowed for the mere damaging of property. Those cases are clearly distinguishable, because the constitutional right of the property owner in this state extends to freedom from damage as well as from a taking.

Some of the other cases announcing the minority rule are predicated upon purely economic grounds—that is that the cost of public improvements would be prohibitive if damages were recoverable in such situations. Those cases argue that, if property owners abutting on the closed street are entitled to compensation, property owners for an indefinite distance in either direction will likewise be entitled to compensation, and the cost of the public improvement will thus become prohibitive. That is not so. The right of the property owner is limited to access and use of the street upon which his property fronts to the next intersection in either direction. Property owners beyond that point have suffered no damage different from that suffered by the general public. As so limited, there can be no basis for the fear that the cost of the improvement will be prohibitive. If there is no material damage, the amount of which is a question of fact, the increased cost will be small. If the damage is large, there is no reason why it should be suffered by the individual. If the property right, as here defined, has been damaged, the Constitution grants the right to damages. If the law is to be changed it should be changed by constitutional amendment and not by judicial mandate.

[13-15] Some of the cases announcing the minority rule state that no property right has been impaired in a cul-de-sac situation because the property owner is only subjected to the same inconvenience to which the public generally is subjected, only to a greater degree. It is true that the public generally has a legal right to pass over public streets, and that that right is impaired by the closing of a street. It is also true that damage to that right by the closing of a street is not compensable. But that right is not a property right. The right of access, as already pointed out, is an easement, and is a property right. If that property right is impaired, and, as a result, the value of property is lessened, the property owner is entitled to compensation. The property owner has suffered a damage peculiar to himself, and vastly different not only in degree but in nature from that suffered by the public generally. That right of access is the right of reasonable access to the street fronting the property, and includes the use of that street in both directions to the next intersection. Of course, the amount of damage, if any, to each property owner within the block, is a ques-

tion of fact which must be left to the jury to be determined according to the usual rules applied in such cases.

From what has been said, it is clear that the trial court abused its discretion in sustaining the demurrers of the Toll Bridge Authority and the Board of Public Works to the original complaint without leave to amend, and in denying plaintiff's request for leave to amend. The judgment is reversed with instructions to the trial court to grant plaintiff's motion for leave to amend.

KNIGHT and WARD, JJ., concurred.

* * *

53 Cal.App.2d 512

JOHN McCLURE ESTATE, Inc., v. JOHNSON, State Treasurer, et al.

Civ. 13655.

District Court of Appeal, Second District, Division 1, California.

July 23, 1942.

1. Taxation 🔑376(1)

Under State Constitution, an insurance company doing business within the state was exempt from payment of franchise taxes provided by Bank and Corporation Franchise Tax Act, and hence stock dividends received by corporate taxpayer from the company were not deductible in determining taxpayer's net income for franchise tax purposes, under provision of franchise tax act exempting dividends received from a corporation doing business in the state, and declared from income included in measuring of the tax imposed by the act on the corporation declaring dividends. Gen.Laws 1937, Act 8488, § 8(h); Const. art. 13, §§ 14, 16.

2. Taxation 🔑376(1)

Provision of the Bank and Corporation Franchise Tax Act allowing deductions of dividends received during income year from corporation doing business in the state and declared from income which was included in measure of tax imposed by the act on the corporation declaring the dividends, applies only to the levy of the tax provided by the act. Gen.Laws 1937, Act 8488, § 8(h).

3. Taxation 🔑376(1)

Even if gross premiums tax paid by insurance company was merely in lieu of payment of franchise tax and in effect the company was subject to tax imposed by the Bank and Corporation Franchise Tax Act, stock dividends received by corporate taxpayer from the company would not be deductible in determining taxpayer's net income for franchise tax purposes, in absence of a showing of what portion of the dividends were declared from premiums, since gross premiums constituted the only measure of the tax imposed by the gross premiums tax act. Gen.Laws 1937, Act 8488, § 8(h).

4. Constitutional law 🔑229(1), 283
Taxation 🔑37, 42(2)

The provision of the Bank and Corporation Franchise Tax Act authorizing deduction of dividends received by taxpayer from corporation doing business in the state, and declared from income included in measure of tax imposed by the act on the corporation declaring the dividends, is not unconstitutional as failing to afford "equal protection of the law", or as being "discriminatory" or amounting to the taking of property without "due process of law", because it does not apply to dividends of insurance companies which are subject to gross premiums tax. Gen.Laws 1937, Act 8488, § 8(h).

See Words and Phrases, Permanent Edition, for all other definitions of "Discriminatory", "Equal Protection of the Law" and "Due Process of Law".

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by John McClure Estate, Incorporated, against Charles G. Johnson, as State Treasurer, etc., Charles J. McColgan, as Franchise Tax Commissioner, etc., and others, to recover amount paid as taxes under protest. From a judgment in favor of the Franchise Tax Commissioner, plaintiff appeals.

Affirmed.

C. W. Bowers, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Valentine Brookes, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant is a domestic corporation doing business in the State of California.

Appellant received dividends on stock owned by it in an insurance company doing business in California and paying the insurance tax on gross premiums imposed during the year 1937, the income year in question, by section 14 of article XIII of the California Constitution. The dividends received by appellant were paid by the insurance company in part from gross premium income and in part from investment income. Appellant contended that, in computing its net income for 1937 by which its franchise tax for 1938 was measured, all the dividends received by it from the insurance company were deductible. The franchise tax commissioner, respondent here, refused to allow any of such dividends to be deducted and increased appellant's tax accordingly. After paying the additional tax appellant instituted this action for the recovery thereof. Judgment of the trial court was for respondent and this appeal followed. The appeal, involving the legality of a tax, was taken to the Supreme Court of this state and was transferred by the Supreme Court to this court.

Appellant contends that the provision of the Bank and Corporation Franchise Tax Act, which permits the deduction of certain dividends in computing net income for franchise tax purposes, applies to dividends received on the stock of insurance companies; and, if not so held to apply, the provision in question is unconstitutional, in that it does not afford equal protection of the law, is discriminatory and amounts to taking property without due process of law.

The provision of the Bank and Corporation Franchise Tax Act, section 8(h) thereof, read, at the time of the instant tax levy, as follows (Stats.1929, p. 19, as amended; Act 8488, Deering's General Laws): "§ 8. In computing 'net income' the following deductions shall be allowed: * * * (h) Dividends received during the income year from a bank or corporation doing business in this State declared from income which has been included in the measure of the tax imposed by this act upon the bank or corporation declaring the dividends."

The following provisions of the state Constitution were also in effect at the time of the instant levy:

Section 14 of article XIII, reading, so far as here pertinent:

"All companies herein mentioned and their franchises, *other than insurance companies and their franchises,* shall be taxed in the same manner and at the same rates as mercantile, manufacturing and business corporations and their franchises are taxed pursuant to section 16 of this article; * * *

"Every insurance company or association doing business in this State shall annually pay to the State a tax, assessed by the State Board of Equalization, of two and six-tenths per centum upon the amount of the gross premiums other than gross premiums from ocean marine insurance, received upon its business done in this State, less return premiums and reinsurance in companies or associations authorized to do business in this state; * * * This tax shall be in lieu of all other taxes and licenses, State, county, and municipal, upon such companies or their property, except taxes upon their real estate; * * *." (Italics added.)

Section 16 of article XIII, the pertinent portion of which reads: "2. The Legislature may provide by law for the taxation of corporations, their franchises, or any other franchises, by any method not prohibited by this Constitution or the Constitution or laws of the United States."

[1] Appellant argues that insurance companies are not exempt from the payment of the franchise tax provided by the Bank and Corporation Franchise Tax Act, because neither the act itself nor the Constitution provides for such an exemption; that the Constitution merely provides that the gross premiums tax shall be "in lieu" of the franchise tax. Appellant further urges that the Bank and Corporation Franchise Tax Act and the provision for gross premiums tax must be read and construed together, that the provisions for the two taxes are in pari materia. The foregoing excerpts quoted from the constitutional provisions are clear in meaning, and the legislative intent embodied therein is at once obvious. There is no uncertainty, doubt or ambiguity requiring the application of any doctrine of judicial construction, other than that of giving to words their ordinary meaning. It is clear that under the Constitution and the laws of this state insurance companies do not pay the franchise tax provided for in the Bank and Corporation Franchise Tax Act. It is equally clear from the above quoted constitutional provisions that it is not intended to subject insurance companies to the payment of such a tax. The Constitution provides another method of taxing insurance

companies; and the measure of such taxation is distinctly different from that provided for the taxation of corporations by the Bank and Corporation Franchise Tax Act. To say, as in section 14 of article XIII, above, that all companies other than insurance companies shall be taxed at the same rates as business corporations, is no more than to state that insurance companies shall not be taxed at the same rates as other business corporations, insofar as the provision applies to insurance companies. Whether the gross premiums tax is considered as a tax "in lieu" of the franchise tax or otherwise, the necessary conclusion to be derived from the foregoing constitutional provisions is that insurance companies are not subject to the franchise tax provided by the Bank and Corporation Franchise Tax Act. Moreover, it is to be noted that the Constitution does not expressly state that the gross premiums tax shall be in lieu of the franchise tax. The Constitution states that the gross premiums tax shall be in lieu of all other taxes, except taxes on real estate.

[2, 3] It cannot be disputed that section 8(h) of the Bank and Corporation Franchise Tax Act applies only to the levy of the tax provided by that act. Since the franchise tax provided by that act is not imposed upon an insurance company it necessarily follows that a dividend declared from income of an insurance company cannot be held to have been declared from income which has been included in the measure of the tax imposed by the Bank and Corporation Franchise Tax Act. Moreover, in the instant case the specific income from which dividends of the insurance company were declared was income derived at least partially from other sources than premiums. Therefore, even if it could be assumed that insurance companies were subject to the franchise tax imposed by the foregoing act, that section 8(h), supra, applied to dividends of insurance companies, and the gross premiums tax paid by the insurance company was merely in lieu of the payment of the franchise tax, it could not be held that the dividends here in question were declared from income which had been included in the measure of the tax imposed, because the gross premiums alone constitute the only measure of the tax imposed upon an insurance company, and it is not shown what portion of the dividends were declared from premiums. In any event, therefore, the dividends in question were not proper deductions to be made in the computation of the tax imposed upon appellant by the provisions of the Bank and Corporation Franchise Tax Act, under the circumstances here presented.

[4] Appellant's contention as to the unconstitutionality of section 8(h) of the Bank and Corporation Franchise Tax Act cannot aid appellant in obtaining a deduction of the dividends in question. As respondent points out, the net result of appellant's argument in this respect, if upheld, would be to preclude deduction of any dividends. It is only by virtue of section 8(h), supra, that any deduction of dividends is allowable in computing the franchise tax. If, therefore, section 8(h) were held unconstitutional there would remain no statutory authority for the deduction of any dividends in computing the tax in question. Moreover, appellant's argument as to the unconstitutionality of section 8(h), as applied to dividends from insurance companies, is unfounded. See: Brushaber v. Union Pac. R. Co., 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493, L.R.A.1917D, 414, Ann.Cas.1917B, 713.

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

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53 Cal.App.2d 484

In re CONNORS' ESTATE.

CONNORS v. CONNORS.

Civ. 12175.

District Court of Appeal, First District,
Division 2, California.

July 21, 1942.

Hearing Denied Sept. 14, 1942.

1. Evidence 🔑288, 291

Evidence of declarations and acts of deceased members of the family was admissible to prove whether deceased was the mother of one claiming to be her child, as was also the evidence of a member of the family as to common reputation in the family on the matter. Code Civ.Proc. §§ 1852, 1870, subds. 4, 11.

2. Evidence 🔑**313**

In evaluating the weight of evidence of declarations and acts of deceased members of the family on issue whether deceased was mother of one claiming to be her son, the trial judge was not bound to isolate it from its background and consider it as if in a vacuum. Code Civ.Proc. §§ 1852, 1870, subds. 4, 11.

3. Bastards 🔑**6**

In proceeding by one claiming estate of deceased unmarried woman as her illegitimate child, evidence sustained finding that deceased was mother of claimant.

4. Evidence 🔑**313**

Declarations of deceased persons concerning family relationship when corroborated by other evidence will support a finding in accordance with the declarations. Code Civ.Proc. §§ 1852, 1870, subds. 4, 11.

5. Bastards 🔑**6**

In proceeding by one claiming to be the illegitimate son of deceased, in weighing the testimony of certain members of the family the court was entitled to consider that as beneficiaries under the will they were both testifying against their own interest which tended very much to soften the rule as to the weakness of evidence of declarations as to family relationship, or at least to make its application less rigid. Code Civ.Proc. §§ 1852, 1870, subds. 4, 11.

6. Bastards 🔑**6**

Where issue was whether deceased unmarried woman was the mother of one claiming to be her son, testimony of physician attending deceased at death that deceased's hymen was unbroken was subject to contradiction by nonexpert witnesses and was not binding on trial court, since presence or absence of an unbroken hymen was not exclusively the subject of expert testimony.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the estate of Mary Alice Connors, deceased, by Joseph Connors, as guardian, etc., against Thomas I. Connors. From a decree finding that the guardian's ward was the son of the deceased, and ordering the estate distributed to him, the defendant appeals.

Affirmed.

John T. McCarthy and J. Bruce Fratis, both of San Francisco, for appellant.

Frank J. Hennessy, of San Francisco, for respondent.

DOOLING, Justice pro tem.

In 1910 the decedent, Mary Alice Connors, was living with her mother, two brothers and two sisters in the mother's home at 207 Hoffman Avenue in San Francisco. She was an unmarried woman in her early thirties employed by the telephone company. On February 28, 1910, she resigned her position "on account of ill health" and disappeared from the family home. She remained absent until some time in August of 1910 when she telephoned to her sister Maud from a hotel at Fourth and Mission Streets in San Francisco to come and help her home with her luggage. She was reinstated in her position with the telephone company on September 1, 1910. During the decedent's absence from home the incompetent Joseph Thomas Murphy was born in Los Angeles. His baptismal certificate introduced into evidence herein recites that he was the son of Francis T. Murphy and Mary A. Holland Murphy, born in St. Vincent's Hospital, Los Angeles, California, on the 29th day of July, 1910.

In 1915 the decedent told the members of her family, then living at 207 Hoffman Avenue with her, that she would like to bring a young boy into the home as a boarder. She arranged with her sister Maud to take charge of the boy for an agreed compensation of fifteen dollars per month. A few weeks later she brought Joseph Thomas Murphy, who then appeared to be five or six years old, to the family home. He slept in a crib in the decedent's room and during the daytime was looked after by the sister Maud. This arrangement continued until 1918, Maud receiving fifteen dollars per month from the decedent for the care of the boy during that period. In 1918 Maud accepted employment outside of the household and the payments of fifteen dollars per month to her from decedent ceased. Decedent and young Murphy continued to live at 207 Hoffman Avenue for several years and then both went to live with decedent's maternal uncle at 743 Baker Street in San Francisco. The boy went to school successively at the Noe Valley Primary School and St. Paul's School in San Francisco and at St. Joseph's College in Mountain View. At St. Paul's decedent paid his tuition and at St. Joseph's it was paid by decedent's uncle, Thomas Madden, with whom they were then living. The records of St. Joseph's College show the names of the boy's parents as Frank Murphy and Mary Holland and Thomas Madden is shown thereon as his uncle.

In 1931 or 1932 young Murphy was compelled by ill health to leave St. Joseph's College and in 1932 he was adjudged insane and committed to Agnews State Hospital. The affidavit of insanity was sworn to by decedent. In the report of the medical examiners she was described as "distant nearest relative," and in the judgment of insanity she and Thomas Madden were described as "relatives".

In 1934, Murphy having in the meantime been discharged from the state hospital, he was again adjudged insane. Decedent again made the affidavit of insanity, and was described both in the certificate of medical examiners and the judgment of insanity as "cousin."

Decedent died in 1940, having never been married, leaving a holographic will which named her brother, Thomas I. Connors, appellant herein, executor and left to him the bulk of her estate. Small amounts were left to her sister Maud, her brother Joseph and to another brother who predeceased her. Joseph Thomas Murphy was not mentioned in the will. Joseph Connors as guardian of Murphy appeared in the probate proceedings alleging that Murphy was the illegitimate son of decedent and praying that the estate be distributed to him as a pretermitted heir. From a decree finding Murphy to be the son of decedent and ordering the estate distributed to him this appeal is taken.

In addition to the facts recited above it was established on the trial that Holland was the family name of collateral relatives of decedent's father living in the eastern part of the United States, none of whom had ever been seen by any of the witnesses, that no persons claiming to be relatives had ever visited Murphy, that decedent frequently referred to Murphy as her nephew, and that she also frequently stated that his mother was a close friend of hers who had died and his father was a railroad company employee.

Against this background of undisputed facts Maud Connors testified that on the evening that decedent brought young Murphy to their home in 1915 she said to decedent that if she was to have the care of the boy she hoped that his relatives would not be bothering her by visiting him, and that decedent after asking her to keep the disclosure secret whispered in her ear: "I am his mother." She further testified that out of respect for her sister's wishes she did not disclose this conversation to anyone until after her sister's death.

Joseph Connors testified in answer to a direct question about the common reputation in the Connors family as to the maternity of Joseph Thomas Murphy:

"My deceased sister, Mary, was known as his mother in the family—as the boy's mother."

On cross-examination he stated that by "common reputation" he meant "common knowledge * * * taking care of the boy, clothing him, looking after his welfare and physical condition * * * paying all his bills and clothing him."

He further testified that he had never heard his sister Mary say that she was the boy's mother and that shortly after the boy was brought into the household he had asked his mother about the boy (the witness was about nineteen years of age at that time) and "she told me not to bother my head about it; in other words, I was told to mind my own business." His mother never told him that Mary was the boy's mother. However, his brother, Frank, and his sister, Christine, both deceased at the time of trial, told him that Mary was young Murphy's mother, and his sister Agnes, also then deceased, "from the way she took care of him—she was closely associated with my sister Mary—from her actions, from the way she spoke; that is she believed my sister Mary—from conversations I had with her—was the mother of the boy."

[1] This evidence of declarations and acts of deceased members of the family was admissible to prove the relationship in issue (§§ 1852 and 1870, subd. 4, Code Civ.Proc.; In re Estate of Flood, 217 Cal. 763, 21 P.2d 579) as was the testimony of Joseph Connors as to common reputation in the family. § 1870, subd. 11, Code Civ. Proc. This is not disputed by appellant, but he argues that as to Maud Connors' testimony it was of a single conversation with the testatrix and that unsupported testimony of a single declara-

tion by a deceased person has been characterized as the weakest of all kinds of evidence. 10 Cal.Jur. 1097 and cases collected in footnote 7. The same argument is directed against the testimony of Joseph Connors as to the declarations of his brother Frank and sister Agnes and the acts and conduct of his sister Agnes. As to his testimony of common reputation in the Connors family appellant points out that on cross-examination it proved to be based on his sister Mary's conduct and the conduct and equivocal declarations of Agnes and on isolated declarations of Frank and Christine; and that neither Mary, Maud, Thomas, Agnes, nor their mother, nor their uncle Thomas Madden, ever declared to Joseph that Thomas Murphy was Mary's son.

[2-5] We may put aside Joseph's testimony as to common reputation, as having no more probative value than the facts on which it was based. There remains as direct evidence of maternity Maud's testimony of the declaration made to her by her sister Mary, and Joseph's testimony of the declarations made to him by his brother Frank and his sister Christine. Granted that this is the "weakest kind of evidence possible," it is nonetheless both at common law and under the express provisions of our code above cited admissible and competent to prove pedigree. And in evaluating its weight the trial judge was not bound to isolate it from its background and consider it as if in a vacuum. This evidence, which uncorroborated might have been regarded as the lifeless bones of an unarticulated skeleton, was given flesh and contour by the other facts in evidence, undisputed and unimpeached. Standing alone Mary's abrupt and unexplained absence from her home from early March to late August, 1910, during which time Joseph Thomas Murphy was born in Los Angeles; the coincidence of his mother's first name and middle initial as shown on his baptismal certificate, "Mary A.", being identical with that of the testatrix' and the surname Holland being familiar in the family as collaterals of the testatrix' father; his introduction into the family home by the testatrix with only the most evasive sort of explanation; and her subsequent conduct in supporting him and keeping him with her in her homes and referring to him variously as nephew, cousin and relative might do no more than raise a strong suspicion of maternity. Standing alone the testimony of Maud as to the isolated declaration of the testatrix in 1915 and of Joseph as to the isolated declarations of Frank and Christine might be held to have slight probative value. But assembled the two fit together as patly as the two parts of a jig-saw puzzle. Each takes form and substance from the other. Not only does the recited evidence as a whole in our opinion amply support the finding of the trial court, but in the absence of contradiction we doubt if it would support a contrary finding. Whatever might be the rule as to the weight to be given to uncorroborated testimony of isolated declarations of deceased persons, when corroborated by other evidence it will support a finding in accordance with the declarations. Harp v. Harp, 136 Cal. 421, 69 P. 28; In re Estate of Williams, 128 Cal. 552, 61 P. 670, 79 Am.St.Rep. 67. In weighing the testimony of Maud and Joseph Connors the court was also entitled to consider that as beneficiaries under the will they were both testifying against their own interest, a fact said in Harp v. Harp, supra [136 Cal. 421, 69 P. 29], to "tend very much to soften the rule" as to the weakness of such testimony, "or at least to make its application less rigid."

The suggestion that it is improbable that the testatrix in 1915 would be likely to make any explanation or confide the fact of maternity to Maud when their mother was the head of the household is met by the testimony of Joseph that "Maud wanted to go to work at that time, and so it would not be necessary for her to go to work my sister agreed to pay her to take care of the boy."

[6] A physician who took care of the testatrix in her last illness testified that in 1939 when he first examined her he found that she had an unbroken hymen and that from his experience it would have been impossible for that reason for her to have given birth to a child in the normal way. On cross-examination he stated that he made no written record of the presence of an unbroken hymen but had a clear recollection of the fact because it made his examination of his patient difficult. Appellant argues that this being expert testimony on a matter of scientific and specialized knowledge is conclusive in the absence of contradiction by other expert testimony. Passing the possibility of a caesarean birth, as to which there was no evidence either way, the wit-

ness' opinion was based on his testimony of a physical finding. The presence or absence of an unbroken hymen was not the subject exclusively of expert testimony. It was a fact which could have been observed and testified to by a lay person as well as a physician. Borkheim v. Borkheim, 65 Cal.App. 218, 222, 223 P. 429. Conceding that the opinion of the doctor could not be contradicted by non-expert evidence (a concession not justified in view of the holding of the court in Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163), the premise on which he based it (the presence of a virginal hymen) could be so contradicted. It was contradicted, assuming his expert opinion to be correct and again excluding the possibility of a caesarean birth, by all of the testimony which led the trial court to its finding of maternity.

We conclude that the decree appealed from finds substantial support in the evidence and it is accordingly affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

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53 Cal.App.2d 596

PEOPLE v. BRAZIL.

Cr. 3592.

District Court of Appeal, Second District. Division 2, California.

July 27, 1942.

1. Kidnapping 🔑5

Evidence that accused exhibited a gun to prosecutrix and ordered her to get into his automobile established that accused used "force" within statute defining kidnapping as forcible taking of a person from one part of a county to another part of the same county. Pen.Code, § 207.

See Words and Phrases, Permanent Edition, for all other definitions of "Force".

2. Criminal law 🔑1159(4)

In kidnapping prosecution, prosecutrix' testimony was not required to be disbelieved on ground that it was inherently improbable. Pen.Code, § 207.

3. Criminal law 🔑1036(1)

Where accused did not object to question regarding an arrest until after it was answered, accused "waived" his right to complain of admission of the testimony upon appeal. Pen.Code, § 207.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Witnesses 🔑379(1)

A witness may be impeached by evidence that he has made at another time, inconsistent statements regarding a material issue, conflicting with his testimony at the trial.

5. Witnesses 🔑388(5)

Where accused's wife had testified in support of accused's alibi, questions on cross-examination whether wife had stated that she had not seen accused for days at a time were properly asked to lay a foundation for wife's impeachment. Code Civ.Proc. § 2052; Pen.Code, § 207.

6. Witnesses 🔑391

Where accused's wife had testified in support of accused's alibi, witness' statement that wife had told witness that accused would stay away from home for days at a time at different intervals was admissible for impeachment purposes. Code Civ.Proc. § 2052; Pen.Code, § 207.

7. Criminal law 🔑1036(5), 1044

Where accused neither objected nor moved to strike alleged hearsay testimony, the objectionable feature thereof was "waived" and could not be raised for the first time on appeal.

8. Criminal law 🔑1131(4)

Where no motion for new trial had been made, accused's purported appeal from an order denying new trial was dismissed.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Manuel Ted Brazil was convicted of kidnapping, and he appeals and purportedly appeals from an order denying a motion for new trial.

Affirmed. Purported appeal dismissed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of kidnapping after trial before the court without a jury, defendant appeals. There is also a purported appeal from an order denying a motion for a new trial.

The evidence being viewed in the light most favorable to the people (respondent), the essential facts are:

Shortly after 2 a. m., September 29, 1941, the prosecuting witness and a gentleman, now her husband, were seated in a parked car. Defendant flashed a light into the car, told them he was a police officer, and that they were under arrest. After questioning the prosecuting witness' escort, defendant told him to get into his own car and drive away. After some discussion, the prosecuting witness' escort complied with defendant's orders. The prosecuting witness then questioned defendant as to whether he was in fact a policeman, since he was not wearing a uniform, thereupon defendant exhibited a gun and told the prosecutrix to get into his car because he was going to take her to a police station. After they had driven a short distance he stated to the prosecutrix that he would let her go if she "would love him up a little." Thereafter defendant stopped his car and told the prosecutrix to do what he wanted her to do or else he would take her to jail. Defendant then unfastened the zipper on his trousers and exhibited his privates, whereupon the prosecutrix screamed and defendant put his hand over her mouth and stuck a white handkerchief in it. This she removed and screamed again, whereupon defendant put the prosecutrix out of the car and pushed her in front of it where she fell down. Defendant returned to his car and started to drive it toward the prosecutrix. She crawled from in front of the car and fled into a nearby orange grove where she concealed herself until after defendant had driven away.

Defendant urges for reversal of the judgment two propositions which will be stated and answered hereunder seriatim.

First: There is no substantial evidence to sustain the finding of the court that defendant used any force in taking the prosecutrix from one place in the county to another place in the same county. (§ 207, Pen.Code.)

[1, 2] This proposition is untenable. There was direct testimony of the prosecuting witness as to each and every fact set forth above. From the prosecuting witness' testimony that, when she questioned defendant's authority to take her to jail, he exhibited a gun to her and ordered her to get into his car, the trial court properly found that defendant used force in taking her from one part of the county to another part of the same county. Likewise there is no merit in defendant's contention that the prosecuting witness' testimony was inherently improbable.

Second: The trial court committed prejudicial error in ruling upon the admissibility of evidence as set forth hereunder:

(a) While defendant was testifying upon cross examination the following occurred:

"Q. And you were not arrested in connection with this case at that time, were you? A. No, I wasn't.

"Mr. Casey: I object to that as being highly prejudicial, incompetent, irrelevant and immaterial."

[3] Defendant may not urge error predicated upon the answer to the foregoing question, for the reason that the rule is established in California that where, as in the instant case, the subject matter of a question is objectionable and a party fails to object to the question until after it is answered, he thereby waives his right to complain of the admission of the testimony upon appeal. (People v. Scalamiero, 143 Cal. 343, 345, 76 P. 1098; Wigmore on Evidence, vol. I, 3d Ed. (1940) 323, § 18.)

(b) 1. While defendant's wife, Zillah Brazil, was being cross-examined, this occurred:

"Q. And did you, in words or substance, state to the officer at that time that, 'I have known for some time that my husband has been drinking, and I have been suspecting him of running around.'?

"Mr. Casey: Just a moment. Objected to as incompetent, irrelevant and immaterial and hearsay."

2. "And that you then asked the officer: 'Who was he with?,' and with reference also to this question did you also say, 'He works for the Downey Patrol,' and that sometimes you didn't see him for days at a time?

"Mr. Casey: Just a moment—

"A. I didn't say that.

"Mr. Casey: Just a moment. I am going to object to that and move to strike the answer on the ground that counsel stated it was for the purpose of fixing the

date. The question has been answered. She admitted she had a conversation with him on or about that date. Now, the substance of that conversation certainly is not material at this time, purely hearsay. The date has been fixed.

"Mr. Roll: No, not the date of the conversation. It is for the purpose of fixing various dates here. She said there was only one occasion, if the Court please, that she knows about, during this time that he was away from home. Now, she told the officer there were several times he was gone and she didn't know where he was. I think it is very permissible and impeachment along this line.

"The Court: Objection overruled.

"Mr. Casey: Well, if your Honor please, for the purpose of impeachment and for the purpose of fixing dates, this evidence might be permissible, but for the purpose of prejudicing the rights of the defendant by bringing up other matters, such as the witness has testified to, I don't believe it is proper."

[4, 5] The law is established in this jurisdiction that a witness may be impeached by evidence that he has made at another time inconsistent and contradictory statements regarding a material issue, which statements are in conflict with his testimony at the trial. (People v. Crow, 48 Cal.App.2d 666, 671, 120 P.2d 686.) In the present case the witness, defendant's wife, had testified in support of defendant's alibi that he had been away from home at night only on one occasion during the months of September, October, and November. The foregoing questions were properly asked for the purpose of laying a foundation for the impeachment of the witness pursuant to the provisions of section 2052, Code of Civil Procedure.

(c) During the examination of the witness Jackson the following occurred:

"Q. And did she referring to the witness Zillah Brazil at that time, tell you that her husband had been drinking considerably in the past few weeks and would stay away from home two or three days at a time at different intervals? A. Yes, sir.

"Mr. Casey: Just a moment. I am going to object to that and move that the answer be stricken as incompetent, irrelevant and immaterial and hearsay, not made in the presence of the defendant, and highly prejudicial to him.

"Mr. Roll: For impeachment.

"The Court: The motion is denied and the objection overruled."

(d) During the examination of witness Staebler the following took place:

"Q. And directing your attention to that time, did the wife of the defendant in words or substance state to you as follows: 'I have known for some time that my husband has been drinking and I have suspected him of running around. Who was he with?,' and also did she say, 'He works at the Downey Patrol, and sometimes I do not see him for days at a time.'? Did she say that in words or substance to you?

"Mr. Casey: Just a moment, please. We object to that as incompetent, irrelevant and immaterial and as purely hearsay. There is no evidence that the defendant was present at that time.

"The Court: Well, it is not offered for anything more than impeachment purposes as to the particular witness on the stand.

"Mr. Roll: That is correct, your Honor.

"The Court: And we are not trying him for any misconduct, if there was any, other than the matter here charged.

"Mr. Casey: I appreciate that, your Honor. I understand that all of these questions are perhaps more or less to show a chain of events, to identify the dates, but peculiarly enough they carry with them the stigma of some other incident.

"The Court: That is true, but of course there is a rule that where, in the examination of any witness concerning a matter in hand, other matters, even other crimes may be brought in; if the matter in hand is material to the cause on trial, why the mere fact that other crimes may be actually proven is not sufficient to exclude it.

"Mr. Casey: Very well.

"Q. By Mr. Roll: You may answer the question. Did that conversation occur in words or substance? A. The words were not exactly the same, but the substance is correct."

[6] Both of the foregoing rulings were correct, as the testimony tended to impeach the witness Zillah Brazil who had testified that defendant had only on one occasion during the months of September, October, and November been away from home at night.

[7, 8] We need not consider defendant's strictures upon the admission of certain other testimony of the witness Staeb-

ler on the ground that it was hearsay testimony, for the rule is established in California that, where, as in the instant case, hearsay evidence is admitted and there is neither an objection to it nor a motion to strike the same, such objectionable feature of the testimony is waived and may not be raised for the first time on appeal. (People v. Guiterez, 126 Cal.App. 526, 530, 14 P.2d 838; People v. Magusin, 120 Cal. App. 115, 117, 7 P.2d 764.) The record in the present case discloses that a motion for a new trial was not made and obviously no action could have been taken with reference thereto. Therefore defendant's purported appeal from an order denying a new trial is dismissed.

For the foregoing reasons, the judgment is affirmed.

MOORE, P. J., concurred.

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53 Cal.App.2d Supp. 841

PEOPLE v. GRIER.

Cr. A. 1885.

Appellate Department, Superior Court,
Los Angeles County, California.

July 24, 1942.

1. Master and servant 🔑84

In prosecution for failure to pay contributions and furnish report required by the Unemployment Insurance Act, evidence failing to show that accused failed to make contributions allegedly due or that Unemployment Reserves Commission required any report from him, did not support conviction. Gen.Laws 1937, Act 8780d, § 101.5; Gen. Laws Supp.1939, Act 8780d, § 101(e).

2. Master and servant 🔑1

A test of whether one is an "employee" is whether his personal services are rendered to his alleged employer.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

3. Master and servant 🔑1

The word "servant" is generally synonymous with the word "employee".

See Words and Phrases, Permanent Edition, for all other definitions of "Servant".

4. Master and servant 🔑5

The test of whether one is a "servant" or an "independent contractor" is whether employer has right to exercise complete control over alleged servant, and one who is subject to employer's control for definite and restricted purpose, or follows employer's desires in result but not in means used, is an "independent contractor".

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

5. Master and servant 🔑5

In determining whether one is a "servant" or an "independent contractor", right to discharge is important factor, and if such right is unlimited so that it may be exercised arbitrarily, this indicates that party in question is a "servant".

6. Master and servant 🔑78

Where orchestra leader assembled orchestra, furnished music library, contracted for engagements, received all proceeds from engagements out of which he was only obligated to pay orchestra members union scale of wages, and expenses, called rehearsals and discharged and hired orchestra members, leader and members were not "partners" or "joint adventurers", and leader was not an "independent contractor" as to members, but members were his "servants" within Unemployment Insurance Act. Civ.Code, § 2400; Gen.Laws 1937, Act 8780d, §§ 6.5, 9, 101.5; Gen.Laws Supp.1939, Act 8780d, §§ 37, 101(e).

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventurer" and "Partner".

7. Master and servant 🔑78

Where establishments at which orchestra played designated place of performance, route to be followed in going to and from orchestra stand, and conduct of members during rest periods, and required home town music to be played and at certain tempos, and wearing of particular uniforms, but contracts were for fixed terms and fixed compensation, leaving to orchestra leader hiring, discharge and compensation of members and

manner in which musical selections were arranged and presented, leader was an "independent contractor" as to such establishments, and members were "servants" of leader, rather than of such establishments within Unemployment Insurance Act. Gen.Laws 1937, Act 8780d, §§ 6.5, 9, 101.5; Gen.Laws Supp.1939, Act 8780d, §§ 37, 101(e).

◆

Appeal from Municipal Court of City of Los Angeles; Leo Aggeler, Judge.

James W. Grier was convicted of wilfully and unlawfully failing to make contributions required by the Unemployment Insurance Act and of wilfully and unlawfully failing to furnish a report required by such act, and he appeals.

Reversed and remanded.

Leonard Comegys, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Joseph McFarland, Asst. City Atty., and Roger Arnebergh, Deputy City Atty., all of Los Angeles, for respondent.

VICKERS, Judge pro tem.

The defendant was charged under Counts I and II of the complaint with violating section 101.5 of the Unemployment Insurance Act, in that, being a person subject to and liable for the payment of contributions to the Unemployment Fund, he wilfully and unlawfully failed to make such contributions for the second and third quarters of the year 1940. He was also charged under Count III of the complaint with violating section 101(e) of the same act, in that being an employing unit, he wilfully and unlawfully failed and neglected to furnish the Unemployment Reserves Commission with a report required by said commission showing the names, social security numbers and wages paid each person employed by him for the first quarter of the year 1941.

The case was submitted to the trial court, a jury having been waived, upon a stipulation of facts, the substance of which is hereinafter set forth. The defendant was adjudged guilty by the court on each count and sentenced to pay fines with the alternative of imprisonment.

[1] An examination of the stipulation of facts discloses no evidence that the defendant failed to make the contributions alleged to have been due from him as charged in Counts I and II of the complaint or that the Commission required any report from him, as he is charged by Count III of the complaint with having failed and refused to furnish. Since each of these facts must be proved in order to establish a violation of said sections 101(e) and 101.5 respectively, as charged by the respective counts of the complaint, the judgment of the trial court must be reversed as to all of them. However, in view of the importance of the only questions argued by counsel in their briefs, and because such questions will necessarily be presented on a new trial, we will proceed to consider them for the assistance of court and counsel. These questions are: (1) Was the relationship between the defendant and the members of his orchestra that of employer and employee or were they partners or joint adventurers? (2) Was the relationship between the defendant and the establishments for which he and his orchestra played that of employee and employer or was he an independent contractor? Another way of putting the above questions is, was the defendant an employing unit under the Act in question?

Section 101.5 of the Unemployment Insurance Act (Act 8780d, Deering's General Laws) reads as follows:

"It is a misdemeanor for any person to wilfully fail or refuse to make any contributions to the unemployment fund which are due under this act."

Section 101(e) of the same Act reads as follows:

"§ 101. It is a misdemeanor: * * *

"(e) On the part of any employing unit, or any officer or agent of an employing unit, wilfully and unlawfully to fail or neglect to furnish to the commission reports required by it when necessary for the enforcement of this act."

The stipulation of facts is a lengthy one, the substance of which, so far as pertinent to the questions involved, is as follows:

That prior to September of 1939 for some seven years the defendant had been a musician, either playing in orchestras conducted by other persons or leading orchestras under his own organization. That in September, 1939, the defendant assembled an orchestra of twelve musicians, including himself, and one woman singer, which orchestra was known as "Jimmie Grier and His Orchestra." That the understanding and agreement between the defendant and the other members of his orchestra were as follows: (a) that the defendant had a contract with the Music Corporation of America, a booking Agency licensed under the Federation whereby the said Agency agreed to render its services in obtaining engagements for the defendant and his orchestra which he would assemble; (b) that the assembled orchestra agreed to operate under said contract with the Music Corporation of America; (c) that each member thereof would own and supply his own instruments, except piano, and his own uniform, the style to be selected by vote of the orchestra; (d) that the defendant should furnish the music library; (e) that the defendant should contract for engagements and appearances and set the terms thereof; (f) that the compensation paid for engagements and appearances should be handled by the defendant, who would pay out of the proceeds: (1) to each member of the orchestra an amount at least equal to the scale of compensation set by the Federation; that defendant determine and set the amount that any member receive above the said scale; (2) to pay the dues and other charges fixed by the Federation; (3) to pay the amounts set by the Federation for transportation charges; (4) to pay the other normal expenses of the orchestra, as such; (5) that the balance of the money should be retained by the defendant as his compensation for the services he rendered; (g) that the defendant should act as leader of the orchestra and as such should fix the time and place for rehearsals and direct other matters of the kind; (h) that in the event any member was unsatisfactory to defendant, he had the power to discharge such member and to select a new member, provided each new member of the orchestra enter into the organization under the same terms and conditions as the original members. That the orchestra played at many hotels, restaurants, night clubs, and other similar places, playing popular music; that all engagements were secured by the Music Corporation of America under written contract signed by said corporation as representative of the defendant, a duplicate copy of which was received in evidence as Exhibit C; that the Music Corporation of America's representative, upon obtaining the signature to each contract, collected 50 per cent of the contract price, from which it deducted its commission and delivered the balance to the defendant in cash, the balance of the contract price being paid to the defendant at the time of performance; that the defendant deposited none of this money in a bank account but divided the money amongst himself and the other orchestra members, as per the above agreement, this resulting in each member of the orchestra, including the defendant, receiving not less than the scales of compensation and expenses set by the Federation (this part of the stipulation is controverted in Exhibits D, E and F hereinafter referred to, which disclose that on occasions the defendant suffered a financial loss); that from April to December, 1940, there were twenty changes in personnel of the orchestra, occasioned as a result of the voluntary quitting of the members and the filling of such vacancies by such additions as defendant desired.

The stipulation of facts further recites that the establishments at which the orchestra performed did the following things: (a) determined the number of musicians to play; (b) owned and controlled the premises at which the services were performed; (c) designated the specific place for the performance; (d) gave the defendant, as leader of the orchestra, specific directions covering what the establishments required or expected of the leader of the orchestra; (e) prescribed the route and the manner whereby the members of the orchestra reached and left the orchestra stand; (f) gave orders as to the conduct of the orchestra members during intermissions and rest periods; (g) required the orchestra to coordinate and conform to the convenience of the establishment in the service of food and beverages and the schedule of floor shows or other entertainment specially employed in the establishment; (h) limited the time and place of rehearsals on the premises; (i) required the orchestra to rehearse with other artists specially employed by the establishments; (j) required the orchestra to play home-town music not contained in their library; (k) required the leader to act as master of ceremonies, to introduce local celebrities and to take part in activities not included in the rendition of dance music; (1) required the orchestra members to wear a particular uniform; (m) required the orchestra to play certain types of music, such as more or less waltzes, faster or slower pieces, long or short pieces, and control the volume, all as the operator of the establishment might desire. None of the various establishments where defendant and his orchestra played had any authority to: (a) determine or control the amount of compensation defendant paid to each or any member of the orchestra; (b) hire or discharge any member of the orchestra; (c) determine or control the arrangement or instrumentation of any of the musical selections played from defendant's library.

As part of the stipulation of fact, Exhibits D, E and F were received in evidence. They consist of statements showing the various amounts received and disbursed by the appellant for the second, third and fourth quarters of 1940 as a result of the various engagements. An examination of these exhibits discloses that while the various members of the orchestra received fairly constant amounts as a result of each engagement, the amounts received by appellant varied greatly. For the second quarter the members received $6,924.56 and the appellant $2,236.16. For the third quarter the members received $5,732.77 and the appellant nothing—in fact lost $42.46. For the fourth quarter the members received $1,996 and the appellant $1,102.50.

The parties further stipulated that when the defendant filed returns upon forms required by law indicating that he had been an employer during the second and third quarters of the year 1940, he did so under the belief that he was at that time an employing unit as defined in said Act; that defendant did not furnish any reports to the Unemployment Commission during or covering the first quarter of 1941, or any portion thereof, nor did he file with the Commission a written application for termination of coverage; and that the defendant was at all times alleged in the complaint a resident of Los Angeles and that certain of the places referred to in Exhibits D, E and F, where defendant and his orchestra had played, were located in Los Angeles.

The answers to the two questions raised by this appeal are found in certain sections of the Unemployment Insurance Act and in decisions of the courts of this state and those of New York, which state has an Unemployment Insurance Act comparable to ours in so far as the questions before us are concerned. The pertinent portions of Section 6.5 of the Act read as follows: "'Employment,' subject to the other provisions of this act, means service * * * performed for wages or under any contract of hire, written or oral, express or implied." The pertinent portions of Section 9 of the Act define "employer" and "employing unit" as follows: "'Employer' means: (a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; * * * (e) 'Employing unit,' as used in this act, means any individual or type of organization * * * which has * * * in its employ one or more individuals performing services for it within this State. * * * Each individual employed to perform or to assist in performing the work of any individual employed by an employing unit shall be deemed to be employed by such employing unit * * * whether such individual was hired or paid directly by such employing unit or by such individual so employed, providing the employing unit had actual or constructive knowledge of the work."

Section 37 of the Act, after providing for the accrual of the employer's contributions, declares: "Such contributions shall become due and be paid to the commission for the unemployment fund by each employer in accordance with such regulations as the commission may prescribe, and shall not be deducted in whole or in part, from the wages of individuals in his employ."

It will be seen that the legislature has not endeavored to distinguish between an employer and independent contractor, nor between the relation of employer and employee and that of partners or coadventurers. For these distinctions we look to the cases.

[2-4] In the case of Western Indemnity Co. v. Pillsbury, 1916, 172 Cal. 807, 159 P. 721, the court laid down certain principles for determining whether or not a person was an employee or an independent contractor. These principles have been recognized and quoted with approval by our courts ever since when dealing with a similar problem. In that case the Industrial Accident Commission had found that a certain Mr. Stevens was an employee and therefore entitled to an award under the Compensation Act. The Supreme Court determined that Stevens was an independent contractor and annulled the award. In doing so, the court said (page 810 of 172 Cal., page 723 of 159 P.): "* * * but there could be no employé unless his personal services were rendered to the employer, and since wages are generally paid for personal services, wages or salary are made the criteria of compensations given to injured employés. The word 'servant' is generally synonymous with the word 'employé'." Again (page 811 of 172 Cal., page 723 of 159 P.), "But it is urged * * * that the test of what constitutes independent service lies in the con-

trol exercised * * *. It is true that many authorities specify 'control' of the person performing work as a means of differentiating service from independent employment. The test of 'control,' however, means 'complete control.' * * * Labatt, in his work on Master and Servant (2d Ed. § 25), says: 'It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled.'" Again (page 813 of 172 Cal., page 724 of 159 P.), "It has been said that the true test of a contractor is that he renders service in the course of an independent occupation, following his employer's desires in the results but not in the means used. 1 Shearman & Redfield on Negligence (6th Ed.) 396. But in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking."

In the case of Brosius v. Orpheum Theater Co., Ltd., 1936, 16 Cal.App.2d 61, 60 P.2d 156, 159, the plaintiff recovered a judgment for damages by reason of the defendant's negligence due to a fall while he was performing a comedy cycling act that was one of a number of vaudeville acts on the program. The plaintiff and his partner were engaged by the defendant under a written contract. The defendant had interposed the defense that the plaintiff was an employee of the defendant as defined by section 8 of the Workmen's Compensation Act, St.1933, p. 2613, and that therefore his sole means of redress was by application to the Industrial Accident Commission. The defendant introduced in evidence the contract of employment. Among other things, this contract provided the length of employment, the time, the number of performances, the salary, the right of the defendant to cancel any part of the engagement because of impropriety or suggestive part of the act, if the plaintiff refused to eliminate same when requested; that the plaintiff was to present the act or specialty of himself and partner in their usual customary manner; that the plaintiff was to abide by all reasonable rules and regulations prescribed by the defendant; and that the plaintiff was to be present for rehearsals at the usual time for holding same at the theater. The reviewing court affirmed the judgment, citing cases, particularly Western Indemnity Co. v. Pillsbury, supra, and quoted with approval a portion of the language of that case, excerpts of which appear above. The court stated: "The provision requiring plaintiff to be present at rehearsals does not establish complete control. Plaintiff's act being one of several, orderly conduct of the theater would require that all the acts be rehearsed together for the purpose of co-ordinating the entire performance and synchronizing the acts with the music of the orchestra and the work of the employees of the theater. The provisions obligating plaintiff to abide by 'all reasonable rules and regulations' is a requirement which, in view of defendant's business, would naturally be imposed on independent contractors and employees alike."

[5] The case of Winther v. Industrial Accident Comm., 1936, 16 Cal.App.2d 131, 60 P.2d 342, 344, was, as the title indicates, another case involving an award of the Industrial Accident Commission. The reviewing court annulled the award. In doing so, it quoted from Western Indemnity Co. v. Pillsbury, supra, as to the meaning of the phrase "right of control," as a determining factor in establishing the relationship of employer and employee. The court said: "The test of control in such cases means 'complete control,' or the full and unqualified right to control and direct the details of or the means by which the work is to be accomplished." The court thereupon also approved the language in Labatt on "Master and Servant," which we have quoted earlier in this opinion, and went on to declare, at pages 137 and 138, of 16 Cal.App.2d, at page 345 of 60 P.2d, as follows: "The right of discharge is a fact that undeniably has a bearing on the question of authoritative control. If such right is unlimited so that it may be exercised arbitrarily, it is a fact which obviously points in the direction of that completeness of control which the decisions recognize as 'one of the best tests' of the relationship between individuals in the matter under discussion. * * *"

In the case of Bohanon as Adm'x v. James McClatchy Pub. Co., 1936, 16 Cal. App.2d 188, 60 P.2d 510, 514, the plaintiff recovered a judgment against McClatchy Co. and one Engebrecht for injuries caused by the negligence of the latter who, at the time of the accident, was delivering newspapers for the defendant corporation under a written contract. In affirming the judgment as to Engebrecht, but reversing it as to the publishing company on the ground, that Engebrecht was an independent contractor, the court said: "It may now be regarded as settled in California that the control which has been adopted as the test by which the relationship between two persons is to be measured for the purpose of discovering whether such relationship is that of master and servant is complete or unqualified control. * * * When one person is performing work in which another is beneficially interested, the latter is permitted to exercise a certain measure of control for a definite and restricted purpose without incurring the responsibilities or acquiring the immunities of a master, with respect to the person controlled." Citing Western Indemnity Co. v. Pillsbury, supra, and other cases.

Counsel have cited a number of New York cases involving the relationship between an orchestra leader and the members of his orchestra on the one hand, and the establishment for which they played on the other. One of the latest of such cases in point of time is that of Matter of Miller (Appeal of Amigone), July 1941, 262 App. Div. 385, 29 N.Y.S.2d 15, 17. In that case a night club owner, Amigone, appealed from a decision of the Unemployment Insurance Appeal Board that had affirmed a decision of its referee holding that Miller, a member of Royal Worth's orchestra, was an employee of appellant. Worth, during the period in question, was under contract with appellant to furnish an orchestra to play, and which did play, in appellant's night club. Under the facts as stated by the court, the contract provided that Worth furnish an orchestra consisting of twelve men to play at the club between certain hours daily, for a four weeks' period, for $750 per week. The orchestra was not assembled or organized for the purpose of playing at that night club but was a completed unit before the execution of the contract. Worth evidently intended it to be a permanent organization which he expected would rapidly gain recognition. The orchestra included a number of expert musicians whose services were obtained by Worth. Appellant had no supervision over the members and no authority to direct or control their actions, and could not employ or discharge plaintiff. Appellant paid Worth and Worth paid the members of his orchestra. After reviewing the above facts the court said: "From the proof in this record there cannot be the slightest doubt that Worth was an independent contractor and that claimant and the other members of the orchestra were his employees." (Citing cases.) "Although it is apparent from an examination of cases involving the independent contractor relationship that there is no absolute rule for determining whether one is an independent contractor or an employee, and that each case must be determined on its own facts, nevertheless, there are many well recognized and fairly typical indicia of the status of an independent contractor, even though the presence of one or more of such indicia in a case is not necessarily conclusive. It has been held that the test of what constitutes independent service lies in the control exercised, the decisive question being as to who has the right to direct what shall be done, and when and how it shall be done. Practically every contract for work to be done reserves to the employer a certain degree of control, to the end that he may see that the contract is performed according to specifications. The employer may exercise a limited control over the work without rendering the employee a mere servant, for a relation of master and servant is not inferable from a reservation of powers which do not deprive the contractor of his right to do the work according to his own initiative, so long as he does it in accordance with the contract. The control of the work reserved in the employer which effects a master-servant relationship is control of the means and manner of performance of the work as well as of the result; an independent contractor relationship exists where the person doing the work is subject to the will of the employer only as to the result, but not as to the means or manner of accomplishment. Accordingly where an employer may prescribe what shall be done, but not how it shall be done or who shall do it, the person employed is an independent contractor. 27 Am.Jur. Independent Contractors §§ 2, 3, 5, 7; 31 C.J. 473."

In the Miller case, claimant Miller relied on the cases of In re Rogavin, 259 App.Div. 774, 18 N.Y.S.2d 302, and Ajello v. Savarins Management, Inc., 259 App.Div. 949, 19 N.Y.S.2d 886. Our appellant likewise relies upon them. The court in the Miller case distinguished them as follows: "In the Rogavin case (259 App.Div. 774, 18 N.Y.S.2d [302], 303), the contract was executed by one Azpiazu 'individually and as agent for his orchestra', one of whom was the claimant. Under the agreement each member of the orchestra was employed by the restaurant company and it reserved the right to direct and control in many respects the manner in which such members should perform their services. In fact, the contract provided that the restaurant should have 'personal supervision and control of the artists at all times.'

"In the Ajello case the employer secured the services of one Barrett, an orchestra leader, to assemble an orchestra to furnish dance music at its restaurant. Claimant became a member of the orchestra for that special engagement. Barrett was the employer's agent and the contract in that case specifically provided that claimant and the other members should be deemed to be employees of the appellant.

"In the case under consideration Worth executed the contract not as an agent but as a principal. In the instant case all the elements upon which liability was predicated in the Rogavin and Ajello cases are lacking. The facts are entirely dissimilar."

One of the principal cases relied upon by counsel for appellant is that of Steel Pier Amusement Co. v. Unemployment Comp. Commission, September 1941, 127 N.J.L. 154, 21 A.2d 767. Similar questions were involved in that case as in our case with respect to an orchestra leader and the members of his orchestra and the amusement company for which they played. The Supreme Court of New Jersey held that a member of the orchestra was an employee of the amusement company. However, that case is clearly distinguishable from ours both under the facts and under the law. The contracts in question were very short, being quite dissimilar from our contracts, and declared that the orchestra leader was acting as the agent for the members of the orchestra. The court specifically declared that the relationship between the parties had to be determined from the statutory viewpoint alone. The opinion then quoted portions of the Unemployment Act of New Jersey, N.J.S.A. 43:21-1 et seq., which have no comparable counterpart in our Act. It is also of interest that the Supreme Courts of Nebraska and of Wyoming, in passing upon the same questions involving orchestras and in construing statutes identical with that of the State of New Jersey, came to a contrary opinion. These cases are Hill Hotel Co. v. Kinney, 1940, 138 Neb. 760, 295 N.W. 397, and Unemployment Comm. v. Mathews, 1941, 56 Wyo. 479, 111 P.2d 111.

[6] When we apply the statutory law of California and the rules laid down by the courts of this state and of New York, as set forth above, to the facts in our case, we are of the opinion that the relationship of the appellant and the various members of his orchestra was that of employer and employee. The terms of the contract between the appellant and the members of his orchestra clearly established the relationship of employer and employees. The appellant assembled the orchestra, furnished the music library, contracted for the engagements and set the terms thereof, received all the proceeds from such engagements, out of which he was only obligated to pay each member an amount equal to the union scale of wages, and then after paying all expenses retained the balance, if any, for himself. He acted as leader, fixed the time and place for rehearsals and directed other similar matters. He could discharge any member unsatisfactory to him and select any new member, provided such member entered into the organization under the same terms and conditions as the rest. Operating under the contract the appellant secured the engagements through the Music Corporation of America, as his agent. The financial records (Exhs. D, E and F) disclose that the compensation to the members remained more or less constant whereas the appellant at times made a large profit and at others actually suffered a financial loss. It is apparent that the contract created an "employment" under the Unemployment Insurance Act. The obligations of the members were services "performed for wages or under any contract of hire". § 6.5 of the Act. The members were servants, i.e., employees, since they "rendered personal service to the appellant remaining entirely under his control and direction." They were under the complete control of the appellant in so far as the details of or the means by which the work was to be accomplished, and received a fixed salary. Western Indemnity Co. v. Pillsbury, supra; Brosius v. Orpheum Theater Co., Ltd., supra; Winther v. Industrial Accident Comm., supra; Bohanon as Adm'x v. James McClatchy Pub. Co., supra. The appellant retained the unlimited right of discharge that could be exercised arbitrarily by him. Winther v. Industrial Accident Comm., supra. The appellant was an "employing unit" under section 9 of the Act since he

had "in [his] employ one or more individuals performing services for [him] within this State."

Counsel for appellant has urged that the appellant and the members of his orchestra were partners or joint adventurers. With this we cannot agree. They were not "an association * * * to carry on as co-owners a business for profit". Civil Code, § 2400. They did not share in the profits, except for their wages, did not contribute to the losses, were subject to discharge by appellant at any time, had no voice in the selection of new members or the wages to be received by any of their fellow members above the Union scale nor of the manner in which the appellant carried on his business.

[7] We are also of the opinion that the relationship of the defendant to the establishments for which he and his orchestra played was that of an independent contractor. This relationship is rather clearly disclosed from the form of contract used (Exh. C) and the stipulation of facts. The contract, in addition to the stipulated facts, recites that it is between the attraction Jimmie Grier and his orchestra, and the employer, naming it, fixes a lump sum as the price and is signed "Jimmie Grier by Music Corporation of America, authorized representative." There are other recitals for the benefit of the agent and the Union which do not concern us. The relationship as thus disclosed is undoubtedly that of independent contractor in so far as the appellant and the establishments are concerned, with the members of the orchestra not being employees of the establishments.

The "things done" by the establishments, as set forth in the stipulation, were those which appear reasonable from the nature of their business, and were directed toward the "results" to be accomplished rather than the "means" used therefor. Western Indemnity Co. v. Pillsbury, supra. The "results" for the most part were the entertainment and satisfaction of the public, the orchestra being one of the attractions. For this purpose the establishments designated the place of performance, gave directions covering what they expected, prescribed the route to be followed in going to and from the orchestra stand, gave orders re the conduct of members during rest periods, required the orchestra to coordinate and conform to the convenience of the rest of the activities carried on by the establishments, required home-town music to be played and at certain tempos, and required the wearing of particular uniforms. Such "rights" did not in themselves create the relationship of master and servant. (See cases cited below.)

On the other hand the employment contract was for a fixed term with no right of discharge of either the appellant or the members of his orchestra. Winther v. Industrial Accident Comm., supra; In re Earle, May 1941, 262 App.Div. 789, 27 N.Y.S.2d 310. The compensation to appellant was a fixed sum for the engagement with no attempt to interfere with appellant's right to hire and discharge his orchestra's members and to pay them such wages and at such times as he desired. Also the manner in which the musical selections were to be arranged and presented was entirely under appellant's control. It thus appears that while the establishments exercised a certain measure of control for a definite purpose, they did not have "authoritative" or "complete control." Western Indemnity Co. v. Pillsbury, supra; Bohanon as Adm'x v. James McClatchy Pub. Co., supra. The reservation of powers was necessary to enable the establishments "to coordinate the entire performance" and "the requirement to abide by reasonable rules and regulations," in view of their business, would naturally be imposed upon independent contractor and employees alike. Brosius v. Orpheum Theater Co., Ltd., supra. See, also, In re Radio City Corp., Nov. 1941, 262 App.Div. 593, 31 N.Y.S.2d 284.

For the reasons set forth at the beginning of this opinion, the judgment is reversed, and the cause is remanded to the Municipal Court for a new trial.

BISHOP, Acting P. J., and FOX, J., concur.

20 Cal.2d 681

SCHAUER et al. v. PEEK, Secretary of State.

S. F. 16796.

Supreme Court of California.

Aug. 4, 1942.

Elections 🔑171

Where justices for newly created division of District Court of Appeal were appointed to serve until first day of January after next general election, and they sought election to succeed themselves, but did not know the length of terms sought by them because of constitutional provision that justices elected shall so classify themselves by lot that one of them shall go out of office after four years, one after eight years, and one after twelve years, they were entitled to have "for the term prescribed by law" placed on the ballot, rather than the constitutional phrase "to the office for the term expiring January ———," since the constitutional provision dealing with the form of the ballot requires only substantial compliance therewith. Pol.Code § 758b, as added by St.1941, p. 2934, § 2; Const. art. 6, §§ 4a, 26.

In Bank.

Original mandamus proceeding by B. Rey Schauer, Clement L. Shinn, and Parker Wood, as the incumbent presiding justice and associate justices of the District Court of Appeal of the Second Appellate District, Division 3, against Paul Peek, as Secretary of State, etc., respondent, to compel the respondent to accept and file the petitioners' respective declarations of candidacy to succeed themselves and to certify their nominations to the proper officers. The respondent demurred generally to the petition.

Peremptory writ of mandamus issued.

Schauer, Ryon & McMahon, of Santa Barbara, for petitioners.

Paul Peek, in pro. per., of Long Beach, and Earl Warren, Atty. Gen., and Chas. W. Johnson, Deputy Atty. Gen., for respondent.

PER CURIAM.

By this proceeding in mandamus the petitioners as the incumbent Presiding Justice and Associate Justices of the District Court of Appeal of the Second Appellate District, Division Three, seek to compel the respondent, as Secretary of State, to accept and file their respective declarations of candidacy to succeed themselves and to certify their nominations to the proper officers. Respondent has demurred generally to the petition.

Division Three of the District Court of Appeal of the Second Appellate District was created by the Legislature in 1941 (Stats.1941, ch. 1179, p. 2934, § 2, Pol. Code, § 758b). The Governor thereafter appointed petitioner B. Rey Schauer as Presiding Justice and petitioners Clement L. Shinn and Parker Wood as Associate Justices of such newly created division of the District Court of Appeal. Their appointments were duly confirmed by the commission on qualifications (Const., art. VI, sec. 26) and each has since qualified and is now the commissioned and acting incumbent of the office to which he was so appointed. As such appointees the petitioners hold office until January, 1943, and under the cited constitutional provision it is essential, if they are to succeed themselves in their respective offices, that each "Within thirty days before the sixteenth day of August next preceding the expiration of his term * * * file with the officer charged with the duty of certifying nominations for publication in the official ballot a declaration of candidacy for election to succeed himself." This being done, the constitutional section then provides that "the name of such candidate shall be placed upon the ballot for the ensuing general election in November in substantially the following form:

For .... (title of office)	
Shall ....be elected (Name)	Yes
to the office for the term expiring January ———? (year)"	No

Within thirty days before August 16, 1942, each petitioner herein tendered to respondent for filing a declaration of candidacy for election to succeed himself, each requesting that there be placed upon the ballot the following proposition:

"Shall .... be elected to the office for the term prescribed by law?"
(Name)

Respondent has refused to accept petitioners' declarations of candidacy and to certify petitioners' names for publication in the official ballots in the form above set forth, or in any form which does not specify the exact day, month and year upon which the term for which each petitioner proposes to be a candidate shall expire.

The sole issue here presented is whether, in view of the provisions of section 26 of article VI of the Constitution, quoted above, the petitioners are entitled to have "for the term prescribed by law" substituted for the specific date upon which the term for which each is a candidate expires. We entertain no doubt upon the proposition. Under the circumstances disclosed by the petition, it is presently impossible to ascertain the expiration date of the terms for which petitioners are candidates. The statute under which the Third Division of the District Court of Appeal was created (Stats.1941, supra, § 2) makes no provision for the determination of the terms of the justices first appointed thereto. Inasmuch as the Third Division is an additional division created by the Legislature, its initial organization is governed by that portion of section 4a of article VI of the Constitution reading: "Upon the creation of any additional division of the district court of appeal the Governor shall appoint three persons to serve as justices thereof until the first day of January after the next general election. The justices of said division elected at such general election shall so classify themselves by lot that one of them shall go out of office at the end of four years, one of them at the end of eight years, and one of them at the end of twelve years, and entry of such classification shall be made in the minutes of said division, signed by the three justices thereof, and a duplicate thereof filed in the office of the secretary of state."

No authority is conferred by this provision upon any officer to fix the length of each of the three terms prior to the general election to be held this year. That authority is delegated only to the three justices "elected at such general election." Therefore, it is impossible to presently determine which of the three terms, for which petitioners are candidates, expires in four years, which in eight years, and which in twelve years. Under these circumstances, it is impossible to specify upon the ballot the date when the terms for which petitioners are candidates expire. The section does not require that the form be followed exactly as set forth therein, but requires only substantial compliance therewith. The phrase "for the term prescribed by law," here used, is a substantial compliance with the constitutional provision.

Let a peremptory writ of mandate issue forthwith upon the filing of this decision.

20 Cal.2d 670

Ex parte TENNER.

Cr. 4406.

Supreme Court of California.

Aug. 3, 1942.

Rehearing Denied Aug. 27, 1942.

1. Pardon 🔑1

The administration of parole is an integral part of criminal justice, having as its object the rehabilitation of those convicted of crime and the protection of the community.

2. States 🔑6

The compact between California and Washington concerning return of parolees from one state to another, entered into pursuant to uniform act for out-of-state parolee supervision, was an agreement for co-operative effort and mutual assistance in prevention of crime and in enforcement of criminal laws of each state within contemplation of federal statute authorizing such agreements, and was not violative of constitutional provision prohibiting states from entering into compacts with each other, without consent of the United States. St.1937, p. 469; p. 470, § 3; 18 U.S.C.A. § 420; U.S.C.A.Const. art. 1, § 10, cl. 3.

3. Constitutional law 🔑272

Where parole accepted in Washington by parolee was granted on express condition that Board of Prison Terms and Paroles might at any time cause parolee to be returned to penitentiary to serve sentence, arrest of parolee in California and his return to Washington pursuant to compact between California and Washington executed under uniform act for out-of-state parolee supervision, would not deprive the parolee of his liberty without "due process of law".

St.1937, p. 469; p. 470, § 3; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

4. Pardon 🔑14

One convicted of crime has right to reject an offer of parole, but having once elected to accept parole, he is bound by its express terms.

5. Constitutional law 🔑29

Provision of Federal Constitution that one charged with crime who shall flee from justice and be found in another state shall on demand of executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime, is not "self-executing". U.S.C.A.Const. art. 4, § 2, cl. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing".

6. Extradition 🔑30

A convict whose parole has been revoked is a "fugitive from justice" within federal extradition statute, even though he entered the asylum state with consent of paroling authorities, and he is subject to return to demanding state by extradition proceedings. 18 U.S.C.A. § 662; U.S.C.A. Const. art. 4, § 2, cl. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Fugitive From Justice".

7. Extradition 🔑21

The right of extradition created by Federal Constitution is a guaranty of which a state may avail itself to secure return of an offender against its law. U.S.C.A.Const. art. 4, § 2, cl. 2.

8. Extradition 🔑21

The extradition provisions of Federal Constitution and statutes are not for the benefit of the fugitive, and an asylum state may require the Governor to surrender a fugitive on terms less exacting than those imposed by the act of Congress. 18 U.S.C.A. § 662; U.S.C.A.Const. art. 4, § 2, cl. 2.

9. Extradition 🔑21

Authority to require return of fugitives from one state to another remains with the states except as expressly limited by Federal Constitution. U.S.C.A.Const. art. 4, § 2, cl. 2.

10. Extradition 🔑22

Uniform act for out-of-state parolee supervision under which compact was entered into between California and Washington concerning return of parolees from one state to the other is not void as conflicting with federal constitutional provision and statute relating to extradition, since federal method of extradition is not exclusive. St.1937, p. 469; p. 470, § 3; 18 U.S.C.A. § 662; U.S.C.A.Const. art. 4, § 2, cl. 2.

11. Constitutional law 🔑250

The uniform act for out-of-state parolee supervision, under which compact was entered into between California and Washington concerning return of parolees from one state to the other was not void as denying "equal protection of the law" to parolee who was paroled in Washington, and was permitted to go to California, and later was arrested for return to Washington to serve his sentence, since the statute applied uniformly to all parolees from states which were parties to the compact. St.1937, p. 469; p. 470, § 3; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of Law".

CARTER, J., dissenting.

In Bank.

Proceeding in the matter of the application of Joseph Tenner for a writ of habeas corpus to obtain the petitioner's release from custody of a chief of police.

Writ discharged and petitioner remanded to custody of chief of police.

William F. Herron, of San Francisco, for petitioner.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The question presented for decision by the petitioner's application for a writ of habeas corpus concerns the constitutionality of the Uniform Act for Out-of-State Parolee Supervision. Stats.1937, p. 469; Deering's Gen.Laws, 1937, Act 5783. He is held by the respondent Chief of Police pursuant to the direction of the Board of Prison Terms and Paroles of the State of Washington as a convict whose parole has been revoked.

It appears that after his conviction of a felony and sentence to serve five years in the Washington State Penitentiary, the petitioner was granted a parole, and, in connection therewith, permission to come to this state. Later, the Board of Prison Terms and Paroles revoked his parole and ordered that he be returned to the penitentiary. Following his arrest upon the order of his board, he filed in the superior court a petition for a writ of habeas corpus. Upon the denial of his petition, he applied to the United States Supreme Court for a writ of certiorari. That court denied the writ, Tenner v. Dullea, 314 U.S. 692, 62 S. Ct. 364, 86 L.Ed. 554, but issued its order prohibiting the State of California from removing Tenner, or permitting him to be removed from the state, pending the filing by him of a petition for a writ of habeas corpus in this court and a determination of the issues presented by it. In re Tenner, 314 U.S. 585, 62 S.Ct. 409, 86 L.Ed. 473.

The Constitution of the United States provides that, without its consent, no state shall enter into any agreement or compact with another state. Art. I, § 10. Recognizing this constitutional prohibition, in 1934, the Congress of the United States enacted a statute which reads as follows: "The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." 48 Stats. 909, 18 U.S.C.A. § 420.

A majority of the states, including California and Washington, have enacted the Uniform Act for Out-of-State Parolee Supervision, supra. It authorizes the governor to enter into a compact on behalf of the state with any of the United States legally joining therein permitting parolees to reside out of the state in which they have been convicted and sentenced. The compact obligates the receiving state to assume the duties of their visitation and supervision and makes provision for the retaking of parolees in these terms: "That duly accredited officers of a sending State may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State. If at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense." § 3.

Concededly the compact authorized by the California statute and that of Washington was ratified by each of these states and has not been renounced.

The petitioner contends that the compact authorized by these statutes is unconstitutional in that it is repugnant to the provisions of article IV, section 2, clause 2 of the United States Constitution and to section 5278 of the Revised Statutes of the United States, 18 U.S.C.A. § 662, providing for the extradition of fugitives from justice. More specifically, the petitioner contends that extradition is the sole means by which an alleged fugitive may be rendered up by one state to another. He also argues that the compact is contrary to the provisions of article I, section 10, clause 3 of the Constitution of the United States providing that no state shall, without the consent of Congress, enter into any agreement or compact with another state, and, finally, that it deprives the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The respondent takes the position that the legislation under attack does not violate any constitutional provision. On the contrary, he justifies the compact as one expressly authorized by the act of Congress relating to agreements between states (supra). He also argues that the congressional act may be deemed a statute empowering the states to enter into mutual compacts for the interstate transportation of criminals in aid of the enforcement of their penal laws under the interstate commerce clause of the Constitution. In addition, the respondent contends that the state has the right, under its police powers reserved by the Tenth Amendment to the United States Constitution, to exclude from its borders convicts and fugitives from justice.

[1] The administration of parole is an integral part of criminal justice, having as its object the rehabilitation of those convicted of crime and the protection of the community. Unquestionably such rehabilitation of a parolee may often be facilitated by transferring him to another state, with new surroundings and better opportunities for employment. It is apparent, however, that the success of such out-of-state transfers requires adequate control and intelligent supervision of parolees during the period of their readjustment to civil life. And from the standpoint of the protection of society, there is sound reason for an agreement between states that the authority over parolees should follow them across state lines. The knowledge on the part of the out-of-state parolee that he may summarily be returned to prison for any violation of the rules which he has agreed to obey undoubtedly is an effective check upon any inclination to violate parole.

[2] The compact represents the social policy of both California and Washington in this regard. It is an agreement for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the criminal laws of each state within the contemplation of the federal legislation and therefore does not violate the prohibition of the Constitution concerning compacts between states.

[3, 4] Nor does the act of the respondent deprive the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. He had his day in court when he was tried and convicted of a felony and sentenced to a maximum term of five years in the Washington State Penitentiary. The parole which he accepted was granted upon the express condition that the Board of Prison Terms and Paroles "may at any time within its discretion and without notice cause the parolee to be returned to the said institution to serve the full maximum sentence or any part thereof." One convicted of crime has the right to reject an offer of parole, but once having elected to accept parole, the parolee is bound by the express terms of his conditional release. In re Peterson, 14 Cal.2d 82, 92 P.2d 890.

[5, 6] The most serious question presented by the petitioner is his contention that article IV, section 2, clause 2, of the United States Constitution providing for the extradition of criminals and the act of Congress carrying that constitutional provision into effect constitute the sole method by which a parolee whose parole has been revoked may be returned to the state in which he was convicted. The Constitution provides:

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime." This provision is not self-executing. (Com. of Kentucky v. Dennison, 24 How. 66, 16 L. Ed. 717; Roberts v. Reilly, 116 U.S. 80, 6 S.Ct. 291, 29 L.Ed. 544; Hyatt v. People of New York, 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657), and Congress, by statute, established the procedure to make it effective.

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded wit hhaving committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate or the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." Rev. Stats. § 5278, 18 U.S.C.A. § 662. It has been held that a convict whose parole has been revoked is a fugitive from justice within the meaning of this statute, even though he entered the asylum state with the consent of the paroling authorities, and is subject to return to the demanding state by extradition proceedings. In re McBride, 101 Cal.App. 251, 281 P. 651; for cases from other jurisdictions see notes in 78 A.L.R. 419, 8 A.L.R. 903.

The validity of legislation in aid of the act of Congress concerning extradition is now well established (Dennison v. Christian, 196 U.S. 637, 25 S.Ct. 795, 49 L.Ed. 630, affirming 72 Neb. 703, 101 N.W. 1045, 117 Am.St.Rep. 817; Ex parte White, 49 Cal. 433; Kurtz v. State, 22 Fla. 36, 1 Am.St.Rep. 173; Ex parte Ammons, 34 Ohio St. 518; Ex parte Romanes, 1 Utah 23) and it has been held that a state may legislate upon a subject of extradition unprovided for because Congress failed to extend section 5278 of the Revised Statutes to the full limits of constitutional power. Innes v. Tobin, 240 U.S. 127, 36 S.Ct. 290, 60 L.Ed. 562. But all legislation which the courts have heretofore considered had reference to the federal extradition procedure. The interstate compact, however, is not of that character. It provides: "All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons." § 3(3). This can only mean that states which are parties to the compact have established a method to procure the return of parolees from one state to another, which is entirely independent of the extradition procedure. And whether states may mutually agree upon a method of securing the return of a certain class of fugitives other than by way of extradition is a question apparently never before decided by any court.

Prior to the adoption of the Constitution, the states or colonies regulated the return of fugitives by agreement. If no compact existed between the demanding state and the asylum state, an escaped prisoner might remain in the asylum state with impunity. The question then is, did the framers of the Constitution intend to prevent the states from entering into agreements for the return of prisoners, or did they intend only to provide a federal procedure which would not necessarily be an exclusive one.

The Supreme Court of the United States succinctly stated the purpose of the constitutional provision concerning extradition in two early cases. In the first of these, after an exhaustive discussion of its history and purpose, the court said: "* * * it is manifest that the statesmen who framed the Constitution were fully sensible, that from the complex character of the Government, it must fail unless the States mutually supported each other and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered." Com. of Kentucky v. Dennison, supra [24 How. 100, 16 L.Ed. 717]. "The sole object of the provision of the constitution, and the act of congress to carry it into effect," the court reiterated a short time later, "is to secure the surrender of persons accused of crime, who have fled from the justice of the state whose laws they are charged with violating. * * * No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offenses committed in the state from which they flee." Lascelles v. State of Georgia, 148 U.S. 537, 542, 13 S.Ct. 687, 689, 37 L.Ed. 549.

[7-9] Except for section 2 of article IV of the Constitution, there would be no question concerning the right of states to provide, by their joint agreement, for the return of a certain class of fugitives, subject, of course, to the constitutional provision regarding interstate compacts. The right created by article IV, it has been held, is a guarantee of which a state may avail itself to secure the return of an offender against its law. State v. Parrish, 242 Ala. 7, 5 So.2d 828, 832; Ex parte Roberts, 186 Wash. 13, 56 P.2d 703. And since the extradition provision is not for the benefit of the fugitive, an asylum state may require the governor to surrender a fugitive on terms less exacting than those imposed by the act of Congress. State ex rel. Treseder v. Remann, 165 Wash. 92, 4 P.2d 866, 78 A.L.R. 412. As authority to require the return of fugitives originally existed in the states and remains there except as expressly limited by the Constitution, even in the field of federal extradition, the act of Congress is not exclusive of state action which does not come within its express terms. On the contrary, said the Supreme Court of the United States, it must have been intended to leave subjects within the constitutional power and not provided for by that statute subject to the

state authority which then controlled them. Innes v. Tobin, supra. Neither the terms of the constitutional provision nor the act of Congress making it effective indicate that the extradition procedure was intended to be exclusive. Indeed, the language of the act of Congress provides that the duty of the asylum state to deliver the fugitive does not arise under federal law until "the Executive authority of any State or Territory demands any person as a fugitive from justice" in a specified manner. And as the Supreme Court of Florida has pointed out: "Neither the act of Congress nor the Constitution of the United States relate in any way to fugitives from justice from one State to another, or makes any provision concerning them until a *demand* has been made for their delivery. 'The demand is evidently the initial point at which the Constitution and the law begin to operate, and prior to this neither has any application to the case.' Id. While legislation by a State against the Constitution and the law of Congress, impairing the full operation of their provisions, would be nugatory, yet it is competent for a State Legislature to enact laws on the subject at a stage prior to that which the Constitution and Federal Laws have designated as the time at which they take cognizance of it, provided that such enactments are not inconsistent with the end named in the Constitution." Kurtz v. State, supra.

Of course, when a state elects to use the method of federal extradition, and in so doing has made the demand as required by the Constitution and act of Congress, the federal law applies and governs the procedure of return. And any legislation of the asylum state which purports to limit the exercise of this constitutional guarantee to the demanding state, such as requiring greater evidence of guilt to be produced than is required by the federal act is unconstitutional. In re Briscoe, 51 How. Prac., N.Y., 422; Kurtz v. State, supra. If, however, the return of the fugitive may be effected without the necessity of invoking the constitutional guarantee to the demanding state, no question of federal constitutional law is involved.

[10, 11] The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the federal laws with relation to extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to follow the federal procedure and claim the constitutional guarantee, the fugitive of course has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly the parolee detained under the interstate compact has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. But no right exists on the part of the parolee, whose parole has been revoked, to claim that he may only be removed by the method of his choosing. And since the statute applies uniformly to all parolees from states party to the compact, the petitioner may not complain that the statute deprives him of the equal protection of the laws. Caskey Baking Co. v. Commonwealth of Virginia, 313 U.S. 117, 61 S.Ct. 881, 85 L.Ed. 1223; Williams v. State of Arkansas, 217 U.S. 79, 30 S.Ct. 493, 54 L.Ed. 673, 18 Ann.Cas. 865; Field v. Barber Asphalt Pav. Co., 194 U.S. 618, 621, 24 S.Ct. 784, 48 L.Ed. 1142; Missouri, etc., R. Co. v. May, 194 U.S. 267, 24 S.Ct. 638, 48 L.Ed. 971; Tinsley v. Anderson, 171 U.S. 101, 18 S.Ct. 805, 43 L.Ed. 91; Minneapolis, etc., R. Co. v. Beckwith, 129 U.S. 26, 9 S.Ct. 207, 32 L.Ed. 585; Walston v. Nevin, 128 U.S. 578, 9 S.Ct. 192, 32 L.Ed. 544; Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923.

For these reasons, the writ is discharged and the petitioner is remanded to the custody of the respondent chief of police.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. While the policy embodied in the Uniform Act for Out-of-State Parolee Supervision (Stats.1937, p. 469) may be desirable in facilitating the transference from one state to another of violators of parole, I do not believe the legislation can stand in the face of United States Constitution, article IV, section 2, clause 2, and the Congressional Act, 18 U.S.C.A. 662, providing for extradition. It has been uniformly held that the United States Constitution and the act of Congress are paramount in this field and no state statute inconsistent therewith may stand. United States ex rel. McCline v. Meyering, 7

Cir., 75 F.2d 716; Day v. Keim, 4 Cir., 2 F.2d 966; Ex parte Morgan, D.C., 20 F. 298; Ex parte Montgomery, D.C., 244 F. 967, affirmed 246 U.S. 656, 38 S.Ct. 424, 62 L.Ed. 924; Kuney v. State, 88 Fla. 354, 102 So. 547; Fitzpatrick v. Williams, 5 Cir., 46 F.2d 40, 73 A.L.R. 1365; later Florida case, State v. Quigg, 91 Fla. 197, 107 So. 409, 411. Authority for interstate rendition of fugitives by extradition emanates solely from the power delegated to the federal government by the Constitution of the United States. In this state, such proceedings are wholly dependent upon the organic and statutory law just quoted. Legislation as to interstate rendition of fugitives being within the power of Congress, the federal law upon that subject is paramount to state Constitutions and statutes. People v. Meyering, 357 Ill. 166, 191 N.E. 318; Keeton v. Gaiser, 331 Mo. 499, 55 S.W.2d 302; Ex parte Owen, 10 Okl.Cr. 284, 136 P. 197, Ann.Cas.1916A, 522; Ex parte Bergman, 60 Tex.Cr.R. 8, 130 S.W. 174; Ex parte Goodman, 79 Tex.Cr.R. 67, 182 S.W. 1120; Waller v. Jordan, Ariz., 118 P.2d 450; State v. Parrish, 242 Ala. 7, 5 So.2d 828; State v. Grosch, 177 Tenn. 619, 152 S.W.2d 239; In re Sanders, Ohio App., 31 N.E.2d 246; People v. Bell, 372 Ill. 572, 25 N.E.2d 45; Ex parte Roberts, 186 Wash. 13, 56 P.2d 703. That being true the act here in question must fall as it is clearly inconsistent with the provisions of the Constitution of the United States and the act of Congress above-mentioned. It wholly dispenses with all of the requirements therein set forth and permits a person to be taken from one state to another by the officers of the state claiming the person by merely establishing identity and violation of parole by a peace officer of the asylum state. The rule announced in the majority opinion is applicable to cases other than those of paroled convicts. It announces the broad general rule that *before a demand* for extradition is made by the demanding state, *the federal laws with reference to extradition are not operative,* and the state may make any regulation it wishes in respect to the matter. In so holding it relies upon a Florida case. Kurtz v. State, 22 Fla. 36, 1 Am.St.Rep. 173. The majority opinion states, quoting from the Kurtz case: "'Neither the act of Congress nor the Constitution of the United States relate in any way to fugitives from justice from one State to another, or makes any provision concerning them until a *demand* has been made for their delivery. "The demand is evidently the initial point at which the Constitution and the law begin to operate, and prior to this neither has any application to the case." Id. While legislation by a State against the Constitution and the law of Congress, impairing the full operation of their provisions, would be nugatory, yet it is competent for a State Legislature to enact laws on the subject *at a stage prior* to that which the Constitution and Federal Laws have designated as the time at which they take cognizance of it, provided that such enactments are not inconsistent with the end named in the Constitution.'" (Emphasis added.) If that rule is applied, the federal laws with relation to extradition are completely ignored and rendered wholly ineffective for any purpose. To bring the rule into operation requires only that the governor of the demanding state make no demand, thus no extradition proceedings are initiated. Then the peace officers of that state may go into the asylum state and take the prisoner to their state. Under this practice or procedure extradition as now known would be a thing of the past. It is conceded in the majority opinion that the federal procedure for extradition embraces paroled convicts who breach the terms of their parole. Therefore, the removal of them from this state to another state is in fact extradition but all of the federal law formalities are disregarded. In any event, it cannot be denied that the rule as stated embraces all others charged with crime who are undeniably embraced in the federal extradition laws. To say that before a demand is made no extradition exists, and therefore the federal laws need not be observed, is to permit that to be accomplished indirectly which could not be done directly. The fact is that if the prisoner is taken from the asylum state to the state where he is charged with the crime, he is beyond doubt extradited, and if extradited, the federal law must be followed, and a state law eliminating all of the federal requirements is a clear invasion of the powers of Congress.

Not only is the language quoted from the Kurtz case wholly dictum, but the court there had in mind an entirely different situation. In conformity with the rule that a state may adopt statutes *in aid* of but *not inconsistent* with the federal laws, it had in mind state laws that provided for the arrest of fugitives from justice by the officers of the asylum state *pending the initiation and completion of extradition proceedings in conformity with the federal laws.* It was contemplated that the extradition that followed would be in conformity with the federal law. Such a law is of course not inconsistent with the federal law being merely in aid of it. But where, as here, the *complete process of extradition* is permitted without following the federal requirements, it cannot be said that the state act is in aid of the federal law.

In my opinion, the California statute in question is in direct conflict with the provisions of the Federal Constitution and statutes, and is therefore invalid, and the writ of habeas corpus prayed for by petitioner should be granted and petitioner discharged from custody.

WEST KEY NUMBER SYSTEM

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20 Cal.2d 705

PEOPLE v. LAMARR.

Cr. 4433.

Supreme Court of California.

Aug. 18, 1942.

1. Bigamy 🔑1

Accused was not entitled to acquittal of bigamy because he proved that at time of his second marriage, alleged in information to be the lawful marriage, he was legally married to another and remained such other's husband at time of third and allegedly bigamous marriage, since if at time of third marriage, accused was already validly married to any spouse, he became guilty of "bigamy" on the third marriage. Pen.Code, § 281.

See Words and Phrases, Permanent Edition, for all other definitions of "Bigamy".

2. Bigamy 🔑1

If no valid prior marriage is proved, alleged bigamous marriage is in fact a legal marriage, but if any valid prior existing marriage is proved, then status of accused as a married person is established and a subsequent marriage during existence of such status is "bigamous". Pen.Code, § 281.

See Words and Phrases, Permanent Edition, for all other definitions of "Bigamous".

3. Bigamy 🔑4

A misnomer in information of spouse, marriage to whom established the status of defendant as a married person, is not necessarily fatal to judgment of conviction of bigamy. Pen.Code, § 281.

4. Bigamy 🔑1

The essential things for pleading and proof to show to establish "bigamy" are the previously established status of defendant as a married person and his additional marriage during continuance of that status. Pen.Code, § 281.

5. Bigamy 🔑5

The name of person with whom, and to some extent the place where and the date when bigamous marriage took place are important to protect defendant against being placed in jeopardy more than once, but the name of person with whom and place where and time when marriage establishing status was consummated are important only to extent that defendant be not prejudiced in preparing his defense on facts tending to establish such status. Pen.Code, § 281.

6. Criminal law 🔑1186(1)

A mistake of law as to what would constitute a technical defense is no ground for reversal of judgment since a "mistake of fact" is where a person understands the facts to be other than they are, whereas a "mistake of law" is where a person knows the facts as they really are but has a mistaken belief as to legal consequences of those facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Mistake of Fact" and "Mistake of Law".

7. Bigamy 🔑2

Proof of valid existing marriage at time of marriage alleged in information to be the first or status-establishing marriage may or may not constitute a defense to bigamy, since if it existed at time of alleged first marriage but was dissolved before alleged bigamous marriage, it constitutes a defense because then alleged bigamous marriage is in fact valid, but if first marriage continues from time previous to first alleged marriage, through time when alleged bigamous marriage was contracted, then such proof supports conviction. Pen.Code, § 281.

8. Indictment and information 🔑171

The test of "materiality" of a variance is whether indictment or information so fully informs defendant of criminal act with which he is charged that taking into consideration the proof, he is not misled in making his defense or placed in danger of being twice put in jeopardy for same offense. Pen. Code, § 1151.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Variance".

9. Bigamy 🔑5

Where accused showed that at time of his second marriage, alleged in information to be the lawful marriage, he was legally married to another and remained such other's husband at time of third and allegedly bigamous marriage, any variance between information and proof was not "material". Pen.Code, §§ 281, 1151.

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In Bank.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Reginald Raymond Lamarr was convicted of bigamy, and he appeals.

Affirmed.

For prior opinion, see 126 P.2d 678.

Donald Kolts, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

PER CURIAM.

This cause was taken over after decision by the District Court of Appeal, Second District, Division Three. Upon further examination of the record, we adopt the opinion of Presiding Justice Schauer, with certain omissions and additions, as and for the decision of this court, as follows:

Defendant appeals from a judgment convicting him of the crime of bigamy under section 281 of the Penal Code, and from an order denying his motion for a new trial. The pertinent facts developed at the trial are as follows: On May 24, 1929, defendant married one Wally Meyer Lamarr in San Francisco, California; on March 20, 1935, he married Selma Lamarr in Ventura, California, while his marriage to Wally Meyer Lamarr was still in effect; and on November 23 or 24, 1938, he married Josephine Lamarr at Yuma, Arizona, neither of the two earlier marriages having been theretofore annulled or dissolved by divorce or death of a contracting party. The three wives were present in court and testified at the trial. Section 281 of the Penal Code provides that "Every person having a husband or wife living, who marries any other person, except * * * [in certain situations not existing here], is guilty of bigamy."

The amended information, upon which defendant was convicted, alleged "That the said Reginald Raymond Lamarr on or about the *23rd* day of *November, 1938,* * * * did knowingly, willfully and feloniously marry one Josephine Roney, said defendant being then and there the lawful husband of another person, to wit: Mrs. Selma Lamarr, then and there living, the marriage of said defendant and said Mrs. Selma Lamarr not having been anulled or dissolved and said defendant and said Josephine Roney having thereafter cohabited together as husband and wife in the County of Los Angeles, State of California. * * *" It was not until the trial that, by the testimony of defendant and of defendant's witness, Wally Meyer Lamarr, the fact of defendant's marriage to Wally Meyer Lamarr previous to his other two marriages was disclosed. Although some question is raised in the appeal briefs of the parties as to whether the trial court accepted the testimony of defendant and of Wally Meyer Lamarr concerning their marriage to each other, and as to whether the court may have drawn an inference of a divorce between them before defendant contracted his next marriage, to Selma Lamarr, we find no indication in the record as to the relative weight given by the trial court to the testimony of the various witnesses or as to the inferences deducible therefrom, and so proceed on the basis of the facts as set forth above.

[1-5] Defendant contends, chiefly, that he could not be convicted under the allegations of the amended information for the reason that at the time of his marriage to Selma Lamarr, alleged in the information to be the lawful marriage, he was legally married to Wally Meyer Lamarr. This contention cannot be sustained. It is to be noted that defendant makes no claim to having been divorced from Wally Meyer Lamarr at any time, and on the contrary the evidence produced by him established without contradiction that he was still her husband at the time of his third marriage.

We know of no California case in which this point has been squarely decided. It is necessary therefore that we proceed by reason, examining en route such authorities as seem pertinent to ascertain whether they either tend to guide us to or away from the conclusion which reason suggests.

Defendant relies principally upon People v. Spitzer, 1922, 57 Cal.App. 593, 208 P. 181, in which a contention of the defense, as here, was that defendant was the lawful husband of another woman at the time he was married to the wife alleged in the information to be the lawful (or first) wife. In that case the court said, at page 594 of 57 Cal.App., at page 182 of 208 P., "It seems to be the law that, if the first marriage alleged in an information charging the crime of bigamy be shown to have been void because of a previous valid existing marriage, the defendant cannot be convicted thereunder. Commonwealth v. McGrath, 140 Mass. [296] 297, 6 N.E. 515; State v. Sherwood, 68 Vt. 414, 35 A. 352; People v. Mock Yick Gar, 14 Cal.App. 334, 111 P. 1039. As said in Lane v. State, 82 Miss. 555, 34 So. 353: 'The rule is thoroughly settled that one indicted for bigamy must be acquitted on that indictment if he can show that the first marriage alleged in the indictment is void by reason of the existence of a prior lawful marriage, still existing.'" The court also stated in denying a petition for rehearing that "* * * while, as held in the main opinion, the New York marriage to Mary Truell [first marriage], had it been established, would have constituted a technical defense, nevertheless, since it was not proven, defendant must upon this record be deemed guilty as charged." It appears therefore that this case is not authority for the proposition on which defendant relies. No showing was there made that the first marriage alleged in the information was void because of a previous valid existing marriage. Hence, the statements from the opinion therein, quoted above, are dictum and were unnecessary to the decision of the case.

There is a fundamental difference between the proposition that proof of *a* valid previously contracted and existing marriage is absolutely essential as a basis for guilt of bigamy on subsequently contracting another marriage and the theory that proof of invalidity of the first marriage *charged in the information,* through establishing a prior existing marriage, requires acquittal. If there was *no* valid existing marriage at the time of the alleged bigamous marriage obviously the defendant is not guilty of bigamy. Proof of a marriage contracted prior to and valid at the time of that alleged in the information to be the valid or first marriage would destroy the probative value of the *alleged* first marriage and to that extent would be material. But the gravamen of the offense is the *bigamous marriage.* If at the time of the *alleged bigamous marriage,* the defendant was already validly married to *any* spouse, he obviously became guilty (in fact) of bigamy on the latter marriage. The former proposition involves a question of substantive proof, the latter a question of pleading and procedure. If *no* valid prior marriage is proved then the alleged bigamous marriage is in fact a legal marriage but if *any* valid prior existing marriage is proved then the *status of the defendant as a married person* is established and a subsequent marriage *during the existence of that status* is bigamous. A misnomer in the information, of the spouse, marriage to whom established the *status* of the defendant, is not necessarily, in our opinion, fatal to the judgment. It was said in People v. Priestley, 1911, 17 Cal.App. 171, 176, 118 P. 965, 967, that "It is immaterial when or where the first marriage took place if the accused, at the time of the second marriage, had a wife living. * * * 'As the first marriage is not criminal, but its existence a condition which makes the second marriage a crime, it is of itself a fact, and there is no substantial reason why the averment of it should ever have been required except in general terms.'" The essential things for the pleading and proof to show are (1) the *previously established status* of the defendant as a married person and (2) his additional marriage *during perdurance* of that status. It is the *additional* marriage which identifies the particular crime. The name of the person with whom, and to some extent the place where, and the date when, the additional or bigamous marriage took place are important to identify the crime and protect the defendant against being placed in jeopardy more than once for that offense, but the name of the person with whom and the place where and the time when the *marriage establishing the status* was consummated have no significance in identifying the particular crime and are important only to the extent that the defendant be not misled and prejudiced in preparing his defense on the facts tending to establish such status.

[6] If the people rather than the defendant had produced the evidence of defendant's marriage to Wally Meyer Lamarr, seeking without previous notice to defendant to establish his status as a married person by virtue of his marriage to Wally in San Francisco on May 24, 1929, instead of by virtue of the specifically alleged marriage to Selma in Ventura on March 20, 1935, he perhaps would have some basis for contending that he had been misled in preparing his defense, that the information should have been amended, or at least that he should have had a continuance to enable him to prepare to meet such "surprise" testimony. But here the defendant did not seek any continuance and certainly he was not surprised by facts which he himself adduced. By the information which was filed he was fully and correctly informed of the particular criminal act with which he was charged. His own testimony, voluntarily given, and that of his witness, was as competent to prove his previously contracted married status and its existence at the time of the bigamous marriage as could have been any evidence that the People might have produced. It therefore appears that the defendant has not been misled as to the nature or identity of the criminal charge against him, he has not been taken by surprise by the evidence adduced, and he is not in danger of being twice put in jeopardy for the same offense. A mistake of law as to what would constitute a technical defense is no ground for reversal of the judgment. "A 'mistake of fact' is where a person understands the facts to be other than they are; whereas a 'mistake of law' is where a person knows the facts as they really are, but has a mistaken belief as to the legal consequences of those facts." Quoted from O'Brien v. Selskab, 94 N.J.L. 244, 246, 109 A. 517; 40 C.J. 1227, in People v. Kelly, 1939, 35 Cal. App.2d 571, 574, 96 P.2d 372.

It is not to be implied from what we have said that the state could allege as the lawful marriage a defendant's marriage to B and a subsequent bigamous marriage to C; and then upon proof by the defendant, or otherwise, that he had in fact previously married A and that the marriage to B took place during the existence of the marriage to A, thereupon claim a conviction on the charge as laid, *on the theory that the B marriage was the bigamous one.* On that theory the defendant would be entitled to acquittal on the ground of variance (§ 1151, Pen.Code); there would be a failure of proof; i. e., the identity of the crime would be different. The first marriage (to A), while it continued to exist at the time of the marriage to B, might have been terminated before the marriage to C. In that case the C marriage would be lawful and the B marriage, although bigamous in fact, could not support a conviction on the charge as stated because *it* was not alleged as the crime. But if, as here, it appeared that the A marriage continued as a valid status not only at the time of the B marriage but also at the time of the C marriage, then the C marriage would be bigamous as charged and would support a conviction. Proof of *any* valid marriage previous to the alleged bigamous marriage and existing at the time of the latter would establish the married status of the defendant and support the charge that the latter marriage was bigamous. The identity of the crime for that bigamous marriage would obviously be the same regardless of when, where or with whom the valid status-establishing marriage took place.

[7] It is thus apparent that proof of a valid marriage prior to and existing at the time of the marriage alleged in an information to be the first or status-establishing marriage may or may not constitute a defense to the charge. If it existed at the time of the *alleged* first marriage but was dissolved before the alleged bigamous marriage it constitutes a complete defense because in that case the alleged bigamous marriage is in fact valid. But if the proof shows that the first consummated marriage perdured from a time previous to the first *alleged* marriage through the time when the alleged bigamous marriage was contracted then that proof supports conviction.

In view of our conclusion that the discussion of the issue in the Spitzer case, supra, is dictum we find it unnecessary to here discuss in detail the authorities cited in the Spitzer decision. Suffice it to say that they presented either distinguishable factual situations or turned on questions of pleading and proof.

[8, 9] If there be any point to defendant's contention it is purely a question of variance between pleading and proof. An immaterial variance should be disregarded. 14 Cal.Jur. 96; People v. Mizer, 1940, 37 Cal.App.2d 148, 153, 154, 99 P.2d 333. The test of the materiality of a variance is whether the indictment or information so fully and correctly informs the defendant

of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense. 14 Cal.Jur. 96; People v. Terrill, 1901, 132 Cal. 497, 499, 500, 64 P. 894; People v. Freeman, 1916, 29 Cal. App. 543, 544, 545, 156 P. 994; People v. Harrington, 1928, 92 Cal.App. 245, 254, 255, 267 P. 942; People v. Thorn, 1934, 138 Cal. App. 714, 733, 734, 33 P.2d 5; People v. Jacobs, 1935, 11 Cal.App.2d 1, 6, 52 P.2d 945; People v. Woodson, 1936, 11 Cal.App. 2d 604, 606, 54 P.2d 33; see, also, People v. Arras, 1891, 89 Cal. 223, 226, 227, 26 P. 766; People v. Evanoff, 1919, 45 Cal.App. 108, 112, 187 P. 54. From what has been said, we regard it as evident that under the test stated in the authorities cited any variance in the instant case was not material.

Appellant calls to our attention the cases of People v. Beevers, 1893, 99 Cal. 286, 33 P. 844; People v. LeDoux, 1909, 155 Cal. 535, 102 P. 517; People v. Bisbee, 1933, 134 Cal.App. 181, 25 P.2d 232; and People v. Kelly, 1939, 32 Cal.App.2d 624, 90 P.2d 605. In only two of these cases, People v. Bisbee and People v. Kelly, were three marriages of a defendant involved. Neither of the other two cases states any principle pertinent to our discussion. In People v. Bisbee defendant claimed as a defense to a charge of bigamy the fact that he had married another woman prior to the marriage alleged in the information to be the lawful one. On denying petition for rehearing after affirming defendant's conviction of bigamy, the court there said, at page 183 of 134 Cal.App., at page 233 of 25 P.2d: "Appellant testified positively that he had been absent from, had not seen nor heard of or from, Marie Shay for about six years before he married Viola Kelly and that he did not know whether she was dead or alive. Under this testimony the second marriage was 'valid until its nullity is adjudged by a competent tribunal.' Section 61, Civ.Code.

"The testimony demonstrates that, of the three marriages proved, he contracted the third one without any dissolution of the second one. In these circumstances neither the trial court nor an appellate court will indulge in strained inferences from inconsistent, indefinite, and improbable testimony that perhaps, after all, appellant was married to some one else when he married the second wife, therefore he should be acquitted of legal wrong in taking the third wife under representation that he was an unmarried man." We perceive nothing in that case (People v. Bisbee) which requires us to make the holding defendant seeks by this appeal. Defendant's second marriage there was found valid, and the decision does not constitute authority for the proposition that had it been found invalid and had the first marriage continued in effect at the time of the third, defendant would have been entitled to an acquittal.

In People v. Kelly, 1939, supra, 32 Cal. App.2d 624, 90 P.2d 605, the judgment of conviction of bigamy and the order denying defendant's motion for new trial were affirmed, where the question of defendant's marriage to another woman prior to the marriage relied upon by the prosecution as the lawful marriage was not raised until the hearing on the motion for a new trial. On a subsequent appeal (People v. Kelly, 1939, 35 Cal.App.2d 571, 96 P.2d 372) an order denying defendant's motion to vacate the judgment of conviction was also affirmed. Defendant, however, contended that his admittedly third marriage, for which he was prosecuted, was not itself bigamous but was rendered valid under the provisions of subdivision one of section 282 of the Penal Code by the fact that he had not heard from his first wife for five years at the time he married his third (see page 574 of the opinion in 35 Cal.App.2d, 96 P. 2d 372). That is not akin to the factual basis in the present appeal.

People v. Burke, 1941, 43 Cal.App.2d 316, 110 P.2d 685, is also a case in which three marriages of defendant were involved. All three were proved by the prosecution and admitted by defendant, who contended, however, that neither number two nor number three was bigamous, by reason of various presumptions asserted by him as to innocence and as to the continuance of life of wife number one beyond the time of his marriage to number two but terminating before that to number three. His conviction was affirmed on appeal and we find nothing in that case to influence us here.

The judgment and order appealed from are affirmed.

20 Cal.2d 635

WESTOVER v. CITY OF LOS ANGELES.

L. A. 18276.

Supreme Court of California.

July 30, 1942.

1. Trial 🔑295(1)

A charge must be read in its entirety, each instruction being considered in connection with the others, and if they harmonize as a whole, and accurately state the law, a reversal may not be had because of verbal inaccuracies or because a separate instruction does not contain all of elements which are to be gathered from the instructions as a whole.

2. Automobiles 🔑279

In action against city for injuries to passenger who was thrown against top of automobile as it crossed dips in street, an instruction dealing in part with negligence of motorist, that city had duty to exercise reasonable care in locating warning signs and if warning was so located as not to be readily discernible or if warning was obliterated, or misleading, then jury should find motorist not negligent was erroneous where there were many other factors which jury might have considered in determining motorist's negligence. Gen.Laws 1937, Act 5619, § 2.

3. Automobiles 🔑282

If motorist was negligent, city could not escape liability for injuries to passenger who was thrown against top of automobile as it crossed dips in street, if jury found that city was negligent and that such negligence was a proximate cause of passenger's injuries. Gen.Laws 1937, Act 5619, § 2.

4. Trial 🔑295(4)

In action against city for injuries to passenger who was thrown against top of automobile as it crossed dips in street, error in instruction that jury should find motorist not negligent if city so maintained warning signs that they were misleading or obliterated was not prejudicial where charge as a whole correctly stated the rights and duties of motorist and the city. Gen.Laws 1937, Act 5619, § 2.

5. Trial 🔑296(3)

In action against city for injuries to passenger who was thrown against top of automobile as it crossed dips in street, instruction that to impose liability jury was required to find that city violated the 1923 Public Liability Act was not erroneous as failing to include all elements essential to city's liability under the act where the act in its entirety was read to the jury in the next succeeding instruction and the act stated all elements indispensable to municipal liability. Gen.Laws 1937, Act 5619, § 2.

6. Appeal and error 🔑883

A city whose counsel stated that he had no objection to giving of pretrial instructions to clarify the law in action for injuries to automobile passenger could not on appeal challenge propriety of giving such instructions.

7. Trial 🔑296(1)

In action against city for injuries to passenger who was thrown against top of automobile as it crossed dips in street, pretrial instructions which stated in general terms the principles of law and illustrated such principles with hypothetical examples were not erroneous when considered with other detailed instructions given at the close of the case.

8. Negligence 🔑61(1)

Liability may be imposed upon a defendant where his negligence is one of several contributing factors each of which is a proximate cause of the injury.

9. Automobiles 🔑308(4, 10)

In action against city for injuries to passenger who was thrown against top of automobile as it crossed dips of street, whether city was negligent and whether its negligence was proximate cause of injury were for jury. Gen.Laws 1937, Act 5619, § 2.

In Bank.

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by John A. Westover against the City of Los Angeles for injuries sustained while riding in the back seat of an automobile as result of an alleged dangerous condition in a street. From a judgment for the plaintiff, defendant appeals.

Affirmed.

Prior opinion, 120 P.2d 58.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Leonard Husar, Victor P. Spero, Louis A.

Babior, and Albert E. Wheatcroft, Deputies City Atty., all of Los Angeles, for appellant.

Thomas R. Lynch and Irving E. Read, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

The defendant city appeals from a judgment recovered by the plaintiff for injuries sustained by him while riding as a passenger in an automobile. The injuries were alleged to have resulted from the dangerous and defective condition of a public street. The action was brought under the 1923 Public Liability Act (Stats.1923, p. 675, Deering's General Laws, Act 5619) which imposes liability upon cities for damages "resulting from the dangerous or defective condition of public streets * * * where the governing * * * board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time * * * to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition." Section 2.

When the accident occurred, between 4:30 and 5 p. m. on June 7, 1937, plaintiff was riding in the center of the rear seat of a 1936 De Soto sedan, which was proceeding in a southerly direction on Gaffey Street where it crosses 20th Street in the city of Los Angeles. Both streets were paved and dry. Extending across Gaffey Street at approximately the north and south curb lines of 20th Street were two drainage gutters or dips in the pavement, from 6 to 8 inches in depth. Plaintiff was injured when thrown against the top of the automobile as it crossed these gutters or dips. The intersection in question was constructed and accepted by the city in 1923. A councilman from this particular district testified that prior to this accident his attention had been called to various complaints about the intersection in question, and that he had reported the matter to the office of the city engineer.

Plaintiff became unconscious after he struck the top of the car as it went through the second dip. He testified that prior to the accident he did not see any sign of the words "Slow—Dip" on the pavement. Other passengers fixed the car's speed at between 15 and 22 miles an hour, and they also did not observe any warning signs painted on the surface of the street. The driver of the car testified that he was proceeding south on the right side of Gaffey Street, that as he approached the intersection he was not conversing with any one but was looking "straight ahead driving the car," and that he did not see any warning sign on the pavement or elsewhere as to the presence of dips in the intersection.

[1-4] Defendant city contends that the trial court committed prejudicial error in certain of the instructions which it gave to the jury. In this connection it should be remembered that the charge to the jury must be read in its entirety, each instruction being considered in connection with the others. If they harmonize as a whole and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, or because a separate instruction does not contain all of the elements which are to be gathered from the instructions as a whole. Douglas v. Southern Pacific Co., 203 Cal. 390, 396, 264 P. 237; De La Torre v. Johnson, 203 Cal. 374, 377, 264 P. 485. An examination of the charge given here does not reveal any prejudicial error requiring a reversal of the judgment. Some fifty-one instructions were given at the close of the trial, only two of which are singled out by the city for attack. Instruction No. 14 dealt in part with the negligence of the driver of the car, who is not a party to this action, and it reads as follows: "It was the duty of the defendant to exercise reasonable care and caution in locating its warning signs so as to give reasonable warning to the public regarding a condition existing in its streets. If the warning in this case was so located that it was not readily discernible, or it was so distantly located that its relation to a condition away from it was misleading or that it called attention to only one dip whereas there were two dips, or that said warning was so obliterated by wear and other conditions that it could not be readily seen, or if seen, it was misleading to a person of ordinary prudence regarding a condition some distance ahead so that such person would not know and fully comprehend its meaning, then the court instructs you to find that Albert Small was not guilty of

negligence." This instruction was erroneous because there are many other factors which the jury might have taken into consideration in determining whether or not the driver of the car was negligent. Defendant urges that this constitutes prejudicial error because its defense is based upon the theory that the negligence of the driver of the car, Albert Small, was the sole proximate cause of plaintiff's injuries.

Many other instructions were given, however, which clearly and correctly stated the rights and duties of both the driver of the car and the city. When the charge is read as a whole (and the jury was told that it should be so considered), it is apparent that the jury was properly instructed that its province was to determine from all the evidence whether the negligence of both the driver and the city contributed to the accident or whether the negligence of either was the sole proximate cause thereof. Assuming that the driver of the car was negligent, the defendant city could not escape liability if the jury found, as it did in this case, that defendant was negligent and that this negligence was a proximate cause of plaintiff's injuries. Under these circumstances, the error in the present instruction cannot be held prejudicial.

[5] Nor do we think Instruction No. 30 was prejudicial, as urged by the city, because it assertedly failed to include all elements essential to its liability under the act. The instruction charged, among other things, that the jury must find "that the defendant city of Los Angeles violated the provisions of the 1923 Public Liability Act" which act in its entirety was read to the jury in the next succeeding instruction. Under the circumstances, it cannot be said that the trial court failed to include the element of necessary knowledge on the part of the city of the dangerous character of the condition which caused the injury, or any other essential element, since the act, which was read to the jury, specifically required such knowledge and stated all other elements indispensable to municipal liability.

[6, 7] It is also contended that the city was prejudiced by so-called "pre-trial instructions" given by the court at the commencement of the trial. In response to a suggestion by counsel for plaintiff, the court stated that because of certain unusual features connected with the case, it felt that "clarification of the law in advance of hearing the evidence would be helpful to the jury." The city now contends that it was not proper for the court to instruct the jury on law prior to the trial of the case. In view of the fact that counsel for the city stated "the city * * * has no objection to your honor stating at the present time the law as to the case to be applied by the jury," the city is not now in position to challenge the propriety of giving such instructions. Nor do we find any error in the substance of these instructions. The court stated in general terms certain principles of law for the guidance of the jury, illustrating such principles with hypothetical examples, and inviting counsel to challenge any such examples if they were in disagreement therewith. It was pointed out that if negligence of the city was not established and the negligence of the driver of the car was shown to be the sole proximate cause of the accident "then the city is not responsible." The court further stated that "The city is liable where it violates the provisions of the 1923 Public Liability Act * * * in other words, in order to prove negligence as against the City you have got to prove everything which the Act says must be shown * * *." Other details of this preliminary statement to the jury need not be mentioned. Considered with the great number of detailed instructions given at the close of the case, it served only to guide the jury in the proper discharge of its functions as trier of the facts.

[8, 9] Defendant also contends that the trial court erred in denying its motion for a nonsuit and its motion for a directed verdict. These motions were predicated upon the theory that the sole proximate cause of the plaintiff's injuries was the negligence of the driver of the car. Liability may be imposed upon a defendant where his negligence is one of several contributing factors, each of which is a proximate cause of the injury. See Condon v. Ansaldi, 203 Cal. 180, 183, 263 P. 198; Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 392, 212 P. 913; see, also, 19 Cal.Jur. 758. The jury found not only that the defendant city was negligent but that its negligence was a proximate cause of plaintiff's injury. Since there was ample evidence to support such a determination, the court did not err

in denying the motions for a directed verdict and for a nonsuit.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 622

ALTRAMANO et al. v. SWAN et al.

L. A. 17819.

Supreme Court of California.

July 30, 1942.

1. Trusts 🔑371(2)

Allegations that transfers from husband to his wife and daughter were made in trust, that wife and daughter held property in trust for husband, and that the actual equitable and beneficial ownership of the property was in husband, sufficiently pleaded an express trust for husband's benefit.

2. Trusts 🔑371(2)

Under modern rules of pleading, general allegations of ownership are sufficient in pleading existence of a trust.

3. Trusts 🔑81(2)

Although ordinarily a resulting trust arises in favor of person paying purchase price of property transferred to another, a resulting trust does not arise upon the transfer of property from husband to wife without consideration.

4. Trusts 🔑371(2)

To state a cause of action attacking a transfer made by a husband to his wife on theory of a resulting trust, one must allege either that husband intended to create a trust or that he intended that wife should not have the beneficial interest in the property.

5. Trusts 🔑89(1)

In judgment creditors' action to subject to payment of judgment an automobile belonging to judgment debtor's wife and postal certificates belonging to debtor's daughter, on theory that debtor transferred the property to wife and daughter in trust for his benefit, evidence that some of debtor's salary was deposited in savings account of wife who possessed separate property, that husband signed conditional sales contract on purchase of automobile, and that wife's payments thereon were credited to husband by assignee of contract, was insufficient to establish transfers of property in trust.

6. Husband and wife 🔑268(1)

Upon proper pleadings and evidence, a creditor may reach community property, with exception of wife's earnings, to satisfy husband's debts.

7. Appeal and error 🔑171(1)

Where judgment creditors' suit was based upon theory that debtor had transferred property to his wife and daughter in trust for his benefit, reviewing court could not uphold judgment in favor of judgment creditors upon theory that it subjected community property to payment of the judgment, since that would have allowed a recovery upon a cause of action not pleaded.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Tony Altramano and others, as judgment creditors, against W. W. Swan, Lillian J. Swan, and Juanita Swan Foreman, to impress the lien of a judgment on certain property as belonging to W. W. Swan, the judgment debtor. Judgment for the plaintiffs and the last two named defendants appeal.

Judgment reversed.

For prior opinion, see 119 P.2d 401.

James B. Fredericks, of Los Angeles, for appellants.

Frederick M. Kraft, of Los Angeles, for respondents.

EDMONDS, Justice.

The appellants, Lillian J. Swan and Juanita Swan Foreman, her daughter, were sued by the judgment creditors of W. W. Swan in an action to subject an Oldsmobile automobile and certain Postal Certificates to the payment of the judgment.

The complaint contains five counts. In the first three of them, the respondents assert that W. W. Swan fraudulently transferred property owned by him to Lillian J. Swan, his wife, and Juanita Swan Foreman, his daughter. In the fourth count, the judgment creditors claim that W. W. Swan transferred the property in controversy to his wife and daughter in trust for his benefit, and that he is the "actual, equitable and beneficial" owner of them. The fifth count claims the right to relief upon a different theory. In making the transfers to his wife and daughter, say the respondents, Swan received no consideration, "and by reason thereof a constructive trust has been created and the actual, equitable and beneficial ownership of said properties is in W. W. Swan."

By way of answer, the appellants deny that W. W. Swan ever owned any interest in the automobile or the Postal Savings Certificates and they assert that they own all the property which is mentioned in the complaint.

W. W. Swan and Lillian J. Swan married in 1909 and have lived together since that time. In 1938, he executed a contract guaranteeing the prize money in a rodeo contest. The judgment against him was rendered the following year in an action upon this contract.

According to the testimony of Swan, he has been steadily employed since 1924 as an investigator. In that year he received a reward of $6,250 and made a gift of the entire amount to his wife. Since his marriage, and particularly in the years from 1936 to 1940, he has given her most of his earnings "to maintain her home, raise her children up, pay her bills, doctor bills, and a lot of other things." At the time he signed the contract upon which the respondents recovered judgment, he had no debts.

In 1936 Mrs. Swan opened a savings account in a Los Angeles bank. Other deposits were subsequently made to her credit and in April, 1940, she withdrew the balance of $2,500 and gave this amount to her daughter. Her explanation of the gift was that she has never made a will, and she gave her daughter the money "to secure her".

The daughter corroborated her mother's testimony concerning the money given to her and said that she purchased Postal Savings Certificates with it. These certificates she placed in Mrs. Swan's safety deposit box.

In addition to the testimony of these witnesses, who were called under the provisions of section 2055 of the Code of Civil Procedure, other evidence was offered in support of the allegations of the complaint. According to the records of the bank, the savings account was opened with the deposit of a check for $500, drawn on another account of Mrs. Swan in the same bank, and $100 in currency. From April, 1936, to February of the following year, $648.50 from the salary checks of Mr. Swan was deposited in it.

The automobile, it appears, was purchased by Mrs. Swan in 1937 upon a conditional sale contract. A representative of the corporation from which it was purchased testified that his company required Mr. Swan, who had an income, to sign the contract although Mrs. Swan signed the purchase order and the car was licensed in her name. An employee of the finance company to which the contract was assigned testified that the bookkeeping code indicated all payments upon it were made by W. W. Swan. On cross-examination, however, he admitted that he had never seen W. W. Swan in the office and "we don't record any identification" of the person who makes a payment on a contract but only the name of the person for whose benefit the payment is made.

Following the denial of the appellants' motion for a nonsuit, they offered evidence tending to show the source of the money which was deposited in the bank account. Mrs. Swan testified that, in 1920, she sold a house at a profit of $2,000. The money to purchase this house and an additional $4,000 was given to her by her brother. She also received $6,250 as a gift from her husband. During these years she often kept money in two or three banks and also, since the time of the bank failures in 1929, in a safety deposit box. She explained that about three days before she opened the savings account in question, she loaned her sister $2,500, and many of the deposits shown to have been made in the account were of money sent by her sister in partial payment of the loan.

Mrs. Swan said that her husband turned over his pay check, averaging $160 per month, to her. That amount was not always sufficient to meet their household expenses, which she always paid in cash. If any of his checks were deposited in the savings account, either she had paid household expenses of an equivalent amount from her separate funds, or his check was used by her to replace money sent to her by her sister, and which had been used to pay household bills. No one but herself had any right to withdraw money from any of her bank accounts.

Concerning the automobile, she said that in 1931 she bought an Auburn which was registered in her own name. In 1937, she bought the Oldsmobile, turning in the Auburn and paying $500 in cash which she took from her safety deposit box. The balance of the purchase price was represented by the conditional sale contract which has been mentioned. Payments on this contract were made by her, either in currency or cashier's checks, with money she kept in her safety deposit box. According to her testimony, no one other than herself has any interest in the automobile.

W. W. Swan testified that he signed the contract at the request of the dealer but he made no payments upon it. He did not know where his wife's bank accounts were carried and he never attempted to exercise any control over them. He knew she had two safety deposit boxes, but he never put anything in either of them, nor had he given her anything to put into them for him; at no time had he given her anything to hold in trust for him. Mrs. Swan does not own or control any property to which he has any legal or equitable title, and he has never claimed any right in property held by her.

At the conclusion of the taking of evidence, the respondents abandoned the first three counts of their complaint, expressly admitting a failure to prove any facts establishing a fraudulent conveyance. But the court found, upon the other counts of the complaint, that Mr. Swan transferred the bank account and automobile to his wife and daughter without consideration and that he acquired these properties in their names. Additional findings are that the transfers involved no change of possession and that the properties have remained in the actual possession and control of W. W. Swan; that the transfers of the bank account and automobile by Mr. Swan to his wife and daughter were made in trust; that the appellants now hold this property in trust, the actual equitable and beneficial ownership being in him; that Mrs. Swan did not acquire the money in the bank account as her sole and separate property; that Mr. Swan contributed unstated sums of money to that account; and that Juanita Swan Foreman did not acquire the $2,500 as a gift.

Upon these findings the court rendered judgment that Mr. Swan is the owner of the Postal Savings Certificates and a 75 per cent interest in the automobile, the respondents being entitled to a lien upon this property for the amount of the judgment.

Attacking this determination, the allegations in count four, say the appellants, that the transfers from W. W. Swan to them "were made in trust" is a mere conclusion of law stating no cause of action. For the same reason they challenge the assertions in the fifth count that no consideration for the transfers passed between W. W. Swan and the appellants and "by reason thereof a constructive trust has been created." And they argue that if this count may be said to allege facts, rather than conclusions, the facts do not state a cause of action, for a married man's transfer of property to his wife or daughter without consideration does not, in itself, give rise to a constructive trust. Finally, the appellants claim, there is no evidence to support the findings of the trial court that any of Mr. Swan's money was deposited in the bank or used to purchase the automobile or that he had any interest in either of them.

The general averment that the legal ownership of the property is in the appellants, and the equitable ownership in W. W. Swan, the respondents maintain, is an allegation of ultimate fact sufficient to state a cause of action in their behalf. They further urge that where title to property is taken in the name of one person and the consideration is paid by another, the one acquiring title holds the same in trust for the person paying the consideration. In any event, the respondents contend, even though a trust may not have been established by the evidence, yet the trial court had the right to rely upon the presumption that all property acquired during the married life of the parties is community property and to disbelieve the testimony offered in behalf of the appellants as to the character of the property. They argue that since some of the money represented by W. W. Swan's salary checks was deposited in the bank account, there was a commingling of funds which justified the trial court in treating all the property as belonging to the community.

In reply, the appellants assert that any discussion of community property law is immaterial, as the complaint does not charge that either the automobile or the money with which the Postal Savings Certificates were purchased was community property, and the court did not find for the respondents upon that ground. But if the respondents now adopt that theory, say the appellants, they are entitled to the benefit of the statutory provision that property acquired by a married woman by an instrument in writing is presumed to be her separate property. Civ.Code, § 164. They also rely upon section 15a of the Bank Act as establishing a presumption that the bank account was Mrs. Swan's separate property. Stats.1909, p. 87, as amended by Stats. 1925, p. 512, Deering's Gen.Laws, 1937, Act 652.

[1, 2] Considering first the contentions of the appellants relative to the sufficiency of the complaint, the allegation that the transfers from W. W. Swan to his wife and daughter "were made in trust," they now hold the property "in trust" for him and that the "actual, equitable and beneficial ownership" of the property is in him sufficiently pleads an express trust for his benefit. Knapp v. Knapp, 15 Cal.2d 237, 100 P.2d 759. Under modern rules of pleading, general allegations of ownership are sufficient. South San Bernardino, etc., Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 P. 699; Wendling, etc., Co. v. Glenwood, etc., Co., 153 Cal. 411, 95 P. 1029.

[3, 4] But the fifth count falls far short of stating a cause of action. A constructive trust does not arise upon the transfer of property from a husband to a wife without consideration. Under section 440 of the Restatement of the Law of Trusts, "Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase price is paid, except as stated in sections 441, 442, and 444." Section 442 reads: "Where a transfer of property is made to one person and the purchase price is paid by another and the transferee is a wife, child or other natural object of bounty of the person by whom the purchase price is paid, a resulting trust does not arise unless the latter manifests an intention that the transferee should not have the beneficial interest in the property." "The fact that the transferee is a wife, child or other natural object of bounty of the payor is more than merely a circumstance tending to rebut the inference of a resulting trust. It is of itself a circumstance sufficient to raise an inference that a gift was intended, and the burden is upon the payor seeking to enforce a resulting trust to prove that he did not intend to make a gift to the transferee." (Comment b.) California cases supporting this rule include Quinn v. Reilly, 198 Cal. 465, 245 P. 1091; Hitchcock v. Rooney, 171 Cal. 285, 152 P. 913; Lezinsky v. Mason Malt Whiskey Distilling Co., 185 Cal. 240, 196 P. 884; Hamilton v. Hubbard, 134 Cal. 603, 65 P. 321, 66 P. 860; Rhea v. Thomson, 115 Cal.App. 466, 1 P.2d 1091; Daniel v. Sisnero, 109 Cal.App. 8, 292 P. 518; Rossiter v. Schultz, 43 Cal.App. 716, 185 P. 997. To state a cause of action attacking a transfer made by a husband to his wife upon the theory of a resulting trust, one must allege either that he intended to create a trust or that he intended that the wife should not have the beneficial interest in the property. Quinn v. Reilly, supra.

[5] The only evidence tending to prove the allegations of the fourth cause of action is that (1) $648.50 from the salary checks of W. W. Swan was deposited in the savings account of Mrs. Swan, and (2) the conditional sales contract evidencing the agreement to pay the $400 balance on the Oldsmobile was signed by him; and (3) the payments on the conditional sales contract were credited to W. W. Swan by the assignee of the contract. But disregarding the testimony of Mrs. Swan and her witnesses, from which the court might well have concluded that the money in the bank account and the automobile were her separate property, the evidence presented by the respondents does not prove that Mr. Swan owned property which he transferred to his wife and daughter without consideration.

In the first place, he made no transfer to his daughter. But of more importance is the fact that the evidence does not even suggest that he ever had any separate property. On the other hand, the respondents concede that, in 1924, he gave his wife the $6,250 which he received as a reward, and they do not attack her testimony concerning the gifts of money from her brother. So, unquestionably, she acquired a substantial amount of separate property. If some of Mr. Swan's earnings were deposited in the bank account or paid on the automobile, there was no transfer of his money or property; at most, there was a commingling of a small amount of community property with the wife's separate property. Under such circumstances, the court might have found that $648.50 and an undivided interest in the automobile are the community property of Mr. and Mrs. Swan. But there is no evidence whatever to support the findings of transfers by Mr. Swan of his property to his wife in trust for his benefit.

[6, 7] Upon proper pleadings and evidence a creditor may reach the community property, with the exception of the wife's earnings, to satisfy the debts of the husband. Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L.R.A. 497, 58 Am.St.Rep. 170; Van Maren v. Johnson, 15 Cal. 308; Lesser v. Pomin, 3 Cal.App.2d 117, 39 P.2d 451; Farmers', etc., Bank v. Drew, 48 Cal. App. 442, 192 P. 105; Civ.Code, § 168. But to uphold the judgment upon the theory that it subjects community property to the payment of the judgment would allow a recovery upon a cause of action not pleaded by the creditors and against which the appellants have not had an opportunity to defend.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 898

Tony ALTRAMANO et al., Respondents, v. RODEO DEL LEGIONARRO, Inc. (a Corporation) et al., Defendants; Lillian J. Swan et al., Appellants.

L. A. 17889.

Supreme Court of California.

July 30, 1942.

In Bank.

Appeal from an order of the Superior Court of Los Angeles County appointing a receiver; Goodwin J. Knight, Judge.

On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 13327 (— Cal.App. 2d —, 119 P.2d 404) reversing order of the Superior Court. Order reversed.

James B. Fredericks, of Los Angeles, for appellants.

Frederick M. Kraft, of Los Angeles, for respondents.

PER CURIAM.

By a stipulation of the parties, the decision upon the appeal from the judgment rendered in Altramano v. Swan, 20 Cal.2d 622, 128 P.2d 353, is determinative of the present appeal, which was taken from an order appointing a receiver made in the same case. As that judgment has been reversed, in accordance with the stipulation the order is reversed.

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20 Cal.2d 697

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 18340.

Supreme Court of California.

Aug. 11, 1942.

Rehearing Denied Sept. 10, 1942.

1. Judgment 🔑203

There can be but one judgment in an action no matter how many counts the complaint contains.

2. Appeal and error 🔑1201(1)

Where a judgment is reversed, on retrial the parties have the same right to apply for permission to amend as though the judgment had never been entered and reversed.

3. Appeal and error 🔑1201(1)

After reversal of judgment of dismissal, limited only by any direction contained in the order of reversal, the trial court has the same power over the complaint as if no judgment of dismissal had been entered.

4. Pleading 🔑218(5)

Where trial court enters an order sustaining a demurrer, the trial court, at any time prior to final judgment, may reconsider its ruling on the demurrer and it may do so even though no request to amend has been made.

5. Appeal and error 🔑1195(1), 1201(1)

Determination of appellate court in reversing judgment of dismissal became the "law of the case" and the trial court was bound thereby, but subject only to that limitation, the trial court had complete power to allow amendment to pleadings or reconsider and change its ruling on demurrer at any time before entry of judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

6. Appeal and error ⚷1201(6)

Where appellate court held that first and second counts of complaint did not state a cause of action, and that trial court did not commit error in refusing to grant leave to plaintiff to amend those counts, but that court erred in sustaining demurrer to third and fourth counts and reversed judgment of dismissal with leave to file an amended complaint, the trial court acted within its jurisdiction in permitting amendment to first and second counts supplying the elements for lack of which such counts had been held to be defective by the appellate court.

7. Appeal and error ⚷1216

Where appellate court held that first and second counts of complaint did not state a cause of action and that trial court did not commit error in refusing to grant leave to plaintiff to amend those counts, but that the third and fourth counts stated a good cause of action and reversed judgment of dismissal with leave to amend, even if trial court exceeded its jurisdiction in permitting amendment to the first and second counts, certiorari would not lie to annul its order permitting amendment.

8. Appeal and error ⚷1216

An order of trial court granting leave to amend while not directly appealable is subject to review on appeal from final judgment, and therefore cannot be reviewed in certiorari proceeding.

9. Certiorari ⚷5(1)

Certiorari will not lie if the effect of the order sought to be annulled can be reviewed and annulled on an appeal from final judgment, even though the order itself is not appealable.

◆

In Bank.

Certiorari proceeding by Bank of America National Trust & Savings Association against the Superior Court of Los Angeles County to review an order permitting an amendment of a complaint.

Order affirmed.

For prior opinions of the District Court of Appeal, see 117 P.2d 733, 122 P.2d 316.

Edmund Nelson, G. L. Berrey, Freston & Files, and James A. McLaughlin, all of Los Angeles, and Louis Ferrari, of San Francisco, for petitioner.

Mitchell, Silberg, Roth & Knupp and Livingston & Livingston, all of Los Angeles, for respondent.

PETERS, Justice pro tem.

Petitioner, one of the defendants in an action pending in the Superior Court of Los Angeles County, seeks, by this proceeding in certiorari, to annul an order of the superior court permitting the plaintiffs in that action to amend the first two causes of action set forth in their complaint. The facts constituting the background of this proceeding are as follows:

In 1935, Aronson et al. filed an action against petitioner charging that in a series of transactions it had converted certain shares of stock belonging to plaintiffs. A general demurrer to the complaint was sustained without leave to amend, and a judgment of dismissal entered. This judgment was affirmed by this court in October of 1937. Aronson v. Bank of America, etc., Ass'n, 9 Cal.2d 640, 72 P.2d 548. In November of 1936, before the affirmance above referred to, the same plaintiffs instituted another action against the petitioner and others, based upon the same transactions, by the filing of a complaint containing four counts. The bank demurred to this complaint as a whole and as to each count, generally and specially. The trial court sustained the demurrer without leave to amend, and subsequently denied plaintiffs' motion for leave to amend. The demurrer was not sustained as to each count, but as to the complaint as a whole, the order reading that the demurrer of the bank "to amended complaint, sustained without leave to amend." Subsequently, a judgment of dismissal as to the bank was duly entered. Plaintiffs appealed from that judgment to the District Court of Appeal, and, in due course, in January of 1941, the appellate court rendered its decision (Aronson v. Bank of America, 42 Cal.App.2d 710 at page 721, 109 P.2d

1001, at page 1007) reversing the judgment, the order reading: "The judgment of dismissal is therefore reversed with directions to the trial court to grant appellants leave to file an amended complaint if they are so advised."

Upon the return of the cause to the trial court the plaintiffs moved for leave to file amendments to the first and second counts of their complaint. Over the objection of petitioner that the court had no jurisdiction, and that to grant such motion violated the law of the case as set forth in the appellate court opinion, the trial court granted the motion. Petitioner thereupon instituted the present proceeding in certiorari for the purpose of annulling the order granting leave to amend.

The basic question presented is, whether the trial court exceeded its jurisdiction in granting permission to plaintiffs to amend the complaint as to the first two counts. The answer to that question turns first, upon ascertaining just what the appellate court decided, and second, upon determining what legal effect the judgment of reversal had upon the power and jurisdiction of the trial court.

An examination of the appellate court decision discloses that the court held that the third and fourth counts set forth in the complaint stated a cause of action against the bank, but that counts one and two did not. In holding that the first two counts did not state a cause of action against the bank, the appellate court predicated its decision on the law stated by the Supreme Court in the prior appeal to the effect that an indispensable element of the cause of action was knowledge on the part of the bank as to what disposition the defaulting administrators intended to make of the converted stock, and the appellate court held that, since these two counts of the complaint (and the amendments contained in the request to amend) contained no such allegation, no cause of action was stated. Speaking of these two counts the appellate court stated (42 Cal.App.2d at page 716, 109 P.2d at page 1005):

"The important factor is knowledge on the part of the bank as to what disposition was to be made of the proceeds received on the transfer and whether any proceeds were to be forthcoming. As to this the complaint is silent and fails to show that the bank in question had any knowledge at the time of the transfers that the administrators intended to apply the stock or the proceeds of the transfer to their own use and benefit or to the benefit of any third party, or that, at the time, the bank was in possession of such facts as to amount to notice of any such plan or purpose.

"Since the transfers complained of in the first and second counts of appellants' complaint occurred before distribution of the estate was decreed and since appellants have failed to charge the predecessor bank with the requisite knowledge of a wrongful purpose on the part of the administrators, those two counts still fall within the rule laid down in Aronson v. Bank of America, supra, and for the reasons there given the said counts fail to state a cause of action against respondent bank."

The court then considered the third and fourth counts of the complaint, and held that those counts stated a good cause of action against the bank. It then stated (42 Cal.App.2d at page 721, 109 P.2d at page 1007):

"It should be mentioned in passing that the complaint is far from a model of pleading and is in no sense concise. It is clear, however, that no attempt has been made to set out more than one cause of action in each count.

"In view of the fact that the allegations of the first and second counts of the complaint reveal a situation wherein no cause of action would lie against respondent bank or its predecessor the trial court did not err in refusing to grant leave to plaintiffs to amend those counts, but for the reasons above given the court erred in sustaining the demurrer to the third and fourth counts and in dismissing the action."

The amendments allowed by the trial court to be filed to the first two counts incorporated the very allegations for lack of which these counts were held defective by the appellate court.

[1] It is the theory of petitioner that, after the reversal, the trial court had jurisdiction for the sole purpose, so far as permitting amendments to the pleadings was concerned, to allow the third and fourth counts to be amended, and was without jurisdiction to permit the first two counts to be amended. This contention is predicated on the arguments that petitioner demurred generally to each count

separately; that it was entitled to a separate ruling on each count; that the effect of sustaining the demurrer to a single count is the same whether the complaint contains one count or many counts; that the decision of the appellate court holding that the trial court had properly sustained the demurrer without leave to amend, so far as the first two counts are concerned, would have finally disposed of those counts had they been the only counts of the complaint; that the legal effect of the decision is not altered by the fact that the pleading contained additional counts held to be sufficient; that the appellate court order reversing the judgment of dismissal in legal effect amounted to an affirmance of the order sustaining the demurrer as to the first two counts, and a reversal of that order only as to the last two counts. These arguments are all predicated upon a fundamental fallacy. They assume that there can be a piecemeal disposition of the several counts of a complaint. They assume, when there is more than one count in a complaint, and a demurrer is interposed and sustained, and a judgment of dismissal entered, that there are as many separate judgments as there are counts in the complaint. That is not the law. There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains. (De Vally v. Kendall de Vally O. Co., Ltd., 220 Cal. 742, 32 P.2d 638; Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174; Potvin v. Pacific Greyhound Lines, Inc., 130 Cal.App. 510, 20 P.2d 129. In the De Vally case, supra, a demurrer was sustained and a judgment entered dismissing two counts of a four-count complaint. The court held that the judgment was premature, and dismissed the appeal from it, and stated (220 Cal. at page 745, 32 P.2d at page 639): "Although the matter is not mentioned by counsel for either side, it appears that the court should not have given a judgment herein until the final disposition of the entire cause. The law contemplates but one final judgment in a cause. As stated in the case of Nolan v. Smith, 137 Cal. 360, 361, 70 P. 166, quoting from Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. [557], 577, 33 P. 633: 'There can be but one final judgment in an action, and that is one which, in effect, ends the suit in the court in which it was entered, and finally determines the rights of the parties in relation to the matter in controversy.'" This language was approved in the Potvin case, supra, where the court said (130 Cal.App. at page 512, 20 P.2d at page 130): "Since a final judgment in an action contemplates a complete adjudication of the rights of the parties and a final determination of the matter in controversy, it is apparent that the so-called judgment rendered upon the sustaining of a demurrer to one cause of action of a complaint without leave to amend, leaving five other causes of action unimpaired presenting matters to be litigated during a trial of the issues of fact, cannot be regarded as a final determination and disposal of the cause."

[2-4] The only judgment here entered was a judgment of dismissal and that judgment was reversed. What was the legal effect of such reversal? It is well settled that when a judgment is reversed, on retrial the parties have the same right to apply for permission to amend as though the judgment had never been entered and reversed. Ellis v. Witmer, 148 Cal. 528, 83 P. 800; Armstrong v. Adams, 102 Cal. App. 677, 283 P. 871; First Nat. Bank v. Stansbury, 118 Cal.App. 80, 5 P.2d 13. In other words, after the judgment of reversal here, limited only by any direction contained in the order of reversal, the trial court had the same power over the complaint as if no judgment of dismissal had ever been entered. It is the same as if the trial court had entered an order sustaining the demurrer (no judgment of dismissal having been entered) and the plaintiff requested leave to amend. The law is well settled that in such a situation the trial court, at any time prior to final judgment, may reconsider its ruling on the demurrer, and this is so even though no request to amend has been made. See cases collected 21 Cal.Jur. p. 124, § 80; People v. Lucas, 78 Cal.App. 421, 248 P. 691; Frantz v. Mallen, 204 Cal. 159, 267 P. 314; Howe v. Board of Supervisors, 118 Cal.App. 306, 5 P.2d 28.

[5] Of course, what was said in the opinion of the appellate court in reversing the judgment became the law of the case, and the trial court was bound thereby. But, subject only to that limitation, the trial court had complete power to allow amendments to the pleading, or to reconsider and change its ruling on demurrer, at any time before entry of judgment.

Petitioner, in apparent recognition of these principles, urges that the appellate court ruled the first counts did not and could not be amended to state a cause of action, and that such ruling is binding as the law of the case. It urges that the court held that the first two counts were "incurably defective." The appellate court made no such ruling. As is clearly indicated from the quotations, supra, it held that the complaint before it, and the amendments then offered, so far as the first two counts were concerned, did not state a cause of action; that such counts, or the proposed amendments, were defective in that knowledge on the part of the bank was not alleged; that the demurrer was properly sustained to those two counts without leave to amend. The amendments permitted to be filed by the order here sought to be annulled supplied the very elements for lack of which the counts were held to be defective by the appellate court.

[6-9] It follows from what has been said that the trial court acted well within its jurisdiction in permitting the challenged amendments to be filed. Even were this not so, and had the trial court exceeded its jurisdiction in permitting the amendments to be filed, certiorari would not lie to annul its order. This is so because the order granting leave to amend, while not directly appealable, is subject to review on appeal from the final judgment. Collins v. Bridge Investment Co., 20 Cal.2d 52, 123 P.2d 436. Certiorari will not lie if the effect of the order sought to be annulled can be reviewed and nullified on an appeal from the final judgment, even though the order itself is not appealable. Hughson v. Superior Court, 120 Cal.App. 658, 8 P.2d 227; Booth v. Superior Court, 81 Cal.App. 709, 254 P. 617; Manoogian v. Superior Court, 48 Cal.App. 609, 192 P. 168; Postal, etc., Co. v. Superior Court, 22 Cal.App. 770, 136 P. 538; Bryant v. Superior Court, 16 Cal.App.2d 556, 61 P. 2d 483. The rule of these cases is sound, and is in no way qualified by Bottoms v. Superior Court, 82 Cal.App. 764, 256 P. 422, or Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001, relied upon by petitioner. In the Bottoms case a petition for hearing was denied, the order reciting that such denial was made "on the sole ground that the question * * * has become moot." 82 Cal.App. at page 778, 256 P. 422. In the Stanton case, supra, there was no proceeding by which the order could be reviewed on appeal. The decision was so explained in Ivory v. Superior Court, 12 Cal.2d 455, at page 460, 85 P.2d 894.

Petitioner argues that the rule is here inapplicable because a review and nullification of the order on appeal from the final judgment would not be a plain, speedy and adequate remedy. It is urged that unless certiorari is permitted it will allow the plaintiffs, as the unsuccessful party to the prior appeal so far as the first two counts are concerned, to return to the trial court, start in all over again, and compel petitioner, as the prevailing party as to those two counts, to submit to a trial and await the final outcome before obtaining redress for the unwarranted reopening of the litigation. If such action is here permitted, says the petitioner, every lawsuit could be perpetual. It is therefore argued that substantial justice requires that relief be afforded by certiorari.

This argument is unsound for several reasons. It is predicated upon an unsound interpretation of the appellate court opinion. Moreover, it would apply in some degree in every case where a trial court erroneously overruled a demurrer and compelled a defendant to proceed to trial. No one would contend that such order could be reviewed on certiorari. Moreover, the argument assumes that it is proper to dispose of some of the counts of the complaint by a final judgment, prior to a trial on the other counts. This would sanction more than one final judgment in the action. As has already been pointed out, there can be but one final judgment regardless of the number of counts in the complaint.

From what has been said, it follows that petitioner must fail in its attempt to annul the order here involved, first, because the trial court had jurisdiction to make the order, and second because, even if it exceeded its jurisdiction, certiorari does not lie to review an order of the nature here involved. For these reasons the order sought to be reviewed is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

54 Cal.App.2d 1

SEEBURG v. EL ROYALE CORPORATION.

Civ. 13352.

District Court of Appeal, Second Appellate District, Division 3, California.

Aug. 12, 1942.

1. Corporations 🔑442

An option to purchase apartment house from corporation was not void because consent of corporation's stockholders was not obtained, as required by statute for corporation to dispose of all or substantially all of its property. Civ.Code, § 343.

2. Vendor and purchaser 🔑18(4)

An option to purchase apartment house was not invalidated by restraining order and temporary injunction restraining optionor from selling such property until time after expiration of option.

3. Vendor and purchaser 🔑18

An "option" to purchase property is not a sale of property, but a sale of right to purchase it or a right acquired by contract to accept or reject a present offer within limited or reasonable time in future.

See Words and Phrases, Permanent Edition, for all other definitions of "Option".

4. Vendor and purchaser 🔑18(3)

On acceptance of option to purchase land by optionee, option becomes a sale contract binding on both parties, but new contract is not made.

5. Vendor and purchaser 🔑18

An option to purchase land vests in optionee right or privilege of acquiring interest in land and, when accepted, entitles him to call for specific performance by optionor.

6. Vendor and purchaser 🔑18(3)

The right of one having option to purchase land to acquire interest therein, when exercised, relates back to time of giving option, so as to cut off intervening rights acquired with knowledge of option.

7. Vendor and purchaser 🔑18(4)

Where one granted option to purchase apartment house did not give optionor written notice of optionee's election to exercise option, nor deposit agreed sum in escrow on account of purchase price, as required by option contract to entitle him to conveyance of property, he had no right to rescind contract and recover amount paid for option because of optionor's temporary inability to convey in consequence of temporary injunction restraining optionor from selling property until time after expiration of option.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Justus P. Seeburg against the El Royale Corporation to recover an amount paid by plaintiff for an option to purchase an apartment house. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

Grady & Hotchkiss, of Los Angeles, for appellant.

Martin Goldman and Aubrey Devine, both of Los Angeles, for respondent.

SHAW, Justice pro tem.

Plaintiff appeals from a judgment of nonsuit rendered against him. On the 27th day of March, 1940, the defendant, being then the owner of a certain apartment house, entered into an agreement with plaintiff whereby it granted to him the "sole and exclusive right and option to purchase" that apartment house, for a price and on terms and conditions therein set forth. Plaintiff paid defendant for this option the sum of $5,000, which was not to be a part of the price if the option should be exercised. The option ran to and including April 27, 1940, and in order to exercise it plaintiff was required to give defendant a written notice and deposit $25,000 in escrow on account of the price. Each party was to have thirty days after this was done "to do and perform each and every act on their respective parts to be performed to consummate said sale." On the 2d day of April, 1940, in an action commenced by one Keeler against defendant—to which plaintiff here was not a party—in the Superior Court of Los Angeles County, an order to show cause and temporary restraining order were made restraining the defendant "from selling or otherwise disposing of" the apartment house. This restraining order continued in force until, after a hearing on the order to show cause, a temporary injunction of the same purport was issued. This temporary injunction was effective until after the expiration of the above-mentioned period of plaintiff's option, and thereafter, on June 3, 1940, by stipulation of the parties to that action, a judgment was entered in favor of the defendant therein, by which the temporary injunction was dissolved. The plaintiff did not at any time do any of the acts required by the terms of the option for an exercise thereof. He was, however, financially able to do so, and was ready and willing to do so, had it not been for the restraining order and injunction. Before beginning this action he demanded of defendant the return of the sum of $5,000 which he paid for the option, but his demand was not complied with and he now sues to recover that sum.

[1] Plaintiff's action is brought on the theory that the option was or became nugatory, for various reasons, and hence the consideration for his payment of $5,000 failed, and that for that reason he is entitled to rescind and has rescinded the option agreement and may recover what he paid for it. Some claim was made in the injunction suit that the option was void because the consent of defendant's stockholders had not been obtained, as required by section 343 of the Civil Code, where a corporation undertakes to "sell, lease, convey, exchange, transfer or otherwise dispose of all or substantially all of its property and assets." This claim is repeated here by plaintiff. The facts necessary to support it are not alleged in the complaint nor do they otherwise appear in the record, except in a copy of the files in the injunction suit, which was admitted in evidence. Some, at least, of the facts necessary to show failure of the defendant corporation to comply with section 343 were pleaded by Keeler in his complaint in that action and admitted by defendant in its answer thereto. We doubt if this entitles us to consider this point. It was not pleaded as a basis of plaintiff's action, nor does it appear that the issue was tried by consent without a pleading, for the files of the injunction case were placed in evidence for quite a different purpose from that of showing the truth of facts alleged or admitted by the pleadings therein. But if the point is before us it is decided adversely to plaintiff in Bradford v. Sunset Land & Water Company, 1916, 30 Cal.App. 87, 157 P. 20. We must regard the option as entirely valid at the time it was made.

[2] Plaintiff's case, in all its other aspects, is founded on the assumption that the option was in some fashion invalidated by the restraining order and temporary injunction, so that it was of no further force after the order was made. No authority is cited for this assumption, and we think it is not tenable under the circumstances of this case.

[3-6] An option is not a sale of property, but a sale of a right to purchase. Hicks v. Christeson, 1917, 174 Cal. 712, 716, 164 P. 395. "Or, stated in another form, it is a right 'acquired by contract to accept or reject a present offer, within a limited or reasonable time in the future.'" Menzel v. Primm, 1907, 6 Cal.App. 204, 209, 91 P. 754, 756. On acceptance the option becomes a contract of sale binding on both parties. 66 Corpus Juris 505; Smith v. Post, 1914, 167 Cal. 69, 74, 138 P. 705; Rheingans v. Smith, 1911, 161 Cal. 362, 367, 119 P. 494, Ann.Cas.1913B, 1140; Cushing v. Levi, 1931, 117 Cal.App. 94, 104, 3 P.2d 958; Menzel v. Primm, supra. This does not mean, however, that a new contract is in fact made by and at the time of the acceptance. The contract has already been made, as far as the optioner is concerned, but it is subject to conditions which are removed by the acceptance. Were this not so, an option could never be enforced where the optionor died during the period allowed for exercise of the option and before its actual exercise, for dead men can make no contracts. And yet it is held that an option for which a consideration has been given can be enforced in such a case. Mueller v. Nortmann, 1903, 116 Wis. 468, 93 N.W. 538, 96 Am.St.Rep. 997; Rockland-Rockport Lime Co. v. Leary, 1911, 203 N.Y. 469, 97 N.E. 43, L.R.A.1916F, 352, Ann. Cas.1913B, 62. As stated in Smith v. Bangham, 1909, 156 Cal. 359, 365, 104 P. 689, 692, 28 L.R.A.,N.S., 522, "* * * the option vests in the grantee the right or privilege of acquiring an interest in the land, and, when accepted, entitles him to call for specific performance. [citing cases.] Such right, when exercised, must necessarily relate back to the time of giving the option (People's St. Ry. Co. v. Spencer, supra [156 Pa. 85, 27 A. 113, 36 Am.St. Rep. 22]), so as to cut off intervening rights acquired with knowledge of the existence of the option."

This is a proper case for the application of the rule just quoted. The plaintiff here was not a party to the injunction suit and his rights could not be affected by any order or injunction made therein. He had a right existing when the injunction suit was filed, which, when exercised, would ripen into a contract of sale. The plaintiff in that action, Keeler, had notice of such right. If plaintiff had exercised his right after the injunction, the contract so arising would have related back to the time of giving the option, and hence would not have been void by reason of the restraining order or the injunction, assuming, but not deciding, that a contract made in violation of such an order or of an injunction is void. If the injunction should be held to prevent the execution of a deed by defendant in performance of the contract, that would not affect the option, as such, and the parties would be in the same situation as in any other case where one party to a contract is prevented, by causes beyond his control, from performing it.

[7] However, even if plaintiff had, before the injunction suit, made a binding contract of purchase and sale, he could not now complain of defendant's inability to make a conveyance without tendering full performance on his part. See Lloyd v. Locke-Paddon Land Company, 1935, 5 Cal. App.2d 211, 42 P.2d 367; also Dennis v. Strassburger, 1891, 89 Cal. 583, 26 P. 1070, where it was held that a vendee of real property who had paid part of the price could not rescind the contract and recover what he had paid, by reason of the vendor's inability to convey a clear title, without tendering the balance of the purchase price and demanding his deed. In Laffey v. Kaufman, 1901, 134 Cal. 391, 66 P. 471, 86 Am.St.Rep. 283, and Walbridge v. Richards, 1931, 212 Cal. 408, 414, 298 P. 971, it was held that even where the contract was oral, but it did not appear that the vendor was objecting to it on that ground, the vendee could not rescind and recover what he had paid without showing that he had paid, or offered to pay, the full consideration and had been met with a refusal or inability to convey.

These principles were applied to the case of an option in Bradford v. Sunset Land, etc., Company, supra, 1916, 30 Cal.App. 87, 90, 157 P. 20, 21, where defendant corporation had executed to plaintiff a document which the court characterized as "an option to purchase the property therein described." It provided for payment of the price by installments on specified dates, the only acts necessary to an exercise of the option by plaintiff being the making of the payments as specified, but contained no agreement by plaintiff to make them. Plaintiff paid part of the price and then sued to recover it, claiming that the option agreement was void because it had not been approved by two-thirds of the stockholders of defendant corporation, as required in certain cases by section 361a of the Civil Code then in force. The court held that section 361a, which by its terms was limited to a sale, transfer or conveyance of the property, did not apply to plaintiff's "mere option to purchase." With this proposition established, it is obvious, although the court did not expressly so declare, that noncompliance with the code section cited would not render the option void, but would merely prevent the defendant there from making a valid conveyance when called upon to do so. The court there said, "Until plaintiff performed or offered to perform the covenants imposed upon him as a precedent condition to the conveyance of the property by defendant, he was in no position to complain of the want of the action on the part of stockholders in giving assent to a sale and conveyance as to which, under the terms of the contract, he had lost all right. * * * [T]he contract * * * was a mere option to purchase, the exercise of which on the part of plaintiff and paying or offering to pay the purchase price in the manner therein specified was necessary in order to place him in a position where he could in any event complain of the failure of stockholders to signify assent." Applying this rule here, it appears that plaintiff has done none of the acts which, by the option contract, were required of him to entitle him to a conveyance of the land by defendant. He has therefore shown no right to rescind on account of defendant's temporary inability to convey.

Plaintiff cites Burks v. Davies, 1890, 85 Cal. 110, 24 P. 613, 614, 20 Am.St.Rep. 213, as opposed to the conclusion just stated. There the plaintiff had paid to the defendant $1,000 under an option to buy land, which sum, had the purchase been completed, would have been a part of the price. It turned out that defendant did not own all the land covered by the option, that plaintiff did not know this fact but defendant did, and that defendant also knew that plaintiff was ignorant of it but failed to inform him. On learning of this defect in defendant's title plaintiff rescinded and was allowed to recover the money he had paid, although he had never tendered further performance on his part. The case is distinguishable on this ground: there the optionor was required to make conveyance at any time within the option period of thirty days, on acceptance of the option, and was therefore, as the court held, "bound to be prepared at all times within the thirty days to convey a good title." That this is the real ground of the decision is declared in Backman v. Park, 1910, 157 Cal. 607, 612, 613, 108 P. 686, 137 Am.St. Rep. 153. Here the plaintiff's option allowed the defendant thirty days after acceptance to comply with the terms of the option; and while the injunction was not actually dissolved until after the option period and also this thirty days had passed, there is nothing to show that this could not have been accomplished sooner, or that, if plaintiff had accepted the option, defendant could not have complied with the agreement within the time limit. Moreover, the remarks of the court in Burks v. Davies, supra, on which plaintiff mainly relies seem inconsistent with this statement of the court in Joyce v. Shafer, 1893, 97 Cal. 335, 338, 32 P. 320, which was quoted and approved in Hanson v. Fox, 1909, 155 Cal. 106, 108, 99 P. 489, 490, 20 L.R.A.,N.S., 338, 132 Am.St.Rep. 72: "One may sell land which he does not own, and yet be able when the time of performance arrives to furnish a good title. In the meantime the purchaser would not be at liberty to disaffirm the contract on the ground that then the vendor was unable to make a good title. It would be incumbent on him to offer to perform, or to show that at the time of performance the vendor could not furnish the title." Burks v. Davies, supra, is also out of line with the following statement of the court in Brimmer v. Salisbury, 1914, 167 Cal. 522, 530, 140 P. 30, 34, made after a review of many decisions on the subject: "This completes the review of our decisions, and, to summarize, they hold, first, that a contract to sell a piece of land by one without title will not be held fraudulent and void by virtue of the mere fact that the vendor had not such title. Deceit, concealment, or false representations upon which a vendee was entitled to rely will of course avoid such a contract * * *." The last sentence just quoted suggests a ground on which the decision in Burks v. Davies, supra, might well have rested, that is, concealment by defendant. This is mentioned in the opinion, but not much stress is laid on it. We do not regard this case as controlling authority here.

The judgment is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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53 Cal.App.2d 786

KAINS v. JONES et al.

Civ. 2853.

District Court of Appeal, Fourth District, California.

Aug. 4, 1942.

1. Fraudulent conveyances 🔑297

Evidence that when transfer was made transferor had no reason to anticipate liability resulting in judgment upon which plaintiff relied and had ample funds and property to pay all liabilities which could then be reasonably contemplated sustained judgment denying relief on ground that transferor was not insolvent at time of transfer and did not thereby render herself insolvent.

2. Fraudulent conveyances 🔑312(3)

Where party to whom personalty was transferred more than 2½ years before action was filed to set aside prior transfer of the personalty to his transferor as having been made in contemplation of insolvency and in fraud of creditors was not made a party to such action, judgment creditor maintaining such action could not be given a lien upon the transferred property to the extent necessary to cover his judgment.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by M. W. Kains against Abbie J. Jones and others to set aside the transfer of certain personal property as having been made in contemplation of insolvency and in fraud of creditors. From a judgment in favor of defendants, plaintiff appeals.

Judgment affirmed.

Aubrey Devine, of Los Angeles, for appellant.

Dempster McKee, of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to set aside the transfer of certain personal property as having been made in contemplation of insolvency and in fraud of creditors.

The background of the action may be briefly stated as follows: In 1910, a predecessor of the plaintiff leased certain real property in San Diego to one Fulkerson for a term expiring in 1936. A theater was conducted on the premises and after three assignments the lessee's interest came into the hands of G. A. and K. G. Bush. In December, 1930, they assigned the lease to Alice N. Bush as security for a debt they owed her. They were, respectively, the husband and father-in-law of Alice N. Bush who is the mother of Abbie J. Jones, the other defendant in this action.

On October 20, 1934, Alice N. Bush reassigned the lease to G. A. and K. G. Bush. All rentals due under the lease up to that time had been paid in full and a theater enterprise which for many years had been conducted on the premises by G. A. and K. G. Bush was still yielding a very substantial profit. Later, the business became unprofitable and in June, 1936, the landlord recovered a judgment for $5,960 against Fulkerson, G. A. Bush, K. G. Bush and Alice N. Bush, that judgment covering two months' rent and some $4,000 for unpaid taxes.

In the meantime, and in November, 1934, Alice N. Bush transferred without consideration the personal property here in question to Abbie Jean Jones. Thereafter, and in March, 1937, Abbie Jean Jones transferred this personal property to one G. C. Parker.

This action, to set aside the transfer of November, 1934, from Alice N. Bush to Abbie Jean Jones, was filed on October 16, 1939. The court found in all respects in favor of the defendants with the exception that it found that the action was not barred by the statute of limitations. Among other things, the court found that at the time of the transfer Alice N. Bush was not indebted to the landlord under the lease; that she was not then insolvent and did not thereby render herself insolvent; that the transfer was not made in contemplation of insolvency; and that at the time of the transfer she had funds and property sufficient to pay all of the outstanding liabilities which she could with reason contemplate. The plaintiff has appealed from the judgment which followed.

One of appellant's main contentions is that the finding to the effect that Alice N. Bush was not indebted under this lease is without support in the evidence and in the law. It is contended that she became liable for future rentals under the lease by accepting a transfer thereof although she did not sign the assignment, and that the judgment obtained against her in the prior action is conclusive in this action although Abbie Jean Jones, the principal defendant here, was not a party to that suit. While a number of interesting legal points are raised in this connection it is unnecessary to consider or decide them because of other findings which are supported by the evidence. Assuming, but not holding, that appellant's contentions in this regard could be upheld the finding here attacked becomes immaterial in view of the other facts found.

[1] The finding that Mrs. Bush did not make the transfer in contemplation of insolvency is supported by the evidence that the payments under the lease were not then in default, that the business being conducted on the leased premises was then yielding the same substantial profit it had long been paying, that the subsequent breach of the lease was caused by events which occurred many months after the transfer in question, and that she then had ample funds and property to pay all of her liabilities which could then be reasonably contemplated. With respect to the latter finding, while the appellant relies upon certain conflicting evidence, competent evidence is in the record which, if believed, discloses that at the time of making these transfers Alice N. Bush possessed other real and personal property of the value of $11,500, after making due allowance for an exemption of $5,000 on account of a homestead filed by her upon one of the real properties.

The evidence supports the court's findings with respect to insolvency and those findings alone are sufficient to support the judgment.

[2] A further consideration is that the evidence shows without conflict that the property, the transfer of which was here sought to be set aside, had been transferred to G. C. Parker more than 2½ years before this action was filed. Parker was not made a party to this action and it is difficult to see how, in his absence, the appellant could have been given a lien upon the transferred property to the extent necessary to cover his prior judgment, as prayed for in the complaint. See Cook v. Huntley, 44 Cal.App.2d 635, 112 P.2d 889.

The judgment is affirmed.

GRIFFIN, J., concurred.

53 Cal.App.2d 726

EUSTACE v. DECHTER et al.

Civ. 12976.

District Court of Appeal, Second District,
Division 3, California.
July 31, 1942.

1. Release 🔑57(1, 2)

Evidence failed to establish that release of all claims against parties who instituted involuntary bankruptcy proceedings against plaintiff in consideration of such parties' dismissing the bankruptcy proceedings was executed by plaintiff because of duress or without consideration, so as to authorize plaintiff to avoid release.

2. Release 🔑21

Where release of claims against parties who instituted involuntary bankruptcy proceedings against plaintiff was executed in consideration of such parties' dismissing the bankruptcy proceedings, evidence that plaintiff accepted benefits accruing through subsequent dismissal of the bankruptcy proceedings and that she made no attempt to rescind release until filing of an action on a claim arising out of the bankruptcy proceedings more than a year thereafter established a failure to comply with statute requiring prompt action, and hence did not authorize avoidance of the release. Civ.Code, § 1691.

3. Appeal and error 🔑1040(2)

Where a release executed by plaintiff would have constituted a complete defense to cause of action attempted to be stated in second count of complaint, sustaining of demurrer to such count without leave to amend, if erroneous, was not prejudicial to plaintiff.

4. Malicious prosecution 🔑55

In order to maintain a malicious prosecution action, plaintiff must allege and affirmatively prove malice and want of probable cause of defendant in instituting the proceeding which was made the basis of the action and that such proceeding has been finally determined in favor of plaintiff.

5. Malicious prosecution 🔑24(5)

Where a person is charged before a competent court having jurisdiction and is found guilty, judgment rendered, unless it is shown to have been obtained by fraud, is conclusive evidence of "probable cause" so as to serve as a defense in malicious prosecution action, even though judgment is reversed on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

6. Malicious prosecution 🔑35(2)

Where judgment of Federal District Court finding plaintiff guilty of contempt was reversed because contempt proceeding was ancillary to a bankruptcy proceeding which had been dismissed by mutual consent on compromise of conflicting claims, termination of contempt proceeding so procured did not make it a basis for a malicious prosecution action.

7. Appeal and error 🔑224

Where plaintiff did not attack motion to vacate default of one of defendants in trial court on ground that notice of motion was defective, but joined in a stipulation as to various facts which were presented to trial court on the hearing, objection that notice of the motion was defective would not be considered when presented for first time on appeal. Code Civ.Proc. § 473.

8. Appeal and error 🔑707(1)

Where record did not purport to include all of the records on file in the action which were referred to in the notice of motion to vacate default filed by defendant as the basis thereof, and did not certify that it contained all of the evidence which was before trial court, appellate court could not determine whether trial court abused its discretion in granting the motion. Code Civ. Proc. § 473.

9. Judgment ⚷157, 161

Trial court did not abuse its discretion in granting motion of defendant to vacate default, although motion was not supported by such defendant's affidavit, and although copy of his proposed answer tendered on hearing of motion did not purport to be verified, where trial court, in light of verified answers of other defendants, which answers were included among papers specified in the notice of motion as a basis thereof, might well have concluded that such defendant had a meritorious defense. Code Civ.Proc. § 473.

10. Appeal and error ⚷901

The burden was upon plaintiff to establish affirmatively error in trial court's granting motion of one of defendants to vacate default, and appellate court could not indulge presumptions in favor of error and predicate a reversal thereon. Code Civ.Proc. § 473.

11. Release ⚷56

A release of all claims against parties who instituted involuntary bankruptcy proceeding against plaintiff which was executed in consideration of such parties' dismissing the bankruptcy proceeding was not a "general release", and hence evidence that plaintiff would not have signed the release had she known then that she had a cause of action against such parties for malicious prosecution was not admissible to avoid bar created by release. Civ.Code, § 1542.

See Words and Phrases, Permanent Edition, for all other definitions of "General Release".

12. Release ⚷30

Where release of claims against parties who instituted involuntary bankruptcy proceedings against plaintiff stated that plaintiff released certain named parties "and any and all other persons heretofore connected with said bankruptcy proceeding", release was operative as a bar to a malicious prosecution action arising out of the bankruptcy proceeding against parties not specifically named in release.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald and Clarence M. Hanson, Judges.

Action by Katie M. Eustace against Raphael Dechter and others for malicious prosecution. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Edmund Gattone, of Los Angeles, for appellant.

Raphael Dechter, B. L. Hoyt, Owen E. Kupfer, and Irving B. Drachlis, all of Los Angeles, and L. Donald St. Clair, of Redondo Beach, for respondents.

SCHAUER, Presiding Justice.

This action, as well as related litigation arising from the same basic facts, has previously occupied the attention of appellate courts (see Eustace v. Lynch, 9 Cir. (1935), 80 F.2d 652; Eustace v. Dechter (1938), 28 Cal.App.2d 706, 83 P.2d 523; Eustace v. Lynch, (1941), 43 Cal.App.2d 486, 111 P.2d 372). The present appeal is by plaintiff from a judgment for defendants in a malicious prosecution action. The sixth amended complaint was framed in two counts. In the first count plaintiff avers that "defendants * * * maliciously and without probable cause, conspired and agreed among themselves and with each other to institute, and did institute an involuntary petition in bankruptcy against plaintiff, charging plaintiff, among other matters, with being insolvent and a bankrupt * * *." It is not contended that a cause of action is not stated in this count. In Count II plaintiff adopts all the allegations of Count I and in addition thereto sets up allegations to the effect that defendants "maliciously and without probable cause" caused a contempt citation against plaintiff to be issued out of the United States District Court. It is further therein alleged: "That said order to show cause [contempt citation] was served upon the plaintiff and a trial was had thereon September 12, 1934. That plaintiff made a motion to dismiss for want of jurisdiction, for lack of a proper or any complaint or affidavit of facts constituting the alleged contempt was ever served upon plaintiff; that the court denied such motion to dismiss and the cause proceeded to a partial hearing. That upon the conclusion of said hearing, the court found plaintiff guilty of contempt while still being deceived, did enter its order in said bankruptcy proceeding ordering said plaintiff to pay a fine of One Thousand ($1,000) Dollars, to the United States of America, and stand committed to the Orange County jail until fine is paid, and was immediately remanded to custody of the United States Marshal. That a stay of execution was denied plaintiff and that thereupon the United States Marshal took custody and control of the plaintiff and did deprive her of her liberty for the greater part of an entire day and until plaintiff was released on bail. That said order and judgment finding plaintiff guilty of contempt was thereafter appealed to the United States Circuit Court of Appeals, Ninth Circuit, and said court did, on the 17th day of December, 1935, reverse said order and judgment referred to above * * *. That said contempt proceeding was finally terminated in plaintiff's favor."

A demurrer to Count II was sustained as to all defendants without leave to amend. A demurrer of one defendant (United States Fidelity and Guaranty Company) was sustained as to Count I and concerning this ruling no complaint is made. The other defendants answered Count I and all of them, in addition to certain denials, pleaded as an affirmative defense that the conflicting claims of the respective parties in the bankruptcy proceedings had been compromised, that such proceedings had been dismissed by mutual consent, and that in consideration of such compromise agreement and dismissal plaintiff had executed a release in the following form:

"Los Angeles, Cal.
"January 29, 1935.

"Mr. Raphael Dechter,
"825 Stock Exchange Bldg.,
"Los Angeles, California.

"Dear Sir:

"This will verify the fact that in consideration of your arranging to dismiss the bankruptcy proceedings now pending against Katie M. Eustace in the United States District Court, for this District, No. 23770-C, the undersigned do hereby agree that they will and do hereby release the Oil Tool Exchange, Inc., Speirs & Meadows, and A. M. Kupfer, as well as E. A. Lynch, and yourself and any and all other persons heretofore connected with said bankruptcy proceeding from any claim of any kind whatsoever arising out of said bankruptcy proceedings and hereby agree to forbear from any legal proceedings by virtue of anything done by the above named parties in and about said bankruptcy proceedings.

"Yours very truly,
"Katie M. Eustace
"Katie M. Eustace
"John M. Eustace
"John M. Eustace
"John Eustace
"John Eustace (Jr.)
"J. A. Griffith
"J. A. Griffith"

At the trial, on motion of the answering defendants, the court proceeded first, pursuant to the provisions of section 597 of the Code of Civil Procedure, to determine the issues raised by the affirmative defense. That section provides in material part that: "When the answer pleads that the action is barred by the statute of limitations, * * * or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar * * * to the prosecution thereof, the court may, upon the motion of either party, proceed to the trial of such special defense or defenses before the trial of any other issue in the case, and if the decision of the court, or the verdict of the jury upon any special defense so tried * * * is in favor of the defendant pleading the same, judgment for such defendant shall thereupon be entered and no trial of other issues in the action shall be had unless such judgment shall be reversed on appeal or otherwise set aside or vacated; * * *."

[1,2] The execution of the release quoted above was admitted by plaintiff but she sought to escape its effect apparently on the mixed or combined theories that it had been executed by the plaintiff while acting under duress of menace and threats, that it had been executed without consideration and had been rescinded. A jury was impaneled to serve in an advisory capacity on issues of fact which might arise in the equitable proceeding whereby plaintiff endeavored to so avoid the release but at the conclusion of the evidence the court held that the showing was insufficient to warrant submission to the jury and advised a verdict for the defendants.

It is to be noted that the release pleaded in this case is the same release which was pleaded in Eustace v. Lynch (1941), supra, 43 Cal.App.2d 486, 488, 111 P.2d

372. We have compared the evidence adduced at the trial in this case, and the offers of proof, with the offers which were made in the cited case and which are related in the opinion prepared by Mr. Presiding Justice York in that case, and find that there is nothing in the record before us to differentiate it legally from that case. Our record contains nothing materially different and favorable to plaintiff that was not included within the scope of the evidence offered in the Lynch case and in fact the evidence actually adduced here was not as favorable to plaintiff as were the offers of proof there. We do not feel justified, therefore, in reciting again what would be substantially a repetition of the matter printed on pages 488 and 489 of 43 Cal.App.2d, on pages 373 and 374 of 111 P.2d. Suffice it to state that according to the opening statement of counsel for plaintiff she had the draft of the release in her possession for two or three weeks before she signed it. During that period she discussed it with her own counsel and friends, including at least three different reputable members of the bar. It is to be noted that whereas the offer of proof made in the Lynch case was to the effect that the asserted threats, menace, duress and fraud consisted of statements and representations made to the plaintiff and other persons signing the release by defendant Raphael Dechter, it was not claimed at the trial in this case that Mr. Dechter had at any time directly communicated with plaintiff. In this connection counsel for plaintiff stated: "None of the defendants in this case made any of these statements face to face, but they got to Mrs. Eustace just the same and she signed it after three weeks." It appears that the only statements or representations which were communicated to plaintiff were matters related to her by her own counsel concerning discussions had with opposing counsel. It is not disputed that the bankruptcy proceedings were in fact dismissed as a result of the compromise agreement. So far as the claimed rescission of the release is concerned, plaintiff's counsel stated, "There is no rescission other than the bringing of this suit, which the plaintiff considers to be a rescission." The record shows that the release is dated January 29, 1935, that it was signed within three weeks from that date, that the action was filed June 1, 1936, and the date of the trial was June 17, 1940. Manifestly there was an utter failure to comply with the salutary provisions of section 1691 of the Civil Code requiring that a party rescinding an agreement act promptly and restore to the other party everything of value which has been received. We find the ruling of the trial court, that the evidence seeking to avoid the release was insufficient, to be correct.

[3] Since the release would also constitute a complete defense to the cause of action attempted to be stated in Count II it is difficult to perceive how any error in ruling on the demurrer thereto could be prejudicial. We have, however, examined the pleading and note that it alleges that as to the contempt citation, the issuance of and proceedings under which are the basis of that asserted cause of action, a hearing was had and the court found plaintiff guilty of contempt. On appeal to the Circuit Court of Appeals, Ninth Circuit, that court held (Eustace v. Lynch (1935), supra, 80 F.2d 652, 656): "We are satisfied, notwithstanding some indications in the record to the contrary, that the contempt proceeding was inaugurated, tried, and determined as a civil contempt, and that the imposition of a fine which bore no relation to the injury suffered by the receiver was unauthorized. * * * The appellee has made no appearance and filed no brief. It appears that the bankruptcy proceeding in which this matter originated has been dismissed. The civil contempt proceeding being ancillary to the bankruptcy proceeding also should be dismissed."

[4-6] As far back as Holliday v. Holliday (1898), 123 Cal. 26, 55 P. 703, it was held that in an action to recover damages for malicious prosecution and false imprisonment, based on a proceeding instituted by the defendants (123 Cal. at page 31, 55 P. at page 704): "The law is well settled that to maintain an action of this kind the plaintiff must allege and affirmatively prove malice and want of probable cause on the part of the defendant in instituting the proceeding which is made the basis of the action, and that the same has been finally determined in favor of the plaintiff. * * * [123 Cal. at page 32, 55 P. at page 704] Without reviewing the cases cited, we deem it enough to say that, while there is some apparent conflict in the decisions, the prevailing rule is that when a person is charged before a competent court having jurisdic-

tion of the matter, and is tried and found guilty, the judgment rendered, unless it is shown to have been obtained by means of fraud, is conclusive evidence of probable cause for making the charge, even though it is afterwards held to be unauthorized, and reversed on appeal." To the same effect, see Carpenter v. Sibley (1911), 15 Cal.App. 589, 602, 119 P. 391; Black v. Knight (1919), 44 Cal.App. 756, 770, 187 P. 89; Bullock v. Morrison (1931), 118 Cal.App. 112, 114, 4 P.2d 812. There was no showing, or offer to show, in the court below that the conviction of plaintiff was brought about by any extrinsic fraud practiced on the court. The reversal of the judgment of the United States District Court finding plaintiff guilty of contempt was not based on fraud. It further appears from the language of the Circuit Court of Appeals above quoted that the contempt proceeding was ordered dismissed because it was ancillary to the bankruptcy proceeding which as hereinabove stated was dismissed by mutual consent on compromise of the conflicting claims. A termination of the proceeding so procured does not make it a basis for a malicious prosecution action (38 C.J. 443, 444; Paskle v. Williams (1931), 214 Cal. 482, 484, 6 P.2d 505; Jaffe v. Stone (1941), 18 Cal.2d 146, 152, 114 P.2d 335, 135 A.L.R. 775). We are satisfied therefore that no prejudicial error was committed in sustaining the demurrer to Count II.

Plaintiff also contends that the court erred in vacating the default of the defendant Kupfer. It appears, as heretofore mentioned, that the complaint herein was filed on June 1, 1936. The clerk's transcript, notwithstanding the provisions of sections 670 and 950 of the Code of Civil Procedure, contains no copy of the summons or the return of service, but a special bill of exceptions recites that it was stipulated that "service of summons and complaint of the within action was made on defendant, A. M. Kupfer on the 4th day of August 1936 and that return of said service was made on the 18th day of August, 1936. 3. That on the 21st day of August, 1936, * * * said court entered an order vacating and quashing said service of summons against the defendant, A. M. Kupfer. 4. That thereafter service of summons and sixth amended complaint was made on the defendant, A. M. Kupfer on the 26th day of June 1939 and that return of said service was made on the 29th day of June 1939." It is also shown that defendant Kupfer specially appeared and moved to dismiss the action under section 581a of the Code of Civil Procedure on the ground that the summons was not served and the return thereon was not made within three years after the commencement of the action. This motion was denied on the ground that "plaintiff had made a sufficient showing that said defendant, A. M. Kupfer had secreted himself to prevent the service of summons upon him and that plaintiff was thereby unable to serve summons upon said defendant within three years from the commencement of the within action." Notice of this ruling was served on the defendant on August 26, 1939, and on September 12, 1939, his default was entered. Three days later, on September 15, defendant filed an application for leave to renew his motion and this application was denied September 20, 1939. On October 13, 1939, defendant Kupfer filed a notice of motion to vacate his default. This notice of motion does not in so many words specify "mistake, inadvertence, surprise or excusable neglect" as a ground for his motion, but it does recite the facts as to the service of summons after three years, the original proceedings instituted by the defendant in endeavoring to cause the service to be quashed, and the further fact that at the time the default was entered defendant's counsel were engaged in the process of taking further proceedings for the renewal of the motion to quash. It is to be noted further that the notice of motion specifies that the motion would be "made upon the within notice of motion and upon the points and authorities attached hereto and upon the proposed answer of defendant filed herewith, and *upon all of the papers and records on file in the within action.*" (Italics added.)

[7] Plaintiff attacks on various grounds the order granting the motion, contending that the notice of motion itself was defective in not specifying with more particularity any of the grounds enumerated in section 473 of the Code of Civil Procedure and that the showing in support of the motion was inadequate in that no affidavit of defendant accompanied the notice. While such notice is inartificially drawn it does not appear that on that ground plaintiff objected in the trial court to the hearing. On the contrary it appears that plaintiff joined in a stipulation as to various facts which were presented to the court on the

hearing. Under such circumstances we do not believe that such objection should be considered when presented for the first time on appeal.

[8-10] As to the sufficiency of the showing on which the trial court acted we are unable to hold that it abused its discretion, because the record does not purport to include "all of the papers and records on file" in the action which were referred to in the notice of motion as a basis thereof and does not certify that it contains all of the evidence which was before the court. The transcript before us discloses that at the time the notice of motion was filed the records and files of the trial court contained verified answers of defendants other than Kupfer which set out the release, and such release on its face purported to constitute a complete defense for Kupfer as well as such other defendants. The special bill of exceptions, which is incorporated in the Clerk's Transcript, states that defendant Kupfer "submitted a proposed answer in support of his motion * * *; said proposed answer was unverified * * *; a copy * * * is appended hereto. * *" The copy appended, among other defenses sets out the release, but does not purport to be verified. It is to be noted that incongruously another portion of the transcript, certified by the clerk, sets forth the answer of the defendant Kupfer, endorsed as filed October 30, 1939, and shows a verification by Kupfer under date of October 23, 1939, which was three days prior to the date of the hearing on the motion. We are of the opinion that although defendant Kupfer's motion was not supported by his own affidavit, and although the copy of his proposed answer tendered on the hearing of the motion did not purport to be verified, the court, in the light of the verified answers of the other defendants, which answers, as previously observed, were included among the papers specified in the notice of motion as a basis thereof, may well have concluded that he had a good and meritorious defense. In any event the burden is upon plaintiff to affirmatively establish error and under the circumstances recited we cannot indulge presumptions in favor of error and predicate a reversal thereon.

[11] Plaintiff advances the further contention that the court erred in excluding offered testimony to the effect that plaintiff would not have signed the release had she known then that she had a cause of action against defendants for malicious prosecution. In this regard plaintiff relies on section 1542 of the Civil Code, which provides that "A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor." The evidence was properly excluded. It requires only a reading of the release to ascertain that it was not a mere general release but was particularly drawn to cover "any claim of any kind whatsoever *arising out of said bankruptcy proceedings.*" (Italics added.) This language is specific in identifying the particular proceedings, claims arising out of which were exclusively the subjects of release.

[12] A further argument is presented to the effect that the release is non-operative as to the defendants Wagner, Coates, Fairfield, and Gray, in that they are not named therein. A sufficient answer to this contention is found in the language of the release, "the undersigned do hereby agree that they will and do hereby release the Oil Tool Exchange, Inc., * * * and any and all other persons heretofore connected with said bankruptcy proceeding." Unless the defendants were in the category of those "heretofore connected with said bankruptcy proceeding" no cause of action was stated against them and if they were so connected the release constitutes a defense.

No other error complained of is of sufficient moment to warrant consideration. The attempted appeals from the order directing a verdict and from the findings are dismissed.

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.

53 Cal.App.2d 780

COBBS v. COBBS.

Civ. 2850.

District Court of Appeal, Fourth District, California.

Aug. 3, 1942.

Hearing Denied Oct. 1, 1942.

1. Evidence 🔑441(1)

Ordinarily, oral evidence may not be received to vary terms of a written contract, and all prior negotiations must be deemed merged in the agreement as written.

2. Contracts 🔑94(6)

The inducing of execution of a contract by a promise made without any intention of performing it constitutes such fraud in obtaining contract that it may be declared null and void in an equitable action brought for that purpose.

3. Evidence 🔑434(8)

Where execution of contract has been induced by a promise made without any intention of performing it, parol evidence is permitted to show such fraud on theory that it does not change terms of contract, but shows that no binding contract has been legally made.

4. Evidence 🔑434(8)

Parol evidence of fraud to establish invalidity of an instrument is admissible if it tends to establish some independent fact or representation, some fraud in procurement of instrument or breach of confidence concerning its use, but not if it establishes a promise directly at variance with the promise of the writing.

5. Evidence 🔑434(8), 443(2)

Where written contract expressly provided $300 per month for life to divorced wife who refused to consent to a remarriage clause, parol evidence that husband signed agreement in reliance on wife's oral promise not to enforce it in event of remarriage was not admissible because contrary to express provision of contract, even though wife allegedly made oral promise without intending to perform it.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Thomas F. Cobbs against Mildred Robertson Cobbs to cancel two contracts on the ground that their execution had been obtained by fraud. Judgment for the defendant, and the plaintiff appeals.

Judgment affirmed.

Dempster McKee, of San Diego, for appellant.

Luce, Forward, Lee & Kunzel, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an action to cancel two contracts on the ground that their execution had been obtained by fraud and to have it declared that both are null and void.

The plaintiff and defendant were married in 1916 and lived in China, where the plaintiff was employed, until 1921. The plaintiff then retired from business and they established their home in San Diego. The plaintiff was then worth a half million dollars, $300,000 of which he had accumulated after the marriage.

In 1923, while the defendant was in Europe with her mother, the plaintiff went to Reno where he brought a divorce proceeding after remaining there for the required time. Shortly before the divorce action was heard both parties and their attorneys met in Reno for the purpose of negotiating a property settlement agreement. They quickly agreed that the plaintiff was to pay to the defendant $300 per month, but the plaintiff strenuously refused to sign a contract drawn by defendant's attorney which provided that such payments should continue for the term of her natural life, and he insisted that this be so changed as to provide for a discontinuance of the payments in case she remarried. She refused to allow this change to be made and on November 1, 1923, an agreement was executed providing that the plaintiff would pay to the defendant $300 on the first day of each and every month thereafter during the term of her natural life. The agreement further provided that within sixty days thereafter the plaintiff would deposit securities of the value of $50,000 with the Guaranty Trust Company of New York as security for the monthly payments to be made to the defendant, and that within that time the parties would execute a trust agreement with that trust company in order to carry out this provision. The next day after that agreement was executed a decree of divorce was entered in which the court approved this agreement. Early in January, 1924, the defendant returned to San Diego and the trust agreement provided for in the other contract was executed. Later that month the plaintiff was married to another woman.

The plaintiff made all of the monthly payments called for by the contract for more than 16 years. In June, 1940, the plaintiff learned that the defendant was about to remarry and started this action, the papers in which were served a few hours before the defendant married another man. The complaint alleges that the defendant, for the purpose of inducing the plaintiff to enter into these property settlement agreements, promised the plaintiff that she would not remarry, that she further promised that in the event of her subsequent marriage she would cancel the contracts and relieve the plaintiff of the payments provided for therein and would terminate the trust created under the other agreement, and that these promises were made without any intention on her part to perform the same.

At the trial the plaintiff testified that when the proposed property settlement agreement was under discussion in Reno the parties and their attorneys argued for a day and a half, and that "on each and every occasion we would come back to this clause about payment for life"; that he finally threatened to leave Reno if an agreement was not reached that day; that they met again that evening at which time the defendant said: "What is the use of all of this objection? I never intend to get married, anyhow. I shall never remarry. Tom knows, for reasons which I have explained to him so often, that I never will remarry. Therefore the agreement might as well stand as it is"; that he accepted her statement that she would never remarry; that the defendant then said: "Very well; I will give him a letter—If I ever remarry again I will give him a letter to cancel and nullify the agreement"; and that he replied: "That will be quite acceptable to me, because I don't believe she will ever remarry again." He further testified that she promised to give him this letter before the execution of the other agreement establishing the trust; that later, at San Diego, he refused to sign the trust agreement until he received this letter; that Judge Sloane, the defendant's attorney, refused to do anything about getting the letter; and that he then told Judge Sloane that he had made up his mind to execute the agreement because he was sure that the defendant would never marry again and that he was executing the trust agreement "against my best judgment, against the advice of my attorneys, on the strength of the promise of Mrs. Cobbs that she will never remarry again." He then signed the agreement and never received such a letter.

The court found that the defendant, in order to induce the plaintiff to enter into said contracts, orally promised the plaintiff before the execution of the first contract that she would not remarry, that in the event she did so she would cancel both of these agreements and would relieve the plaintiff from the payments called for by the contracts, that she would deliver to the plaintiff a letter to that effect before he executed the trust agreement, and that these promises were made without the intention on her part to perform the same. The court concluded, however, that the defendant is entitled to a continuance of the monthly payments provided for in the contracts and that the plaintiff is not entitled to have either of these contracts cancelled. Judgment was entered accordingly and the plaintiff has appealed.

[1-3] The appellant relies upon a well-established exception to the general rule that oral evidence may not be received to vary the terms of a written contract and that all prior negotiations must be deemed merged in the agreement as written. Under this exception, it has been held that where the execution of a contract has been induced by a promise made without any intention of performing it, this constitutes such fraud in obtaining the contract that it may be declared null and void in an equitable action brought for that purpose. Parol evidence to show fraud is permitted in such cases on the theory that it does not, in fact, change or contradict the terms of the contract but rather shows that no binding contract has been legally made. Appellant cites in this connection Williams v. Hasshagen, 166 Cal. 386, 137 P. 9; Martin v. Lawrence, 156 Cal. 191, 103 P. 913; Millar v. Millar, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415, Ann.Cas.1918E, 184; Graham v. Los Angeles First National Trust & Sav. Bank, 3 Cal.2d 37, 43 P.2d 543; Boulevard Land Co. v. King, 125 Cal. App. 224, 13 P.2d 864, and a number of other cases. In each of such cases there was involved a promise to do some additional act which was not covered by the terms of the contract, rather than an act which was directly contrary to the terms of the agreement.

[4] A number of cases in this state have pointed out the distinction, with respect to

permitting oral proof of a promise without the intent to perform for the purpose of nullifying a written contract, between situations where the thing promised relates to a matter about which the written contract is silent and cases where it relates to matters covered by the contract and therefore resting upon a higher form of evidence than oral testimony. In Bank of America, etc., Ass'n, v. Pendergrass, 4 Cal.2d 258, 48 P.2d 659, 661, the court said: "* * * the promise which it is claimed they relied upon was, as pleaded by them, that the respondent would 'extend' or 'postpone' all payments for the period of one year. This promise is in direct contravention of the unconditional promise contained in the note to pay the money on demand. The question then is: Is such a promise the subject of parol proof for the purpose of establishing fraud as a defense to the action or by way of cancelling the note, assuming, of course, that it can be properly coupled with proof that it was made without any intention of performing it? Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing. We find apt language in Towner v. Lucas' Ex'r, 54 Va. [705], 13 Gratt. 705, 716, in which to express our conviction: 'It is reasoning in a circle, to argue that fraud is made out, when it is shown by oral testimony that the obligee contemporaneously with the execution of a bond promised not to enforce it.'"

In W. R. Campbell Co. v. Sears, Roebuck & Co., 136 Cal.App. 765, 29 P.2d 910, 912, the court said: "Plaintiff seeks to evade the result of its plain terms by proof of a parol, unperformed agreement which is directly contrary to such clear meaning. It is well settled that a fraudulent representation as to a material matter inducing the execution of an agreement may be shown by parol evidence, even where the written instrument purports to contain the entire agreement between the parties. Hunt v. L. M. Field, Inc., 202 Cal. 701, 703, 262 P. 730. In our opinion, however, a distinction must be made between such a parol promise as the one here, which by its very nature is superseded by the final writing, inconsistent with it, and a promise made with no intention of performing the same, not inconsistent with the writing, but which was the inducing cause thereof."

Similar views are expressed in Lindemann v. Coryell, 59 Cal.App. 788, 212 P. 47, and in Oxnard Theatres, Inc., v. Paramount Pictures, Inc., D.C., 24 F.Supp. 44, 47. In the latter case the rule is thus stated: "* * * when the subject of the alleged representation is covered by the agreement in a manner different from that alleged, a party to the agreement cannot avoid the rule which makes the written agreement the unimpeachable memorial of the understanding between the parties and claim the benefit of a contradictory undertaking by averring that it was a promise made without intention to perform, and, therefore, fraudulent." This rule is based upon the sound principle that a party having agreed in writing to do a certain thing may not stultify his written agreement by claiming that, in fact he relied upon the other party's oral promise that the terms of the agreement should not be complied with.

The rule pointed out in the cases last cited is applicable and controlling here. An oral promise to sooner terminate a written agreement to make fixed payments for a specified term, and to cancel such payments on a certain contingency, cannot be other than one relating to the same subject matter and necessarily amounts to an agreement that the terms of the written contract shall not be carried out as therein provided. While parties may well provide for a change in their obligations under changed conditions they should not be allowed to agree both ways at the same time on the same proposition.

[5] Appellant's real contention here is that he was induced to enter into a written agreement to make monthly payments to the respondent so long as she lived by an oral promise on her part that she would not enforce that agreement, but would release him from such payments in the event of her remarriage. The oral promise thus relied on not only related to a matter covered by the written agreement, and was directly contrary to the provisions of that agreement, but it related to the one point which was particularly in dispute between the parties in negotiating the terms of that agreement. The appellant himself testified that the respondent positively refused to change the proposed contract in that regard and that he executed the agreement because she had promised not to enforce the very provision which she refused to change or elim-

inate. In effect, he claims that he was willing to execute this agreement with its definite and certain provision in this regard because the parties had theretofore specifically agreed to the contrary in respect to those very terms. Under the rule referred to this may not be done, and even under the claim of fraud arising from a promise made without intent to perform oral evidence cannot be thus used to directly contradict the terms of a written instrument.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

53 Cal.App.2d 794

VILETA v. VILETA.

Civ. 13744.

District Court of Appeal, Second District, Division 2, California.

Aug. 6, 1942.

1. Marriage 🔑57

In suit for annulment of marriage, court could not arbitrarily refuse relief where case had properly been made out.

2. Divorce 🔑6

A court may not deny divorce decree where evidence of plaintiff, adequately corroborated, establishes truth of allegations of complaint.

3. Marriage 🔑58(7)

Misrepresentations or concealments with respect to previous unchaste conduct, or with respect to wealth or social or official station, do not constitute grounds for annulling a marriage, but where fraud is vital to the conjugal relationship, that is, where it goes to very essence of marriage relation, aggrieved party is entitled to have marriage annulled.

4. Marriage 🔑58(7)

A woman who accepts the hand of her suitor thereby impliedly assures him of her ability, so far as lies within her knowledge, to bear children, and her concealment of her sterility is a "fraud" which vitiates marriage contract and justifies annulment when the man acts promptly on his discovery of the fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Suit by Frank Vileta against Darleen Vileta for annulment of a marriage. From a judgment for defendant, plaintiff appeals.

Reversed with directions.

L. J. Seay, of Los Angeles, for appellant.

E. R. Simon, of Los Angeles, for respondent.

GOULD, Justice pro tem.

Plaintiff and defendant were married June 30, 1937. They separated January 15, 1942. By an amended complaint filed April 28, 1942, plaintiff sought to have his marriage with defendant annulled upon the ground of fraud, in that, as alleged in said amended complaint, defendant prior to said marriage represented that she was normal physically and capable of bearing children, whereas, it is alleged, defendant at the time of making said representations knew they were false and untrue; that in truth and in fact defendant was then incapable of bearing children and by reason of her physical condition will suffer permanently from such disability. It was alleged that plaintiff believed defendant's representations as to her normal physical condition; that he relied upon them and would not have entered into the marriage if he had known the true facts; that he did not discover the truth until March 17, 1942, when defendant was examined by a physician, and that he has not lived with defendant since such discovery.

Defendant's answer, while admitting that she had knowledge of her physical condition prior to marriage, denied "that she falsely represented her condition to the plaintiff for the purpose of deceiving the plaintiff, or for the purpose of inducing his marriage to defendant."

At the trial, testimony in substance as above stated was given by plaintiff, by a physician in whose opinion defendant would not be capable of bearing children, and by defendant herself, who, called as a witness for plaintiff, stated under oath that prior to her marriage she was told by a physician whom she consulted "that I never would be able to have children"; that before her marriage she discussed with plaintiff the matter of having children; that she did not reveal to him the advice given to her by the physician whom she had theretofore consulted, but "led him to believe that I could have a family," and that she knew at the time she made such statements that they were not true.

No evidence was offered in behalf of defendant and there was no contradiction of testimony presented by plaintiff.

Annulment of the marriage was refused by the trial court. Plaintiff appeals. Respondent has filed no brief herein and in fact has stipulated that the case be "submitted to the court for decision without argument * * * on files and records and appellant's opening brief."

[1, 2] The court may not arbitrarily refuse relief where a case has been properly made out (Polk v. Polk, 50 Cal.App.2d 653, 123 P.2d 550), and it has been held that the court is not authorized to deny a decree of divorce where evidence of the plaintiff, adequately corroborated, establishes the truth of the allegations of the complaint. Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 P. 853; Benkert v. Benkert, 32 Cal. 467.

[3, 4] While misrepresentations or concealments with respect to previous unchaste conduct (Barnes v. Barnes, 110 Cal. 418, 42 P. 904; Wilcox v. Wilcox, 171 Cal. 770, 155 P. 95), or with respect to wealth or social or official station (Marshall v. Marshall, 212 Cal. 736, 300 P. 816, 75 A.L.R. 661), fall short of constituting grounds for annuling a marriage, yet where the fraud is vital to the conjugal relationship, that is, where it goes to the very essence of the marriage relation, the aggrieved party is entitled to have the marriage annulled. Mayer v. Mayer, 207 Cal. 685, 279 P. 783. A woman who accepts the hand of her suitor thereby impliedly assures him of her ability, so far as lies within her knowledge, to bear children. Her concealment of her sterility is a fraud that vitiates the marriage contract (Baker v. Baker, 13 Cal. 87; Hardesty v. Hardesty, 193 Cal. 330, 223 P. 951) and justifies annulment, when the man acts promptly upon his discovery of the fraud. Aufort v. Aufort, 9 Cal.App.2d 310, 49 P.2d 620; Turney v. Avery, 92 N.J.Eq. 473, 113 A. 710. There is neither rule of law, principle of equity nor reason arising from public policy which requires the continuance of a marriage resulting from such a fraud as that of which defendant was guilty.

For the foregoing reasons the judgment is reversed with directions to the trial court to enter judgment in favor of appellant annulling his marriage to respondent.

MOORE, P. J., and McCOMB, J., concurred.

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54 Cal.App.2d 29

GEORGE v. SOARES.

Civ. 12109.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1942.

Rehearing Denied Sept. 12, 1942.

1. Appeal and error 🔑949

Conveyances by elderly persons of impaired mentality but not absolutely disqualified, made without independent advice and for no consideration, are not required in all cases to be set aside, but when trial court, in the exercise of its judicial discretion, has found that the circumstances warrant such equitable relief, the decree will not be disturbed on appeal.

2. Appeal and error 🔑994(3), 1012(1)

The appellate court does not determine which of the witnesses should be believed and which party had the preponderance of the evidence.

3. Deeds 🔑211(1)
Trusts 🔑46

In administrator's suit to set aside deed and trust agreement made by decedent in favor of defendant because of impaired mentality of decedent, evidence sustained finding that decedent had a clear understanding of the legal effect of the documents as much as a year after their execution and supported a judgment for defendant.

4. Deeds 🔑56(1)
Trusts 🔑37½

Where deed and trust agreement executed by decedent in favor of defendant were delivered to defendant by decedent at time of execution and deed was recorded and trust agreement kept in safe deposit box owned jointly by decedent and defendant, "delivery" was shown.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

5. Deeds ⚿194(2)
Trusts ⚿41

In administrator's suit to set aside deed and trust agreement executed by decedent in favor of defendant, presumption of delivery arising from possession of documents by defendant was "prima facie evidence" of delivery and supported a judgment for defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence".

Appeal from Superior Court, Merced County; Stanley Murray, Judge Assigned.

Suit by Manuel S. George, as administrator of the estate of Manuel S. Pinheiro, deceased, against Mary Soares, to set aside a deed and a trust agreement made by decedent in favor of defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

C. Ray Robinson and Willard B. Treadwell, both of Merced, and John H. Machado, of San Jose, for appellant.

Douglas A. Nye, of San Francisco, and D. Oliver Germino, of Los Banos, for respondent.

NOURSE, Presiding Justice.

Plaintiff, as administrator of the estate of Manuel S. Pinheiro, deceased, appeals from a judgment in favor of defendant in an action seeking to set aside a deed and a trust agreement made by decedent in favor of defendant.

The property involved, situate in Los Banos, was owned by decedent and his wife prior to January 1, 1937, on which date the wife died and decedent became the sole owner. Shortly after his wife's death decedent moved to Oakland to live with his sister-in-law Guilhermina Pasqual. Immediately after his arrival decedent requested his nephew, Joe Pasqual, to make an appointment with an attorney as he wished to give his property to said sister-in-law. A meeting was arranged in an attorney's office and decedent made a gift of his property to said sister-in-law. Thereafter at decedent's request the property was reconveyed to him. Subsequently, and on July 21, 1937, decedent conveyed a one-half interest in the property to said sister-in-law. Soon thereafter decedent went to live with Mary Soares, the defendant herein, and another sister-in-law in Mill Valley. On September 10, 1937, an action was commenced on behalf of decedent to set aside the conveyance of July 21, 1937, to Mrs. Pasqual. This action was settled on or about February 10, 1938. On February 11, 1938, decedent deeded the property to the defendant. The last mentioned deed contained a provision that the property was to be held under the terms of an agreement of trust executed concurrently. Under the trust agreement the net income was to be paid to decedent during his life with the remainder in fee to defendant subject to a power of appointment in decedent as to one-half of the remainder. The trust agreement recited that the transfer was in consideration of defendant's services as trustee and of care and keep theretofore given decedent. The deed was recorded March 12, 1938, but the trust agreement was not recorded until January 16, 1940, which was subsequent to the death of the decedent. On December 16, 1938, decedent was declared incompetent and defendant was appointed his guardian, she having theretofore, on December 3rd, filed a petition to have him so declared. Decedent died on December 1, 1939. The property involved was shown to have a value of about $10,250.

Appellant contends that the evidence establishes (and that findings to the contrary are not sustained by the evidence) that decedent was a man over 65 years of age, of impaired mentality, unable to speak, read or write English, without business experience, and unable to care for his own property; that a confidential relation existed between decedent and defendant; that in the questioned transaction decedent acted without independent advice; that the attorney who handled the matter was selected by and in fact represented defendant; and that there was no consideration for the transfer. It is appellant's contention that under the foregoing circumstances, even though the impaired mentality does not amount to absolute disqualification, a court of equity should set aside a conveyance.

[1, 2] Respondent does not dispute the rule of law, but contends that it is not applicable here because decedent, at the

time of the transfer, was not incompetent to execute the documents, that there was a valuable consideration, and that decedent was independently advised by an attorney of his own choosing, and that in all other issues of fact there was such a conflict in the evidence that the trial court properly refused to apply the rule. Here it should be added that the rule of Moore v. Moore, 56 Cal. 89, 94, and of the other cases cited by the appellant, is not a rule that in all cases where some of these elements are present the trial court must set aside the conveyance. The rule is that when the trial court, in the exercise of its judicial discretion, has found that the circumstances warrant such equitable relief the decree will not be disturbed on appeal. If the facts upon which appellant here relies were all proved by competent and substantial evidence there would be some ground for appellant's attack upon the decree. But such is not the case. Every material fact upon which she relies was disputed by competent and substantial evidence. The appellant does not dispute this, but argues the point as though the appellate court was to determine which of the witnesses should be believed and which party had the preponderance of the evidence.

It is true that evidence offered by appellant tended to prove that the decedent was illiterate, enfeebled in mind and body, unable to read the English language, and unable to manage his property. The testimony of the medical witnesses was that for a short time prior to his death in December, 1939, the deceased was suffering from senility and was unable to think or talk clearly or fluently. Much of the testimony relating to his mental capacity was directed to instances far removed in time from the date of the execution of the documents. The evidence offered by respondent tended to show that the deceased had full knowledge of his property, and business affairs, understood the English language, and was able to carry on a simple conversation in that language. The respondent produced the witness Patricio, a former neighbor of the deceased in Los Banos, and one of the very few disinterested and unbiased witnesses appearing, who testified that he talked with the deceased in June, 1939, when the latter was visiting the witness in Los Banos. When asked what the deceased had told him at that time about this transaction the answer was: "Well, that time he told me that he was glad that he have the ranch out of Mrs. Pasqual and passed it to Mrs. Soares, and he said that his half-share is still in his name and he is going to give it to the ones that takes care of him the last days, and he say because Mrs. Pasqual been treating him rough and Mrs. Soares has been a mother to him." On cross-examination this witness further testified:

"Q. Now Mr. Patricio, when you talked to Mr. Pinheiro after he had transferred the property to Mrs. Soares, he told you that he had transferred half to her, isn't that right? A. Yes, sir.

"Q. And that the other half he had in his name, isn't that right? A. Yes, sir.

"Q. And that he was going to use that half to give to those that took care of him, isn't that right? A. Yes, sir.

"Q. And that is what he told you? A. Yes, but at the same time he told us, told me and my wife that that property that is going to be left to Mrs. Soares because she has been like a mother to him, not because he liked Mrs. Soares, because—Mrs. Pasqual, because mean to the children and in some kind of trouble that he had, but he said Mrs. Soares and the children treated him so nice that he feel like leaving his share, this balance to her, that is the last conversation. Even one time he told me if I want to take that share to take care of him, we take care of him, that he give half that ranch to us, and I said, 'No, we have got five children to take care of, we can't take care of anybody else.'

"Q. In other words, he said he would give you that half to take care of him, is that right? A. Yes, sir.

"Q. Yes. A. But at the same time we say we don't want it, well, he said, 'Mrs. Soares is going to take care of me.'

"Q. Then he said he was going to give her that half, is that right? A. Yes.

"Q. If she takes care of him? A. Yes, if she took care of him like she did."

[3] From this evidence the trial court could have inferred that the deceased had a clear understanding of the legal effect of the documents and that, a year or more after their execution, he expressed satisfaction with the disposition he had made. Upon all the evidence the trial court was justified in finding that none of appellant's attacks upon the documents was sustained by the evidence. And those findings put an end to the case.

[4, 5] The additional point raised by appellant—that the documents were not delivered—finds no support in the record. Both documents were delivered to the grantee by the grantor at the time of execution. The deed was then recorded. The trust agreement was kept in a safe deposit box owned jointly by grantor and grantee. The presumption of delivery arising from possession of the documents is prima facie evidence of delivery and supports the judgment. Ward v. Dougherty, 75 Cal. 240, 17 P. 193, 7 Am.St.Rep. 151; Stewart v. Silva, 192 Cal. 405, 409, 221 P. 191.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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53 Cal.App.2d 721

In re DASHER'S ESTATE.

MITTENDORFF v. DASHER.

Civ. 13653.

District Court of Appeal, Second District,
Division 1, California.

July 31, 1942.

Hearing Denied Sept. 28, 1942.

1. Wills 🔑619

An "annuity" created by a will must consist of a bequest of specified sums periodically. Probate Code, §§ 161, 162.

See Words and Phrases, Permanent Edition, for all other definitions of "Annuity".

2. Wills 🔑439, 470

While testator's intention is the determining factor in construing a will, such intention is to be gathered from a consideration of the instrument in its entirety. Probate Code, § 163.

3. Appeal and error 🔑907(3)

Where appeal was upon the judgment roll alone, the court was bound to assume that sufficient and competent evidence was introduced to support each finding of trial court.

4. Wills 🔑684(7)

Under a will devising remainder of testator's estate to his widow and niece as trustees with provision that entire net income from trust estate should be turned over to widow for her individual use during her lifetime and containing no other bequest to widow except a bequest of certain personal effects, widow was entitled to income from trust property as of date of testator's death rather than from date of distribution to trustees.

5. Wills 🔑684(10)

Under a will devising remainder of testator's estate to his widow and niece as trustees with provision that entire net income from trust estate should be turned over to widow for her individual use during her lifetime, the trustees had no discretion as to amount of income to be paid to widow and were bound to pay her the entire income from date of testator's death.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Proceedings in the matter of the estate of N. S. Dasher, deceased, between Edith Mittendorff and Gertrude A. Dasher, as executrix, etc., wherein Gertrude A. Dasher, as executrix, etc., filed her second and final account and petition for distribution and Edith Mittendorff filed objections to the account. From certain portions of an order settling the second and final account and directing distribution under deceased's will, Edith Mittendorff appeals upon the judgment roll.

Affirmed.

John C. Mead, of Los Angeles, for appellant.

Merriam, Rinehart & Merriam, of Pasadena, for respondent.

WHITE, Justice.

This appeal presents a question of construction of the last will and testament of N. S. Dasher. The testator died on June 24, 1937, leaving a will wherein he nominated his wife, Gertrude A. Dasher, respondent herein, and his niece, Edith Mittendorff, appellant in the instant proceeding, as executrices. On July 1, 1937, the last-named executrix executed a renunciation of her right to act, and the wife was appointed executrix on July 28, 1937. An inventory and appraisement was filed on April 15,

1938. On June 17 of the same year Gertrude A. Dasher petitioned the court for a widow's allowance of $250 per month from the date of the testator's death to June 17, 1938, and an order for such allowance was made on July 7. On April 28, 1941, the executrix filed her second and final account and petition for distribution. To this account Edith Mittendorff filed her objections. It is from certain portions of the order settling the second and final account and directing distribution under the will that this appeal is taken.

After making certain bequests in his will, the decedent provided that all of the rest, residue and remainder of his estate be given, devised and bequeathed unto Gertrude A. Dasher, his wife, and Edith Mittendorff, his niece, as trustees, and that the net income received and derived from the trust estate should be turned over to decedent's wife, Gertrude A. Dasher, for her own individual use and benefit during her lifetime.

The trial court found: "That the trust created and provided for under and by the terms of Articles Sixth and Seventh of decedent's said will is a trust for the benefit of the widow of said deceased, and that Gertrude A. Dasher, widow of said deceased, as a life beneficiary of said trust, is entitled to receive and to have paid to her the total income received and realized from decedent's estate during the period of administration, after deducting the moneys expended for taxes and maintenance of the property of said estate."

By its order settling the second and final account and directing distribution under the will, the trial court decreed:

"* * * 5. That Gertrude A. Dasher, as the widow of said N. S. Dasher, deceased, is entitled to receive and to have paid to her the sum of $2,784.48 on account of income received from the estate during the period of administration, and the trustees of the trust fund created and provided for under and by the terms of Articles Sixth and Seventh of the last Will and Testament of the said N. S. Dasher, be and they are hereby instructed to forthwith pay over and distribute to the said Gertrude A. Dasher, out of the trust estate as soon as the same shall have been distributed to them as such Trustees, the said sum of $2784.48.

"6. That pursuant to the terms of the last Will and Testament of the said N. S. Dasher, and by reason of the stipulation hereinabove referred to, and by reason of the findings and order herein made, the entire residue of said estate, whether described herein or not, be and the same is hereby distributed unto Gertrude A. Dasher and Edith Mittendorff as Trustees in Trust for the uses and purposes herein set forth, to-wit:

"(1) Said Trustees shall immediately upon receipt of said fund, forthwith pay over and distribute to Gertrude A. Dasher, widow of said deceased, the sum of $2784.48, on account of the net income received and realized from the estate of the above-named decedent during administration; * * *."

The question therefore presented to us is whether the testator intended, and whether his will provided, that his widow should receive the net income of the estate only from and after the date of distribution to the trustees, on July 31, 1941, or whether she should be entitled to the net income from the estate as of the date of death of the testator on June 24, 1937. It might here be stated that the will further provided that upon the death of the testator's wife the trust estate should be distributed to Edith Mittendorff, or in the event she predeceased the testator's widow, her children should be the beneficiaries of the corpus of the trust.

[1] Appellant first contends that the trial court was without jurisdiction under the terms of the will to make the above-quoted portion of the decree from which this appeal is taken. This claim is predicated upon the ground that the widow had no right to receive payments under the terms of the trust provisions of the will until the trust property was distributed to the trustees, and then only from the date of such distribution. It is urged that the trust provisions of the will here under consideration contain no express directions that the payments are to accrue from the date of the testator's death. It is not contended by either appellant or respondent that the will here under consideration creates an annuity under the provisions of sections 161 and 162 of the Probate Code, because an annuity must consist of a "bequest of certain specified sums periodically." In re Estate of Watson, 32 Cal.App.2d 594, 600, 90 P.2d 349, 351; In re Estate of Marre, 18 Cal.2d 184, 188, 114 P.2d 586.

[2-4] That the testator had no intent that the payments to his widow were to commence as of the date of his death is not exclusively established by the absence of an

express direction therefor in the testamentary document. While the intention of the testator is the determining factor (Prob. Code, § 163), that intention is to be gathered from a consideration of the instrument in its entirety. The appeal coming before us, as it does, upon the judgment roll alone, enjoins upon this court the duty to assume that sufficient and competent evidence was introduced at the trial to support each finding, including the one which sets forth that "the trust created and provided for under and by the terms of Articles Sixth and Seventh of decedent's said will is a trust for the benefit of the widow of said deceased." Furthermore, the will itself furnishes mute but convincing evidence that the testator intended to create the trust for the specific purpose of providing maintenance and support for his widow, the beneficiary therein named, for it is to be noted that he made no other bequest to her except that of certain personal effects, such as furniture, silverware, pictures, books, clothing and automobiles; while to the appellant niece, who was to receive the corpus of the trust on the death of the widow, he bequeathed the sum of $5,000. Therefore we are persuaded that respondent's right to the income derived from the trust property has relation to the date of the testator's death, and should commence therewith. In re Estate of Marre, supra, 18 Cal.2d page 188, 114 P.2d 586.

[5] Finally, appellant urges that the court was without power to determine the amount of net income from the trust and to order payment of the same to the widow prior to the distribution to the trustees and before the latter had petitioned therefor. Upon the authority of In re Estate of Marre, supra, 18 Cal.2d page 190, 114 P.2d 586, we hold that after the property was distributed to the trustees payment of the income from the trust should have been made by them to the widow as of the date of the testator's death. That is what the court ordered. The fact that the court determined the amount of said income, and there is no controversy as to the correctness thereof, and ordered the whole of such income paid to the widow, did not operate to the prejudice of appellant, because by the provisions of his will the testator directed that "the entire net income received and derived from the trust estate shall be forthwith turned over to my wife, Gertrude A. Dasher, for her own individual use and benefit, during her lifetime." In other words, the trustees were vested with no discretion whatever as to the amount of the income to be paid to the widow. They were required to pay to her the whole thereof from the date of the testator's death. Manifestly, the decree of the court simply ordered the trustees to do that which they were enjoined to do under the provisions of the will and the requirements of their office. No prejudicial error can be predicated upon that part of the decree.

For the foregoing reasons, that portion of the order settling the second and final account and ordering distribution under the will, made and entered in the above-entitled matter on July 31, 1941, and from which this appeal is taken, is affirmed.

YORK, P. J., and DORAN, J., concurred.

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53 Cal.App.2d 590

PEOPLE v. DRISCOLL.

Cr. 1805.

District Court of Appeal, Third District, California.

July 25, 1942.

1. Robbery 🔑24(1)

Evidence sustained conviction of robbery in the first degree.

2. Criminal law 🔑741(1), 742(1)

The weight of evidence and credibility of witnesses are for jury.

3. Criminal law 🔑795(1)
Indictment and information 🔑191(9)

An assault with a deadly weapon or even a simple assault may be included within charge of robbery, and hence, when evidence warrants it, a defendant is entitled to have jury instructed that it may properly find him guilty of either of lesser offenses which may be included within charge of robbery. Pen. Code, § 1159.

4. Criminal law 🔑829(1)

An instruction which was sufficiently covered by charge given was properly refused.

5. Assault and battery 🔑96(3)

In robbery prosecution, an instruction that if jury believed that defendant struck complaining witness in self-defense, "but that said striking did not occur as a result of fear engendered in the defendant by the complaining witness", and if jury believed that no robbery occurred jury might find defendant guilty of assault and battery, was properly refused for failure to state that fear which would justify striking must have been fear that defendant was about to receive serious injury, and for failure to leave for jury question whether defendant acted in necessary self-defense. Pen.Code, § 1159.

6. Criminal law 🔑795(1)

A defendant convicted of robbery in the first degree could not complain of failure to give instruction predicating conviction of assault and battery, where prosecution did not ask that defendant be convicted of a lesser offense. Pen.Code, § 1159.

7. Criminal law 🔑1172(1), 1173(1)

A defendant may not complain of erroneous instruction or of refusal to give instructions, where verdict clearly shows that he was not prejudiced thereby.

8. Criminal law 🔑1172(1)

One convicted of a higher crime may not complain of erroneous instructions upon a lesser offense included within the one of which he was convicted. Pen.Code, § 1159.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

George Francis Driscoll was convicted of robbery of the first degree, and from the judgment of conviction and from an order denying a new trial, he appeals.

Judgment and order affirmed.

Robert A. Zarick and A. V. Panattoni, both of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was charged in two counts of an information with (1) robbery by means of force and fear, and (2) assault with a deadly weapon. Previous to the trial, the last-mentioned count was dismissed. A verdict of guilty of robbery of the first degree was returned by the jury. From the judgment which was accordingly rendered and from the order denying a new trial this appeal was perfected.

Fred Hunt, the prosecuting witness, testified that he and the defendant occupied adjoining cabins in an auto camp in North Sacramento. Hunt was working for a contractor by the name of Dykes, who paid him $20 the day the robbery occurred. Mr. Dykes confirmed that fact. Hunt said that he also had on his person at that time an additional sum of $50. He carried the $70 in greenbacks in his pocket. On the evening of the robbery the defendant had been drinking. When Hunt returned to camp that evening he saw the defendant shooting with a gun at a tin can. The defendant accompanied Hunt to a store where the prosecuting witness bought and paid for some groceries. They returned to the camp and each entered his own cabin. After Hunt had prepared and eaten some ham and eggs, the defendant called to him from outside his cabin. As Mr. Hunt emerged, the defendant, without warning, struck him with his gun and knocked him down. Driscoll then pointed the gun at Hunt and said: "Give me that money you got." The prosecuting witness testified, "There wasn't nothing for me to do but to hand it over to him," which he did. He promptly gave the defendant his roll of greenbacks containing $70. The defendant then commanded him to "head for the river." Hunt obeyed, not daring to refuse for fear of being shot. When he reached a point out of the sight of the defendant, he immediately ran to the home of a friend by the name of Mose and reported the robbery.

As a result of the blow on his head, Hunt received a serious laceration across the bridge of his nose and over his left eye, from which he bled profusely. Two days later he visited Doctor Glenn of Sacramento for treatment of the wounds. The doctor testified that he then treated him for a severe laceration over the left eye and a bruise on the bridge of the nose. His eye was then badly swollen. The doctor said that the wounds were evidently caused by a blow from a blunt weapon such as a gun or a club. Mr. Hunt told the doctor he had been knocked down and robbed. The officers were promptly notified of the crime and the defendant was apprehended and charged with the offense. At the trial the sawed-off rifle, which was used by the defendant in firing at the tin can, and which was identified as the same weapon with which Hunt was struck, was received in evidence. The defendant admitted that he had that gun in his possession in the cabin. The defendant denied that he struck Mr. Hunt with his gun, or that he took any money from him. But he did admit that they had a quarrel that night and that he struck him several times with a club and knocked him down. He said that he struck the prosecuting witness several times with a club in necessary self-defense.

The appellant contends that the verdict and judgment are not supported by the evidence, and that the court erred in refusing to give to the jury one instruction which he offered regarding the right of the jury to consider evidence of a lesser offense of assault included within the charge of robbery.

[1, 2] The verdict and judgment are adequately supported by the evidence. It is true there was no eyewitness to the affair other than the defendant and the prosecuting witness. Their stories are in absolute conflict regarding most of the material circumstances. The defendant denied that he struck Mr. Hunt with the gun or that he robbed him of any money. He admits that he struck him several times with a club and that he knocked him down. Since Mr. Hunt said that he was struck but once with the gun, it is strenuously argued that a scalp wound which he received at or near the temple, together with a bruise over the bridge of the nose and a laceration over the left eye become conclusive evidence that he must have been struck several times, as the defendant says that he was. We are of the opinion that conclusion does not necessarily follow. It does not appear to be improbable that one blow with a gun might inflict all those injuries, including the bruised bridge of the nose, the swollen eye, the cut above the eye and the breaking of the skin near the temple. He might have received the injury near the temple when he struck the ground. Doctor Glenn testified that the injuries which he treated two days after the robbery might have been caused by a blow from a blunt weapon such as a gun or a club. The court and the jury observed the witnesses on the stand and listened to their testimony. No doubt the location of the wounds were pointed out at the trial. The story related by the defendant does not carry conviction with it. The weight of the evidence and the credibility of the witnesses were for the sole determination of the jury. We have no disposition to disturb its conclusions in that regard.

The chief contention of the appellant is that notwithstanding the fact that the second count of the information, charging him with an assault with a deadly weapon, was dismissed, still that crime or a simple assault may be included within the charge of robbery, and he was therefore entitled to have the jury consider the evidence, together with appropriate instructions on that subject, to determine whether he was guilty of a lesser offense of an assault with a deadly weapon, or of a simple assault.

[3] It is true that an assault with a deadly weapon, or even a simple assault, may be included within the charge of robbery. People v. Dahl, 113 Cal.App. 224, 298 P. 59; People v. Foss, 85 Cal.App. 269, 259 P. 123; § 1159, Pen.Code; 8 Cal.Jur. 376, § 409. It necessarily follows that when the evidence warrants it, a defendant is entitled to have the jury instructed that it may properly find him guilty of either of the lesser offenses which may be included within the charge of robbery.

The jury was not only fully and fairly charged with respect to every essential element contained within the crime of robbery, but it was also correctly and elaborately instructed, at the request of the defendant, as to what constitutes an assault with a deadly weapon, and of the absolute right of one who is assailed by another, to use any and all force necessary to repel his assailant and to defend himself. The jury was told that it was not necessary that danger of bodily harm at the hands of one's assailant should be real or actual, but that if the defendant reasonably believed that he was about to be attacked and was in danger of receiving great bodily harm, he had a lawful right to use a club or resort to any other necessary force to defend himself. The principles of law applicable to assaults were fully covered in the instructions which were given to the jury, with specific reference to the defendant's evidence upon which he relies. The jurors were clearly informed that if they were satisfied the defendant, in good faith, struck Fred Hunt with a club and knocked him down, believing that he was about to receive bodily harm, although no danger of such harm actually existed, it was still their duty to "acquit him of the charge of assault * * * upon the ground of necessary self-defense."

The jury was clearly and repeatedly instructed that unless it believed beyond a reasonable doubt that the defendant took the money and personal effects mentioned in the information from the person of the prosecuting witness by means of force or fear, it was bound to find him not guilty.

[4, 5] We are of the opinion the refused instruction is sufficiently covered by the charge which was given to the jury on that subject. Moreover, the refused instruction is misleading. It reads: "You are instructed that the defendant in this case testified that he struck the complaining witness, Fred Hunt, with a club in defense of his person. You are further instructed that in the event you believe such striking to have occurred, but that said striking did not occur as a result of fear engendered in the defendant by the complaining witness, then in that event you are instructed that if you believe no robbery to have occurred, you may find the defendant guilty of assault and battery."

The refused instruction fails to state that the fear on the part of the defendant, which would justify him in striking the prosecuting witness with a club, must have been fear that he was about to receive serious injury at the hands of his assailant. The instruction does not leave for the determination of the jury the question as to whether the defendant acted in necessary self-defense.

[6, 7] The defendant may not complain of the failure to give that instruction, for the prosecution, under no circumstances, asked that the defendant be convicted of a lesser offense. Moreover, the jury and the trial court evidently believed that he did take from the prosecuting witness $70 in cash, by means of force and fear. The evidence supports that conclusion. It has been uniformly held that a defendant may not complain of erroneous instructions or of the refusal to give to the jury instructions where the verdict clearly shows that he was not prejudiced thereby.

[8] It has also been held that when one has been convicted of a higher crime he may not complain of erroneous instructions which were given to the jury upon a lesser offense included within the one of which he was convicted. In 17 Corpus Juris 348, section 3705, 24 C.J.S., Criminal Law, § 1922, it is said in that regard: "It is also generally held that if defendant is acquitted of a lower and convicted of a higher degree of crime, error in instructing as to the former is harmless."

In accordance with the foregoing principle of law, the case of People v. Riley, 65 Cal. 107, 3 P. 413, holds that a defendant who was charged and convicted of the crime of robbery may not complain of erroneous instructions which were given to the jury regarding the lesser offense of larceny, which was contained therein, provided the jury was properly instructed on the subject of robbery. The Riley decision has never been modified in subsequent California authorities. It is a sound declaration of law with respect to that principle.

The case of People v. Foss, supra, upon which the appellant relies, is not in conflict with the Riley case. It is true that case was reversed on account of erroneous instructions regarding a lesser offense which was included within the charge of robbery. But the court distinctly said there was absolutely no evidence in the record in that case showing that the defendant took from the prosecuting witness any money or property. Since there was no evidence to support the charge of robbery, it necessarily followed that error in instructing the jury upon the only offense included therein, which the evidence did support, would result in a reversal. The court said [85 Cal.App. 269, 259 P. 124]: "To constitute the crime of robbery, there must be a felonious taking of personal property (section 211, Pen.Code), but the evidence in this case wholly fails to show any taking. * * * In view of the total lack of evidence as to any taking of personal property, no instructions as to larceny were necessary."

The jury was fully and fairly instructed on every essential element of the crime of robbery and of the lesser offenses included therein. The defendant was not prejudiced by the refusal to give the instruction in question. There appears to have been no miscarriage of justice in this case.

The judgment and the order are affirmed.

SCHOTTKY, Justice pro tem., and ADAMS, P. J., concurred.

53 Cal.App.2d 757

MACAULAY v. BOOTH et al.

Civ. 6722.

District Court of Appeal, Third District, California.

Aug. 1, 1942.

1. Deeds 🔑**196(3)**

Where confidential relationship is shown to have existed between grantor and grantee, proof of independent advice is not indispensable to negative presumption of undue influence.

2. Physicians and surgeons 🔑**12**

The relationship of physician and patient is a "confidential relationship."

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relationship".

3. Appeal and error 🔑**931(1), 989**

Before appellate tribunal is justified in reversing judgment on ground of insufficiency of evidence it must appear from record that, accepting full force of evidence adduced, together with every inference favorable to prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment.

4. Appeal and error 🔑**931(1), 989**

On appeal evidence must be construed most strongly against the losing party below, every favorable inference and presumption which may fairly be deduced from evidence should be resolved in favor of prevailing party, and prevailing party's evidence must ordinarily be accepted as true and contradictory evidence disregarded.

5. Mortgages 🔑**86(3)**

In suit to set aside trust deed and note from patient who was suffering from complication of ailments to physician who had treated patient, without payment, for eight months, evidence supported judgment denying relief on ground that presumption of undue influence was overcome.

◆

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Suit by Georgette Macaulay against Myron M. Booth and others to set aside a trust deed and note, wherein a cross-complaint was filed. From a judgment for defendant, plaintiff appeals.

Affirmed.

George F. Sharp, of Oakland, for appellant.

Tom W. Hanrahan, of St. Helena, and Clarence N. Riggins, of Napa, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment in favor of respondents in an action to cancel a deed of trust and promissory note.

In the early part of 1937, C. E. Godon, who was in ill health, moved from Oakland, California, to Calistoga, California, and took residence there at a place known as "Beauty Cove." Godon was suffering from a complication of ailments, including valvular heart disease and decompensation of the heart, involvement of the liver, unquestionably cirrhosis, dropsical condition, lack of proper circulation, shortness of breath, arteriosclerosis, hemiparesis, and aphasia.

On or about May 24, 1937, respondent Dr. Myron M. Booth undertook treatment of Godon, and the relation of physician and patient existed from that date until the death of Godon on January 23, 1938. During this period the attendance of Dr. Booth on Godon was very frequent, amounting to several visits per week, and the treatment was extensive. On January 22, 1938, Godon executed and delivered to respondent Dr. Booth, a promissory note in the amount of $1,312.46, representing the obligation due Dr. Booth by Godon for medical services rendered in treating the latter from May, 1937, to January 22, 1938, which promissory note was secured by a deed of trust upon the premises known as "Beauty Cove," which said deed of trust and a copy of said promissory note were recorded in the office of the County Recorder of Napa County, on January 24, 1938. Appellant Macaulay claims the property known as "Beauty Cove," by virtue of a deed of gift from Godon, dated July 6, 1937, which said deed was recorded by her on February 2, 1938.

Appellant filed suit in the court below upon the grounds that Godon was entirely without understanding at the time of the purported execution of the instruments in question, and that respondent Dr. Booth, as physician for Godon, gained an unfair advantage over the latter in the transaction. Respondents filed an answer, and respondent Booth filed a cross-complaint to establish the validity of the trust deed and note as a valid lien upon said premises.

The trial court rendered judgment in favor of respondents. Among other things, the court found that Charles E. Godon was fully conscious and well aware of the nature and effect of his act, and in full possession of his mental faculties when he executed the said promissory note and deed of trust; that said promissory note and deed of trust were made, executed and delivered to respondent Dr. Booth for a good and valuable consideration, to wit, for medical services, and without any fraud or undue influence on the part of respondent, Dr. Booth.

Appellant states the questions involved upon this appeal as follows:

(1) Can cestuis que trustent, standing in a confidential relationship to a trustor, retain a benefit obtained from trustor, without the latter having had independent advice concerning the same?

(2) Does the evidence sustain the findings?

(3) Do the findings sustain the judgment?

[1] With reference to the first question, the weight of authority seems to be that when a confidential relationship is shown to have existed between a grantor and grantee, proof of independent advice is not indispensable to negative the presumption of undue influence. In re Hill, 13 Cal.App. 2d 326, 57 P.2d 155; Smith v. Lombard, 201 Cal. 518, 524, 258 P. 55; Brown v. Canadian Industrial Alcohol Co., 209 Cal. 596, 599, 289 P. 613, 614.

In Brown v. Canadian Industrial Alcohol Co., supra, the Supreme Court said: "* * where a fiduciary relationship exists between the donor and donee, the absence of independent advice is a circumstance to be considered in determining whether the gift should be avoided because of alleged undue influence or fraud, but its nonexistence alone does not authorize the court to avoid the gift. All utterances to the contrary have been squarely repudiated by this court."

[2] Appellant asserts, correctly, that the relationship of physician and patient is a confidential one, and contends that respondent Dr. Booth, failed to respect the confidential relationship which he bore to his patient Godon. He quotes the following from 20 California Jurisprudence, page 1072: "Within the principles of the law of fraud and deceit, the relationship of physician and patient is one of trust or confidence, and as such gives rise to certain implications in respect of transactions between the parties. 'Once this relationship is shown to exist, all dealings between the parties will be closely scrutinized to ascertain if the confidence of the trusting party has been betrayed or his mind unduly influenced to his prejudice.' * * * In conjunction with circumstances which furnish an opportunity for deception—such as weakness of intellect on the part of the patient, advanced years or the like—the relationship of the parties gives rise to a presumption that the physician practiced a deception or acted unconscientiously; and the burden of proof is cast upon him to show that the patient acted intelligently or with knowledge of the consequences of the transaction."

Appellant concedes that, as stated on the same page of the same authority: "The presumption against the physician is not conclusive; and the transaction will be sustained where the circumstances show that the patient acted voluntarily or with an appreciation of the consequences of his act."

[3, 4] Appellant argues with great earnestness that the evidence is insufficient to support the judgment, and quotes many portions of the record to sustain this contention. It is a rule too well established to require the citation of authorities that, before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from that record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

We have studied the record, and believe it may fairly be stated that the following facts appear therein:

That Dr. Booth treated Godon from May 24, 1937, until Godon's death on January

23, 1938; that Godon was suffering from a complication of ailments, and that the treatments he received from Dr. Booth, to a large degree, consisted of relieving him from distress and suffering and affording him comfort while he lived; that Godon realized that his death was approaching and that his financial condition was desperate, and had been such since at least July 6, 1937; that he made an effort to compensate Bernard Hooe, a male nurse, who was attending him, and Dr. Booth, the two men who had relieved his suffering and distress; that even though his financial condition was desperate, and his need for funds acute, Godon, on the 24th day of December, 1937, paid Hooe in full for his services to that date; that during the entire time of treatment by Booth, Godon often expressed his desire to meet his obligation to Booth for medical services; that on January 19, 1938, Godon suggested to Dr. Booth that the note and deed of trust be drawn; that on the 21st day of January, 1938, at the request and suggestion of Godon, Dr. Booth requested attorney Tom Hanrahan to prepare a deed of trust and promissory note in the exact amount of the obligation for medical services; that the note and deed of trust were prepared on January 21, 1938; that on January 22, 1938, Dr. Booth, in a telephone conversation with Godon's attorney, advised the attorney that Godon desired that Dr. Booth be protected on the obligation for medical services rendered; that said attorney informed Dr. Booth that he had no objection to Godon's executing the note and deed of trust; that thereupon Dr. Booth and his attorney went to the property described in the deed of trust; that Dr. Booth notified appellant that he had come to have Godon execute the note and deed of trust; that appellant stated that she had no objection to this and that there was just reason for appellant to have this protection; that Dr. Booth's attorney then explained to appellant the nature and reason for the visit; that Dr. Booth and his said attorney then asked appellant to step into the bedroom with themselves and Godon during the explanation and signing of the documents; that Dr. Booth, appellant and said attorney then entered the bedroom and the attorney read the terms of the note to Godon and explained in detail the terms, nature and effect of the deed of trust; that Godon stated he had been expecting them, and was ready to sign the note and deed of trust; that Godon stated that he understood the terms and effect of the note and deed of trust; that appellant Macaulay then assisted Godon in signing the note and deed of trust; that Godon then signed his mark to the note and deed of trust; that Godon was competent both before and during the execution of the note and deed of trust, and was fully aware of the nature and effect of his acts; that during the time of the execution of the note and deed of trust, no attempt was made by Dr. Booth to exclude appellant from the bedroom, but on the contrary, appellant was requested by Dr. Booth to be present in the room.

There is, of course, much testimony contradictory to the evidence hereinbefore referred to, and we may state that had the trial court decided in favor of appellant, the record would support such finding. Counsel for appellant has, with great skill and plausibility, pointed to certain testimony in the record strongly supporting appellant's contentions. However, we are not here concerned with the matter of weighing conflicts in testimony. The question we have to decide is whether, taking all of the evidence into consideration, together with every inference and presumption favorable to respondents which may fairly be deduced therefrom, and disregarding all evidence in conflict therewith, we must conclude that the evidence is insufficient to support the judgment.

[5] Taking the record as a whole, we believe it would be a usurpation of the legitimate function of the trial court for us to say that the presumption of undue influence was not overcome, and that the decision should have been in favor of appellant. While it is true that the law is very jealous of dealings between persons in such confidential relationships as that of physician and patient, and will scrutinize them very searchingly and suspiciously, when they are had in a way that leaves doubt of their integrity and that they were fairly obtained and justly procured, yet it is for the trial court to say, after a consideration of the entire evidence, whether the transaction was fair and honest and the instrument was the voluntary, untrammeled and uninfluenced act of the grantor. It is to be assumed that the learned trial judge in the instant case was entirely satisfied that the presumption of undue influence was overcome, that the transaction was fair and equitable, that Godon was aware of the nature and effect of the transaction and fully competent to execute the note and deed

of trust. It may be here stated that no question is raised by appellant as to the reasonableness of the bill of Dr. Booth for which the note and deed of trust were given.

We do not think it necessary unduly to prolong this opinion by discussing the various cases cited in the briefs. The principles herein announced are well established and are supported by numerous decisions. See Hemenway v. Abbott, 8 Cal.App. 450, 97 P. 190; Schurman v. Look, 63 Cal.App. 347, 218 P. 624; Zihn v. Zihn, 153 Cal. 405, 95 P. 868; Metropolis, etc., Sav. Bank v. Monnier, 169 Cal. 592, 147 P. 265; Cox v. Schnerr, 172 Cal. 371, 156 P. 509; Campbell v. Genshlea, 180 Cal. 213, 180 P. 336.

No other points raised in the briefs require discussion.

We conclude, therefore, that the judgment of the court below is amply supported by the record and should be affirmed.

The judgment is affirmed.

THOMPSON, J., and ADAMS, P. J., concurred.

DANT & RUSSELL, Inc., v. BOARD OF SUPERVISORS OF LOS ANGELES COUNTY et al.

Civ. 13618.

District Court of Appeal, Second District, Division 2, California.

July 24, 1942.

Hearing Granted Sept. 21, 1942.

1. Commerce 🔑81

The statutory requirements that foreign corporation, in order to maintain proceedings in state courts on intrastate business, file certified copies of its articles of incorporation with Secretary of State and county clerk of county wherein its principal place of business in state is located are inapplicable to foreign corporations engaged solely in interstate and foreign commerce. Civ. Code, §§ 405, 408.

2. Commerce 🔑41(1), 77, 81

A foreign corporation, importing lumber from Philippine Islands into state and selling it to customers outside state, was engaged solely in "interstate and foreign commerce", and hence entitled to maintain mandamus proceeding to compel cancellation of county tax assessments on lumber in warehouse yard without filing certified copies of its articles of incorporation with Secretary of State and county clerk. Civ.Code, §§ 405, 408.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate and Foreign Commerce".

3. Commerce 🔑41(1), 72, 77

Where milled and finished lumber, imported into state, is not packaged or bundled together, but shipped, unloaded and piled by individual pieces, and portion thereof is thereafter sold by nonresident owner, maintaining no office in state, to customers outside state, lumber remaining in state is not subject to taxation by county in which located, as each individual piece of lumber is "original package." U.S.C.A.Const. art. 1, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "Original Package".

4. Commerce 🔑77

A state or subdivision thereof may not constitutionally levy a tax on a thing imported into country while it retains its character as import and remains importer's property in original form or package in which imported. U.S.C.A.Const. art. 1, § 10.

5. Commerce 🔑41(1), 77

An "original package", as applied to interstate and international commerce, is a package, bundle or aggregation of goods put up in original form, covering or receptacle for transportation and transported as a unit from one state or nation to another, and is identical package delivered by consignor to carrier at initial point of shipment in exact condition in which it was shipped.

6. Commerce 🔑41(1), 72, 77

The fact that portion of interstate or international shipment of goods is sold or offered for sale in state, leaving remainder intact in their original packages, does not render balance subject to state taxation.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Dant & Russell, Inc., for a writ of mandate to compel the Board of

Supervisors of the County of Los Angeles and others to cancel tax assessments on imported lumber. Judgment for defendants, and petitioner appeals.

Reversed, with directions.

Stanton & Stanton and Henry C. Rohr, all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendant predicated upon the sustaining of a demurrer without leave to amend to an application for a writ of mandate to compel defendants to cancel tax assessments levied upon lumber, petitioner appeals.

The undisputed facts are:

From 1937 to 1940 inclusive petitioner imported shipments of Philippine mahogany from the Philippine Islands into the port of Long Beach. The lumber was milled and finished in the Philippines and then shipped to Long Beach, where it was unloaded from steamships and stored in piles in the yard of a warehouse. The lumber was shipped in individual pieces and not packed nor in any manner bundled together. When unloaded it was stacked in piles, one piece upon another. Each shipment was filed separately and kept to itself. From the piles of lumber thus received portions were sold to customers outside the state of California. When it was sold, petitioner directed its warehousemen to make shipment of the respective pieces of lumber purchased to the purchaser and petitioner paid the cost of loading and freight. Petitioner never maintained an office in California, its principal office being located in Portland, Oregon.

The county of Los Angeles assessed a tax against the lumber of petitioner remaining in the yard at Long Beach on the first Monday of March, 1938, and also a similar assessment was made on the lumber remaining in the yard on the first Monday in March, 1939.

Two questions are presented for determination, which will be stated and answered hereunder seriatim.

[1, 2] *First: Did petitioner as a foreign corporation, which had not recorded with the secretary of state and county clerk certified copies of its articles of incorporation have the right to maintain the present action?*

This question must be answered in the affirmative. It is the law of California that a foreign corporation may not maintain an action or proceeding in any court of this state upon any *intrastate* business, unless it has filed with the secretary of state a certified copy of its articles of incorporation and also filed a certified copy thereof in the office of the county clerk of the county where its principal place of business in this state is located. (§§ 405, and 408, Civ. Code.)

The foregoing requirements, however, are not applicable to foreign corporations which are engaged solely in *interstate and foreign commerce.* Under the facts set forth above, which were admitted as true by respondent's demurrer, petitioner was engaged solely in interstate and foreign commerce and, therefore, was entitled to maintain the present proceeding without complying with the requirements of section 405, Civil Code.

[3] *Second: Where milled and finished lumber is imported into the state of California and not packaged or bundled together but simply shipped by individual pieces and unloaded and stacked in piles, one piece upon another, and thereafter a portion of said lumber is sold by a nonresident owner who does not maintain an office in the state of California to customers outside of the state of California, is the lumber which remains in the state of California subject to a personal property tax of the county in which it is located?*

This question must be answered in the negative and is governed by the following pertinent rules of law:

[4] (1) The law is settled that a state or a subdivision thereof may not constitutionally levy a tax upon a thing during the time it retains its character as an import and remains the property of an importer in a warehouse in the original form or package in which it was imported. (Art. I, § 10, Constitution of the United States; Brown v. State of Maryland, 12 Wheat. 419, 6 L.Ed. 678, 684; F. May & Co. v. New Orleans, 178 U.S. 496, 507, 20 S.Ct. 976, 44 L.Ed. 1165.)

[5] (2) An original package as applied to interstate and international commerce is a package, bundle, or aggregation of goods put up in original form, covering, or receptacle for transportation and as a unit transported from one state or nation to another. It is the identical package delivered by the

consignor to the carrier at the initial point of shipment in the exact condition in which it was shipped. (15 Corpus Juris Secundum, (1939), Commerce, § 28, p. 310; Guckenheimer v. Sellers, C.C.S.C., 81 F. 997, 1000.)

The case of Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 115 A. 900, 26 A.L.R. 965, cited by respondent and apparently strenuously urged in the trial court, which reaches a contrary conclusion, has been expressly disapproved as the law in this state. (See Philippine Ref. Corp. v. Contra Costa County, 24 Cal.App. 2d 665, 669, 76 P.2d 163.)

[6] (3) The fact that a portion of shipments of goods is sold or offered for sale, leaving the remainder intact in their original packages does not make the balance subject to state taxation. (State v. Board of Assessors, 46 La.Ann. 145, 15 So. 10, 49 Am.St.Rep. 318, 320; Mexican Petroleum Corp. v. Louisiana Tax Commission, 173 La. 604, 138 So. 117, 120; City of Galveston v. Mexican Petroleum Corp., D.C.Tex., 15 F.2d 208.)

Applying the foregoing rules to the facts of the instant case, it is our opinion that the original package was each individual piece of lumber, since the lumber was not bundled or in any manner bound together and was the identical thing delivered by the consignor to the carrier at the initial point of shipment and it so remained at all times here in question. There can be no doubt that, had one piece of lumber alone been shipped, it would have constituted the original package and not been subject to taxation under the facts set forth above. Had two or three or a dozen pieces of lumber been shipped, it is likewise obvious that each individual piece of lumber would have constituted an original package. The fact that there were thousands of individual packages did not change the character of each piece of lumber as an original package. Therefore, under the first rule above stated the county was without authority to levy a tax upon the lumber which remained in the original packages and which had not, under the admitted facts, been mingled with the mass of property of this state.

For the foregoing reasons the judgment is reversed with directions to the trial court to overrule the demurrer and allow respondents a reasonable time within which to answer, if they be so advised.

MOORE, P. J., concurred.

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53 Cal.App.2d 764

ABROMS v. NEW YORK LIFE INS. CO.

Civ. 13659.

District Court of Appeal, Second District, Division 1, California.

Aug. 3, 1942.

Hearing Denied Oct. 1, 1942.

1. Reformation of instruments 🔑26

Where husband and wife purchased single premium policy providing for life annuity to wife, and policy provided that annuitant might elect to receive a life annuity of which husband would not be beneficiary, or a refund annuity in lesser amount of which husband would be beneficiary, and husband and wife surrendered policy requesting refund annuity, and insurer in alleged fraud issued life annuity certificate, husband was a "party aggrieved" within section 3399 and entitled to bring an action to reform the policy to show husband's interest in the certificate. Civ.Code, §§ 3399–3402.

See Words and Phrases, Permanent Edition, for all other definitions of "Party Aggrieved".

2. Reformation of instruments 🔑36(3)

An action to reform a contract is in equity and, to state cause of action, pleader must show that because of fraud or mutual mistake, or of mistake of one party which the other at the time knew or suspected, there were omitted from instrument certain material terms. Civ.Code, § 3399.

3. Pleading 🔑214(2)

A demurrer admits all well pleaded allegations of complaint.

4. Appeal and error 🔑917(1)

On appeal from judgment dismissing an action after sustaining a demurrer without leave to amend complaint, it must be assumed that all the facts are as alleged.

5. Reformation of instruments 🔑36(3)

Husband's complaint, alleging that husband and wife had purchased single premium policy providing for life annuity to wife, that policy provided that annuitant might elect to receive a life annuity of which husband would not be beneficiary, or a refund annuity in lesser amount of which husband would be beneficiary, that husband and wife prior to wife's death surrendered policy for refund annuity and insurer fraudulently issued life annuity certificate, and that policy was the community property of husband and wife, stated cause of action for reformation of policy to show husband's beneficial interest in annuity certificate. Civ. Code, § 3399.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Abe Abroms against the New York Life Insurance Company for reformation of a policy. From judgments dismissing the action after a demurrer had been sustained without leave to amend, plaintiff appeals.

Reversed with directions.

Hearing denied; SHENK and EDMONDS, JJ., not participating.

A. Joseph Shapiro, of Los Angeles, for appellant.

Meserve, Mumper & Hughes and Leo E. Anderson, all of Los Angeles, for respondent.

YORK, Presiding Justice.

This is an appeal from two judgments dismissing an action for reformation of an insurance policy after a demurrer had been sustained to appellant's complaint without leave to amend.

A single premium policy was purchased from respondent by appellant and his wife, Rose Abroms, on June 20, 1932, providing for the payment to Rose of a life annuity of $79.10 per month "commencing on the anniversary of this Policy upon which the Annuitant's age at nearest birthday is 60 years; but, at any time prior to the commencement of such Annuity payments, the Annuitant may, provided the Policy is then in force, elect in writing to receive in lieu thereof either:

"(1) A life Annuity, as shown in Schedule I hereof, or

"(2) A Refund Annuity as shown in Schedule II hereof.

"The Company further agrees to pay to Abraham Abroms, husband of the Annuitant, Beneficiary, in the event of the receipt of due proof of the death of the Annuitant, a Death Benefit as shown in Schedule III hereof, if such death shall occur prior to the due date of the first Annuity payment hereunder; or, if a Refund Annuity has been elected and such death shall occur on or after the due date of the first Annuity payment, the Company agrees to pay to said Beneficiary the Annuity payments, if any, becoming due after the death of Annuitant, as set forth in the provision hereof entitled 'Annuity Payments.'

"The Company, upon surrender of this Policy on the anniversary elected for commencement of Annuity payments hereunder, will issue a Certificate in lieu thereof setting forth the rights and benefits as stated herein.

"This contract is made in consideration of the application therefor and of the payment in advance of the single premium of $10,000.00 representing Ten Premium-Units of $1,000 each . . . This Policy takes effect as of the First day of July Nineteen Hundred and Thirty-two. . . ."

On July 1, 1939, Annuity Certificate No. 82810 was issued by the Company, reading in part as follows:

"Retirement Annuity Policy No. 82810, having been issued by the New York Life Insurance Company on the life of Rose Abroms, the Annuitant, and said Policy having been surrendered to said Company,

"And Dividends on Deposit, in the amount of Two Hundred Thirty-one Dollars and Thirty-six Cents ($231.36) having been applied in accordance with the written request of said Annuitant and the provisions of said Policy to increase the amount of the Annuity payments to the amount hereinafter set forth,

"And this Certificate having been issued in exchange for and in full settlement of said Policy,

"Said Company, in accordance with the request of said Annuitant and the provisions of said Policy, shall pay to said Annuitant, if living, a Life Annuity of Eighty Dollars and Sixty-two Cents ($80.62) payable monthly at the Home Office of said Company in the City and State of New York, as follows:

"The First Annuity payment of Eighty Dollars and Sixty-two Cents shall be made as of the First day of July, in the year Nineteen Hundred and Thirty-nine, and a like amount shall be paid monthly thereafter during the lifetime of said Annuitant. Said Annuity payments shall terminate with the last monthly payment due prior to the death of said Annuitant."

It is alleged in the complaint herein that on July 1, 1939 (the anniversary of the policy on which the age of annuitant Rose Abroms at her nearest birthday was 60 years) said annuitant and her husband, Abraham Abroms, the appellant herein, "went to the office of defendant in the City of Los Angles, County of Los Angeles, State of California, for the purpose of surrendering the aforementioned policy and receiving in lieu thereof a Certificate as described in said policy and which would provide for a *refund annuity* as shown in Schedule II of said policy whereunder the annuity payments would be payable to Rose Abroms as annuitant until her death, and upon her death there would be payable to the plaintiff as beneficiary the annuity payments becoming due after the death of Rose Abroms as set forth in the provision of said policy entitled 'Annuity Payments'; that the plaintiff and his said wife then and there informed the defendant and its agents and servants that they were desirous of surrendering the aforementioned policy for a *Certificate providing for such refund annuity;* that the defendant then and there issued to the plaintiff and his said wife a Certificate, copy of which is attached hereto, marked Exhibit 'B,' and by this reference made a part hereof, in lieu of the aforementioned policy and the plaintiff and his said wife then and there surrendered the aforementioned policy to the defendant; that the defendant and its servants and agents at the time of the issuance of said Certificate to the plaintiff and his said wife *knew and were well aware of the fact* that the plaintiff and his said wife had ordered a Certificate providing for a refund annuity as provided in said policy; that the defendant and its agents and servants nevertheless, at said time, falsely and fraudulently represented to the plaintiff and his said wife that said Certificate being so issued to the plaintiff and his said wife did in truth and in fact provide for a refund annuity as provided for in said policy wherein Rose Abroms would be the annuitant and the plaintiff the beneficiary; that the plaintiff and his said wife relied upon said representations and accepted said Certificate in full reliance upon said representations, and surrendered the aforementioned policy in full reliance upon said representations; that neither the plaintiff nor his said wife read or examined said Certificate either at the time of its issuance or at any time prior to the death of Rose Abroms because of their reliance upon the representations so made by the defendant and its agents and servants as aforesaid; that the defendant and its agents and servants induced the plaintiff and his said wife to accept said Certificate and to retain the same until after the death of Rose Abroms by means of their false and fraudulent representations aforesaid; that the Certificate issued to plaintiff and his said wife provided for a life annuity as provided for in said policy rather than the refund annuity ordered by plaintiff and his said wife; that the plaintiff and his said wife would not have ordered or accepted a life annuity Certificate and were at the time of the issuance of said Certificate and at all times thereafter until after the death of Rose Abroms, ignorant of the fact that the Certificate which was issued to them provided for a life annuity rather than a refund annuity." (Italics added.)

On May 16, 1941, the annuitant Rose Abroms died and "shortly after the death of said Rose Abroms, the defendant notified and informed the plaintiff that the Certificate which had been issued to them was in truth and in fact a life annuity Certificate rather than a refund annuity Certificate and then and there informed the plaintiff that the defendant would make no further payments under said Certificate or under the aforementioned policy; that the plaintiff first discovered that said Certificate so issued to plaintiff and his said wife as aforesaid provided for a life annuity rather than a refund annuity after the death of Rose Abroms when plaintiff consulted an attorney."

Demand for reformation of the certificate by appellant and refusal by the respondent to either reform or pay appellant any sum or sums of money are also alleged.

To this complaint respondent corporation interposed a general and special demurrer in support of which was submitted a memorandum of points and authorities to the effect (a) No one can maintain an action to reform a deed or other contract unless he has some title or interest therein; (b) Where the policy reserves to the insured the right to change the beneficiary, the interest of the beneficiary prior to the death of insured is a mere expectancy subject to revocation.

Said demurrer was argued and submitted on December 5, 1941, and on December 15, 1941, was sustained by the court without leave to amend; whereupon appellant moved the court for leave to file his first amended complaint, the original of which was attached to the notice of motion. Said motion was heard and denied by the court on December 31 and on January 5 and January 6, 1942, judgments dismissing said action were entered.

The first amended complaint in addition to the facts alleged in the original complaint averred that Rose and Abe Abroms were married in the year 1905 and continuously from that date until the death of Rose on May 16, 1941, said parties were husband and wife and lived together as such; that on July 7, 1941, appellant was appointed administrator of the estate of Rose Abroms, deceased, and that:

"Abe Abroms is suing herein both in his individual capacity in his own right, and as the duly appointed, qualified and acting administrator of the estate of Rose Abroms * * * deceased. * * *

"That the aforementioned policy number 82810 was at the time of its surrender and at the time of the issuance by the defendant of the aforementioned Certificate, the community property of the plaintiff, Abe Abroms, and his wife, Rose Abroms, and the plaintiff, Abe Abroms, had a community interest therein; that the plaintiff * * * at no time consented or agreed to the issuance by the defendant of the Certificate issued by defendant as above alleged * * * other than a Certificate pursuant to the terms of the aforementioned policy and which would provide for a refund annuity wherein Rose Abroms would be the annuitant commencing at her age sixty (60) and Abe Abroms, Individually and in his own right, the beneficiary; that the plaintiff * * * at no time consented to the surrender of the aforementioned policy except upon the condition that there be issued by the defendant in lieu thereof a Certificate providing for such refund annuity."

The questions for determination by this court appear to be: (1) Has appellant such an interest in the annuity certificate as to entitle him to maintain the present action? (2) Does the complaint sufficiently state a cause of action for reformation?

The gist of the instant action is the fraud of respondent corporation in issuing the wrong type of certificate which erroneously failed to name appellant, thus eliminating therefrom a statement of the benefits conferred upon him under the original policy in which he was the named beneficiary. Attention is here called to the statement in the original policy: "The Company, upon surrender of this Policy on the anniversary elected for commencement of Annuity payments hereunder, *will issue a Certificate in lieu thereof setting forth the rights and benefits as stated herein.*" (Italics added.) Had respondent conformed to said provision and the alleged request of appellant and his wife, and had issued the refund annuity certificate, as requested, appellant would then have had a vested interest in the proceeds of the policy and unquestionably would have been the real party in interest in an action to recover the same.

In Cantlay v. Olds & Stoller Inter-Exchange, 119 Cal.App. 605, 7 P.2d 395, parties who were not designated as the named assureds in an automobile liability policy, but who alleged they were intended to have been insured under the policy, brought an action to reform it so as to show them as being insured and for enforcement of the policy as reformed. In affirming the judgment in favor of plaintiffs, the court said (119 Cal.App. page 617, 7 P.2d page 400): "In the instant case, although the policy of insurance is between the Eastman Company as the insured and the insurance company as the insurer, the allegations of the complaint set forth a beneficial interest therein, in favor of the plaintiffs, and they are therefore entitled to maintain this action."

In view of the terms of the original policy and the allegations of the complaint, it is not reasonable to assume that appellant and the annuitant, for the sole purpose of receiving $8.90 per month additionally, would elect to take a life annuity rather than a refund annuity certificate when such election would result in cutting off the right of appellant as beneficiary to receive the benefits which a refund annuity certificate would confer upon him at the death of the annuitant. According to the provision entitled "Annuity Payments" and the provisions of Schedule III shown in the original policy, the amount of the death benefit at the time of annuitant's death amounted to approximately $12,890. Respondent apparently paid annuitant the sum of $80.62 for twenty-three months, or a total of $1,854.26 which deducted from said death benefit left a balance of $11,035.74 remaining in the hands of respondent upon the death of the annuitant. If respondent's agents issued the Annuity Certificate here in question without an explanation to appellant and his wife of its ultimate effect, that act in itself would bring the parties within the provisions of section 3399 of the Civil Code.

The equitable action for reformation is preserved by sections 3399 to 3402, inclusive, of the Civil Code:

Section 3399, supra: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value."

Section 3400, supra: "For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement."

Section. 3401, supra: "In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be."

Section 3402, supra: "A contract may be first revised and then specifically enforced."

[1] From what has been said, it is obvious that appellant is a "party aggrieved" under section 3399, supra, especially where the demanded reformation is for the purpose of showing his beneficial interest in the Annuity Certificate according to the terms of the original policy.

Respondent urges that appellant has not alleged facts excusing the alleged failure of himself and his wife to read the Anuity Certificate. Upon this subject, the following excerpt is quoted from the opinion in the case of California Trust Co. v. Cohn, 214 Cal. 619, 627, 7 P.2d 297, 300: "We are inclined to the view therefore, that where the failure to familiarize one's self with the contents of a written contract prior to its execution is traceable solely to carelessness or negligence, reformation as a rule should be denied; but that where such failure, and perhaps negligence, is induced, as alleged and admitted by the demurrer in this case, by the false representations and fraud of the other party to the contract that its provisions are different from those set out, the courts, even in the absence of a fiduciary or confidential relationship between the parties, should reform, and in most cases have reformed, the instrument so as to cause it to speak the true agreement of the parties." (Citing authorities.) See, also, S. E. Slade Lbr. Co. v. National Surety Co., 128 Cal.App. 419, 425, 17 P.2d 775.

[2] An action to reform a contract is in equity, and in order to state a case therein, it is incumbent upon the pleader to show by direct averment that "by reason of fraud practiced by one of the parties, or of the mutual mistake of the parties or of a mistake of one of them, which the other at the time knew or suspected, there were omitted from the instrument certain material terms and conditions. In other words, that the language of the writing failed, for some reason, to express the intention of the parties." Pascoe v. Morrison, 219 Cal. 54, 56, 25 P.2d 9, 10.

In Johnson v. Sun Realty Co., 138 Cal. App. 296, 301, 32 P.2d 393, 395, wherein a demurrer to the complaint was sustained without leave to amend, it was held: "The complaint [in an action for reformation] is sufficient if it shows, by direct averment, that by reason of fraud practiced by one of the parties the executed agreement is not the actual agreement. Pascoe v. Morrison [219 Cal. 54], 25 P.2d 9. This it does, for it is alleged that respondent falsely represented that the executed agreement was the one agreed upon, that appellant relied upon such misrepresentation and was induced thereby to sign. Cross v. Bouck, 175 Cal. 253, 165 P. 702."

In the late case of Genuser v. Ocean Acc., etc., Corp., 42 Cal.App.2d 673, 109 P. 2d 753, a complaint for reformation of an insurance policy was held sufficient against demurrer where it alleged (a) an intention and agreement of the plaintiff and defendant that an insurance policy cover plaintiff's automobile of a certain year and with a designated serial number, and (b) the issuance, through the mistake of the plaintiff known to the defendant, of a policy covering a car of a different year and with a different number which was not owned by plaintiff and in which he had no insurable interest.

[3, 4] Since the effect of a demurrer is to admit all of the allegations of the complaint which are well pleaded, it must be assumed on appeal from the judgment that all the facts are as alleged. 21 Cal.Jur. 96; Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501.

[5] A consideration of the allegations of the complaint having the above rule in mind has persuaded this court that the complaint herein states a cause of action for reformation; that respondent's demurrer thereto should have been overruled, and that appellant should have been permitted to file his first amended complaint.

For the reasons stated, the judgments of dismissal are reversed, with directions to the trial court to overrule the demurrer and to permit appellant to file his first amended complaint, if he still desires to do so.

DORAN, J., and WHITE, J., concurred.

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53 Cal.App.2d 839

PEOPLE v. MORAGO.

Cr. 3617.

District Court of Appeal, Second District, Division 2, California.

Aug. 6, 1942.

Criminal law 🔑1069(1)

Where defendant was convicted of felony in November, 1940, but was placed on probation and in March, 1942, probation was revoked and in April, 1942, the judgment of November, 1940, was ordered in full force and effect, and where only argument on appeal was with respect to validity of judgment of November, 1940, from which no appeal had been taken, the appeal was dismissed. Pen.Code, §§ 107, 1239.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Lawrence Pete Morago was convicted of escape from legal custody of an officer and from an order declaring the judgment in full force and effect after the revocation of probation, the defendant appeals.

Appeal dismissed.

Albert Flaxman, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

PER CURIAM.

Respondent's motion to dismiss the appeal having been by stipulation of the parties submitted for decision, and it appearing from the record that appellant was on November 25, 1940, convicted of a felony, towit, escape from the legal custody of an officer (Pen.Code, § 107) and was sentenced to state prison for the term prescribed by law, and that the execution of his sentence was suspended and probation granted on the same day; and it further appearing that thereafter on the 23rd day of March, 1942, probation was revoked and thereafter, on April 13, 1942, the judgment of November 25, 1940, was ordered in full force and effect, from which order appellant gave notice of appeal on the 17th day of April, 1942; and it further appearing from appellant's brief that no attack is made upon the order of April 13, 1942, and that his only argument is with respect to the validity of the judgment of November 25, 1940, from which no appeal was ever taken;

Now, therefore, it is hereby ordered and adjudged that the motion to dismiss is granted and that the appeal be and it is hereby dismissed. Pen.Code, § 1239; People v. Lewis, 219 Cal. 410, 27 P.2d 73; In re Herbert Collins, 8 Cal.App. 367, 370, 97 P. 188.

RICHARDSON v. ROYAL INDEMNITY CO.

Civ. 2843.

District Court of Appeal, Fourth District, California.

Aug. 3, 1942.

Hearing Granted Oct. 1, 1942.

1. Guardian and ward 🔑163

Orders in guardianship proceeding approving guardian's account, and which had become final, could not be collaterally attacked in a subsequent probate proceeding, but could only be reviewed in a proper equity case if extrinsic fraud could be established.

2. Guardian and ward 🔑182(4)

In action against decedent's bondsman to recover alleged misappropriations of decedent as guardian, dismissal of the action with prejudice as against decedent's administrator eliminated all equitable features of the action intended to review final orders in guardianship proceeding on ground of extrinsic fraud, and the action became one at law against surety on the contract, and, without decedent as principal or his personal representative, decedent's liability, if any, could not be determined.

3. Executors and administrators 🔑513(3)
Guardian and ward 🔑163

Orders and decrees, in guardianship and probate proceedings, which approved decedent's account as guardian and administrator and which orders had become final, could not be collaterally attacked in an action at law against decedent's bondsman to recover alleged misappropriations of decedent as guardian.

4. Appeal and error 🔑681

In action against decedent's bondsman to recover alleged misappropriations of decedent as guardian, no breach of discretion was shown in refusing plaintiff's request to file amended complaint naming decedent's administrator as defendant, where record showed no notice of any motion to file such pleading and nothing to indicate that such pleading was presented to trial judge at time of such request nor was there anything to indicate a request to bring in additional parties.

Appeal from Superior Court, San Diego County; Edward J. Kelly, Judge.

Action by F. L. Richardson, as administrator de bonis non of the estate of Anna Baxter, deceased, against the Royal Indemnity Company, to recover alleged misappropriations of defendant's principal while acting as guardian of the property of decedent. From a judgment for defendant, rendered after sustaining objection to the introduction of evidence by plaintiff on the ground that the complaint failed to state facts sufficient to constitute a cause of action, plaintiff appeals.

Affirmed.

F. L. Richardson, of San Diego, in pro. per., for appellant.

Gray, Cary, Ames & Driscoll and Burton D. Wood, all of San Diego, for respondent.

MARKS, Justice.

This is an appeal from a judgment in favor of respondent rendered on October 20, 1941, after its objection had been sustained to the introduction of any evidence by appellant on the ground that the second amended complaint failed to state facts sufficient to constitute a cause of action.

The second amended complaint contained two causes of action.

In the first cause of action it was alleged that Charles T. Chandler was administrator of the estate of Anna Baxter, deceased, from May 8, 1922, to the time of his death in 1935, at which time the estate had not been closed; that defendant had furnished his bond as such administrator; that on June 29, 1922, an inventory was returned in which the assets of the estate were appraised at $31,700.25; that other property of the estate valued at $16,623.25 was in the hands of Chandler which he failed to inventory; that he was indebted to the estate in that amount; that on May 11, 1925, Chandler, as administrator, made his first annual and final account and petition for distribution which did not include assets of the estate in his possession of the value of $17,237.08; that the account came on for hearing on August 16, 1938; that the court found that Chandler had received $32,279.81 belonging to the estate and had disbursed $31,665.98, leaving a balance of $623.83 for distribution. It was further alleged that the $17,237.08 belonging to the estate was concealed from the court and had been wrongfully appropriated by Chandler; that at the time of the commencement of this action (May 11, 1940) R. F. Smith was the administrator of the estate of Chandler; that plaintiff as administrator of the estate of Anna Baxter, deceased, presented a claim for $17,237.08 against the estate of Chandler which was allowed by Smith and approved by the probate court; that the approval thereof by the court was thereafter vacated; that on the 12th day of July, 1940, Smith was removed from his office and Kathleen C. Bach was appointed in his stead.

In the second cause of action it is alleged that on October 5, 1908, Anna Baxter was adjudged to be insane and incompetent; that John R. Baxter was appointed guardian of her person and estate and continued to act as such until his death in 1919, when Charles T. Chandler was appointed in his stead and continued to act as such until her death on March 2, 1922; that thereafter Chandler was appointed administrator of her estate; that defendant furnished his bond; that on June 5, 1922, Chandler filed his third annual and final account as guardian showing he had on hand assets of the estate in the sum of $31,295.25 when in fact he had assets of the value of $46,417.80, thus concealing assets of the value of $15,122.55; that his account was approved and he as guardian was ordered to turn over to himself as administrator the assets of the guardianship estate;

that he failed and refused to deliver to himself as administrator assets of the value of $15,122.55 which he appropriated to his own use; that the heirs of Anna Baxter did not discover this misappropriation until June, 1937; that Chandler had rendered his final account in the estate of Anna Baxter, deceased, which had not been settled prior to his death; that on June 11, 1937, plaintiff was appointed administrator of the estate of Anna Baxter, deceased; that on September 10, 1937, R. F. Smith was appointed administrator of the estate of Chandler and filed an amended account showing that Chandler had received assets belonging to Anna Baxter of the value of $17,901.53 more than shown in Chandler's final account; that on August 16, 1938, both accounts came on for hearing and the probate court refused to settle the amended account filed by Smith, but did settle the account for the amount shown in the account filed by Chandler; that an appeal was taken from this order and it was affirmed by the Supreme Court.

A demurrer both general and special, including the plea of the statute of limitations was interposed to both causes of action. It was sustained to the first cause of action without leave to amend and was overruled as to the second cause of action. The minute order on the demurrer was made on January 27, 1941. A formal judgment of dismissal of the first cause of action was filed and entered February 3, 1941. No appeal was taken from this judgment.

On January 3, 1941, and prior to the ruling on the demurrer plaintiff had dismissed the action, with prejudice, against Kathleen C. Bach as administratrix of the estate of Charles T. Chandler, deceased. This left the Royal Indemnity Company, the surety on the bonds, as the sole defendant in the action.

The same questions presented here were before the Supreme Court in Re Estate of Baxter, 15 Cal.2d 166, 99 P.2d 276 (see, also, In re Estate of Baxter, Cal.App., 91 P.2d 962) with the parties here then before that court. The order of the probate court was affirmed. Additional facts appear in that opinion which need not be repeated here.

[1] It seems probable that this action was instituted in accordance with a suggestion contained in the opinion in Re Estate of Baxter, supra. As the orders and decrees in the guardianship proceeding had long since become final they could not be collaterally attacked in the probate proceeding. However they might be reviewed in a proper equity case if extrinsic fraud could be established.

It seems to have been the original intention of plaintiff to bring an equitable action to recover from the estate of Chandler and his bondsman, the money alleged to have been misappropriated belonging to Anna Baxter. While the pleading lacks many appropriate allegations we assume that such was the purpose of the instant action.

[2, 3] When the plaintiff dismissed with prejudice the action against Kathleen C. Bach as the administratrix of the estate of Chandler, deceased, he eliminated the equitable features from the case. It left the Royal Indemnity Company, the surety, as the sole defendant. The action then became one at law against the surety on its contract, without the presence of the principal or his personal representative and without any opportunity to determine, as against the principal, his liability to Estate of Baxter, if any. In this action at law against the surety, the plaintiff had confronting him the orders and decrees in the probate and guardianship proceedings which had long since become final and which could not be collaterally attacked in this action at law. In re Estate of Baxter, supra; In re Estate of Madsen, 31 Cal. App.2d 240, 87 P.2d 903. Those orders and decrees found in effect that Chandler had finally accounted for all of the estate of the incompetent in the guardianship and all of the estate of the deceased in the probate proceedings. Until set aside in a proper proceeding, defendant was entitled to full protection of those decrees. Under this state of the record when this came on for trial on October 17, 1941, the second amended complaint failed to state facts sufficient to constitute a cause of action and defendant's objection to the introduction of any evidence by plaintiff was properly sustained. The judgment was filed and entered on October 20, 1941.

[4] Plaintiff urges that the trial court committed prejudicial error in refusing to permit him to file a third amended complaint. The record contains an order dated November 14, 1941, denying a request to file such a pleading made on October 17, 1941. There is no notice of any motion to file such a pleading and nothing to indicate that any such pleading was presented to the trial judge at that time. There is nothing

to indicate a request to bring in additional parties.

There is a pleading in the record denominated "Third Amended Complaint * * *" marked "Filed Oct. 21, 1941." It names The Royal Indemnity Company and Kathleen C. Bach, administratrix of the Estate of Charles T. Chandler, deceased, as defendants. There is nothing in the record to connect this pleading with the request to amend. After January 3, 1941, Kathleen C. Bach, as administratrix, was not a party to the action. No proceedings were had to again make her a party if it could have been done after the action against her had been dismissed "with prejudice."

Under these circumstances there was no breach of discretion in refusing the request to file a third amended complaint.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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53 Cal.App.2d 773

RAMSEY v. PENRY et al.

Civ. 2839.

District Court of Appeal, Fourth District, California.

Aug. 3, 1942.

1. Damages 🔑142

Special damages must be alleged or they cannot be recovered.

2. Damages 🔑6

Speculative damages may not be recovered.

3. Conspiracy 🔑19

In action between joint adventurers associated together to promote the development through a corporation of plaintiff's contract rights to a patent, to recover damages sustained by plaintiff because defendants allegedly conspired to prevent plaintiff from deriving profit which he was to receive if certain amount of stock in corporation was sold and corporation profited from use of patented machines, evidence as to damage sustained by plaintiff was too speculative to support judgment for plaintiff. Civ. Code, §§ 3300, 3333.

◆

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by J. R. Ramsey against Willard W. Penry and others and W. West Hunt and another to recover for damages for alleged fraud in the attempted sale of stock of a corporation. From an adverse judgment, W. West Hunt and another appeal.

Judgment against appellants reversed.

Whitelaw & Whitelaw and Russell Yeager, all of El Centro, for appellants.

Wirt Francis, of San Diego, for respondent.

MARKS, Justice.

This is an appeal by W. West Hunt and Harold W. Hunt from a judgment against them and James Ebert for $3,750, in an action for damages for fraud which was alleged to have grown out of an attempt to sell the stock of a corporation. Ebert has not appealed.

George H. Woods was the inventor of a patented tool which had as its purpose the renovation of soil. On June 14, 1938, plaintiff and Woods entered into a contract whereby Woods granted plaintiff the right to purchase these soil renovators and the exclusive right to operate them throughout California except in the county of Ventura. The purchase price was fixed at 40 per cent above cost. Plaintiff obligated himself to order, pay for and accept deliveries of at least five of the soil renovators on or before June 30, 1939.

Plaintiff caused a corporation to be organized named the California Soil Sterilizing Corporation, Woods' Process, which we will call the corporation. He assigned his contract with Woods to this corporation on July 1, 1938.

Under date of July 7, 1938, the Commissioner of Corporations issued a permit for the corporation to sell not more than 37,500 shares of its stock for its par value of $1.00 per share and to pay a licensed broker or agent not to exceed 20 per cent of the selling price. Plaintiff was to receive one share of stock for each share sold for cash, his stock to be placed in escrow with an agreement waiving his right to participate in any distribution of assets of the corporation, "excepting dividends payable according to law," until the subscribers for stock (purchased for cash) should receive the return of the full amount of the purchase price. No certificates were to be delivered and no money paid to the corporation until $15,000, to be received from the sale of stock for cash, had been deposited with an escrow holder. By amendments to the permit the time to conform to its terms was fixed as of January 6, 1940.

Willard W. Penry and Verree A. Mason were licensed brokers doing business under the name of Penry & Mason. By an instrument bearing date June 18, 1938, Penry & Mason was appointed underwriter to distribute 37,500 shares of stock to the general public. There is nothing to indicate that this agency was exclusive or that the corporation could not employ other brokers or agents satisfactory to the Commissioner of Corporations to sell its stock.

James Ebert was a salesman employed by Penry & Mason to whom was delegated the duty of selling the stock. Only 2980 shares were sold. The selling campaign started on August 4, 1938.

W. West Hunt and Harold W. Hunt were brothers doing business in Imperial Valley under the firm name of Hunt Brothers. W. West Hunt subscribed and paid for 500 shares of stock and Harold W. Hunt subscribed and paid for 200 shares and took an option to purchase 4800 additional shares.

The first board of directors of the company was composed of J. R. Ramsey, who was president and acted as general manager, H. E. Trumbell and L. J. Penry. On September 28, 1938, Penry resigned and Harold W. Hunt took his place. As far as we are advised there was no other change in the membership of the board during the time involved here.

Prior to the incorporation of the company a soil renovator had been built and used for experimental purposes. This was destroyed by fire. A second was built which was also burned. A third machine was built by Hunt Brothers which was used for experimental purposes in Imperial Valley, and near Shafter in Kern County. None of the machines were built by Woods and none were ordered by the company from Woods.

Under date of November 15, 1938, Penry & Mason assigned to James Ebert the contract to sell the stock of the company. At that time Hunt Brothers paid Ebert $1,500. He in turn paid Penry & Mason $700 for the assignment, retaining the balance for his own use.

The purchase of the stock-selling contract was made pursuant to the terms of a contract between Ebert and Hunt Brothers, dated November 14, 1938, which contemplated it. In consideration of the payment of the $1,500, Ebert agreed to pay Hunt Brothers a variable percentage of the commissions to become due him for the sale of stock.

The evidence indicates that Hunt Brothers paid Ebert and Woods about $100 per month each as living expenses. We are not able to determine just when these payments were started.

There was little stock sold during the fall of 1938 and thereafter. Ramsey testified that in response to his inquiries, Ebert told him that such sales could not be made until the results of experiments made with the soil renovator in Imperial Valley became apparent; that the value of the renovator could not be determined until the crops planted on land renovated had matured. Ramsey further testified that during the last of February, 1939, Ebert told him there had been no attempt to sell stock for two and one-half months; that Hunt Brothers did not want any stock sold.

Under date of March 20, 1939, Woods and Ebert entered into a contract whereby Ebert was given the right to use the soil renovator in Ventura County. He agreed to purchase one machine from Woods at 40 per cent above the cost of manufacture.

Under date of July 1, 1939, Woods served a written notice of cancellation of the contract of June 14, 1938, because of the failure to purchase five soil renovators before June 30, 1939. A copy of this notice was served on the Commissioner of Corporations.

On November 24, 1939, Woods, Ebert, Harold W. and W. West Hunt entered into a contract concerning the soil renovator. This contract provided for the adjustment of certain outstanding rights to use the soil renovator, and interests in the patent, some of which were created by contracts which we do not find in the record. It provided for the formation of a corporation and the assignment of the patents to it; for division of the interests of the parties so that Woods would have 32½ per cent and each of the other three 22½ per cent, subject to certain small deductions. It was also agreed that a money judgment against Woods be paid and that Woods and Ebert each receive $100 per month. The money to pay the judgment was furnished by Hunt Brothers.

The trial court entered judgment in favor of Penry & Mason, and in favor of plaintiff, and against Ebert and W. West and Harold W. Hunt for $7,500. This judgment was based on findings of conspiracy between Ebert and the two Hunts which damaged plaintiff in destroying the value of his interest in the corporation; that such interest has "been rendered of no value, and plaintiff has suffered damage in the sum of Seventy-five Hundred Dollars ($7500.00)" without any other finding of the value of such interest.

A motion for new trial was made. One finding was modified and new findings were made which completely changed the theory of the case. The reasons for this are stated in an opinion filed by the trial judge in which the following appears:

"Damages were allowed at the original trial upon the theory that plaintiff had been deprived of 7,500 shares of stock of the par value of $1.00 a share, and was damaged accordingly under the rule stated in Victor [Oil Co.] v. Drum, 184 Cal. 226, 193 P. 243, and Dicker v. Italo-American Oil Corporation, 119 Cal.App. 451, 6 P.2d 550.

"However, upon further consideration, on the motion for new trial herein, we are of the opinion that plaintiff's damage is more properly measured by his loss of time and money in his efforts to promote the enterprise, which the acts of defendant have cut off. What profits plaintiff might have made are speculative and uncertain. The loss of time and money is both definite and certain, and we have found it to be $3,750.00."

In the new findings is the following:

"That at all times between September 28th, 1938, and July 1, 1939, plaintiff and defendants James Ebert, Harold W. Hunt and W. West Hunt were joint adventurers associated together for the purpose of promoting the development through a corporation of the contract rights to U. S. Patent #2008891 as set out in the contract of June 14, 1938, by and between plaintiff and George H. Woods * * *.

"Plaintiff was damaged to the extent of $3,750.00 for time and money spent in promoting said contract rights to patent #2008891, which contract rights were made valuless to plaintiff by the acts of defendants Hunt Brothers and Ebert heretofore."

This is the first time that the question of a joint adventure was expressly injected into the case. Appellants urge that there are no allegations in the complaint of a joint adventure to support the new findings; that no right to amend was asked or given; that the findings of joint adventure are entirely without the issues made by the pleadings and unsupported by the evidence.

We do not consider it necessary to decide these questions. For the purpose of this opinion we will assume without holding that the complaint states a cause of action; that sufficient ultimate facts were alleged to support the finding of joint adventure; that the evidence supports the finding of joint adventure and conspiracy on the part of Ebert and the two Hunts. We will confine our consideration to the question of damages alleged and proved.

There were no special damages alleged in the complaint. There is only the allegation of general damage in the sum of $100,000.

[1] Evidence concerning the time and money expended in attempting to promote the affairs of the corporation was received over the strenuous objections of appellants. Special damages must be alleged or they cannot be recovered. San Mateo County v. Christen, 22 Cal.App.2d 375, 71 P.2d 88. Money spent in promoting the organization of a corporation to which certain contracts were to be assigned, has been held to constitute special damages that must be specially alleged in an action quite similar in principle to the instant case. Duell v. Sanstrom, 120 Cal.App. 414, 7 P.2d 1087.

[2] Damages for breach of an obligation arising from contract is an amount that will compensate the party aggrieved for all detriment proximately caused thereby. (§ 3300, Civ.Code.) The damages for a wrong not arising from contract should be an amount that will compensate the aggrieved party for all detriment proximately caused thereby. (§ 3333, Civ.Code.) It is also established that speculative damages may not be recovered. Taylor v. Hopper, 207 Cal. 102, 276 P. 990; Houghton v. Lawton, 63 Cal.App. 218, 218 P. 475; McGregor v. Wright, 117 Cal.App. 186, 3 P.2d 624.

In considering the measure of damages applied here we must observe that plaintiff had no agreement with any one for repayment of any money spent by him in organization expenses or promotion of sales of stock in the corporation. Nor was he to be compensated for time spent in those activities by payment of anything for those services. The only way in which plaintiff could have been compensated for those expenditures of time and money was by receiving the stock placed in escrow for him under the permit of the Commissioner of Corporations.

The hope of plaintiff to derive any profit from the venture is dependent on the happening of three major contingencies: (1) The sale of sufficient stock to cash purchasers so that $15,000 in cash could be deposited from such sales with the escrow holder. Before the deposit of such sum in escrow no money could be released to the corporation. (2) The successful operation of the soil renovator. (3) Sufficient contracts with agriculturists for renovation of soil at prices that would return a profit to the corporation.

Plaintiff attempted to show that sufficient stock could have been sold to permit the corporation to withdraw the money from escrow and start its operations. In doing this he testified concerning two prospective purchasers of stock. One was a "steel man" living in Hollywood, and the other was A. M. Presser.

Plaintiff did not know the name, address, or financial resources of this nebulous "steel man" who had been referred to by Hunt and Ebert in a conversation with plaintiff. This evidence is too unsubstantial to indicate that this person was even a fair prospect to whom stock might be sold.

The other prospective purchaser was A. M. Presser who was not called as a witness. Plaintiff testified that he met Presser when he was interested in investing $35,000 or $40,000 in real estate in San Diego; that he took Presser to Imperial Valley to investigate the soil renovator and introduced him to Ebert and the two Hunts; that Presser then forgot the real estate transaction and wanted to purchase the stock of the company instead; that Presser was ready, willing and able to purchase the stock but Ebert and the Hunts did not follow up and make the sale. On cross-examination he testified that he knew nothing of the worth of Presser, his financial ability or the amount of his assets; that he believed Presser had some money of his own and thought he was representing some wealthy man, without being able to give any ground for this belief. There is nothing substantial in this evidence to indicate that Presser was financially able to purchase the stock had he desired to do so.

If Presser in fact really wanted to purchase the stock, and had the means to make the purchase, there is no reason why the sale could not have been made. The Penry & Mason contract was not exclusive. The sale could have been made by the corporation through an agent or broker duly appointed for that purpose. The members of the Board of Directors were plaintiff, Trumbull and Hunt. There is nothing to suggest that Trumbull was not faithful to his trust as director of the corporation. He and plaintiff constituted a majority of the board of directors and they could have authorized the sale through an agent or broker over the objection of Hunt. They did nothing towards making the sale.

There is no substantial evidence in the record to show that the stock of the company could have been sold to Presser or anyone else had Ebert and the Hunts been faithful to the company and tried to sell the stock.

The evidence on the benefits to be derived from the use of the soil renovator is sharply conflicting. No finding was made on this question but had one been made to the effect that it accomplished the purposes for which it was manufactured such a finding would have had evidentiary support.

Plaintiff testified that several farmers wanted to contract for the use of the soil renovator at the price of $25 per acre; that it cost seven or eight dollars an acre to operate the machine. There is nothing to indicate the number of acres of land to be renovated if these offers could have been accepted so the prospective profits cannot be estimated. Further, to enter into these contracts and perform them, it would have been necessary for the company to have had a machine. It had no assets except the Woods contract assigned to it by plaintiff. It could obtain no money with which to acquire a machine except through sale of stock. Thus its ability to enter into and perform these contracts and reap a profit from them depended on its ability to sell its stock. As the evidence fails to show any ability to sell stock there is no showing of any ability to enter into and perform these contracts or profit from them. Thus there is no substantial evidence of any prospective profits from the operations.

[3] It follows that the evidence of any damage suffered by plaintiff from the wrongful acts of appellants, assuming that they were wrongful, is too speculative to support the judgment; that the trial court was correct when he concluded that "what profits plaintiff might have made are speculative and uncertain."

The portion of the judgment against appellants is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

PEOPLE v. ALLEN.

Cr. 3559.

District Court of Appeal, Second District, Division 3, California.

Aug. 14, 1942.

Rehearing Denied Aug. 24, 1942.

Hearing Granted Sept. 10, 1942.

1. Gaming 🔑75(1)

Under statute making it an offense for any person to keep or occupy any room or building with papers, apparatus or paraphernalia for purpose of recording bets upon result of any contest of speed of a beast, it is not a necessary element that a bet be recorded. Pen.Code, § 337a, subd. 2.

2. Gaming 🔑75(1)

In order to prove a violation on a particular day of statute making it an offense to occupy room or building with books, papers and paraphernalia for purpose of recording bets upon contest of speed of a beast, it is not necessary to establish that there was a race, or purported race on that day. Pen.Code, § 337a, subd. 2.

3. Gaming 🔑75(1)

Under statute providing that every person who keeps or occupies any room, building, etc., with papers, apparatus or paraphernalia for purpose of recording bets on result of any contest of speed of a beast is punishable by imprisonment, it is the keeping or occupancy of a room or place with papers or paraphernalia for purpose of recording bets that is denounced. Pen.Code, § 337a, subd. 2.

4. Gaming 🔑98(5)

In prosecution for keeping or occupying a room or place with papers or paraphernalia for purpose of recording bets on horse races, it was incumbent upon the prosecution to prove that the place was kept or occupied for that purpose but it was not necessary to make the proof by direct evidence. Pen.Code, § 337a, subd. 2.

5. Gaming 🔑98(5)

In prosecution for keeping and occupying a place with papers and paraphernalia for purpose of recording bets on horse races, the purpose in keeping or occupying the place may be determined from circumstances shown in evidence. Pen.Code, § 337a, subd. 2.

6. Gaming 🔑98(5)

Evidence was sufficient to sustain conviction for keeping or occupying a storeroom with books, papers and paraphernalia for purpose of recording bets upon horse races. Pen.Code, § 337a, subd. 2.

7. Gaming 🔑98(5)

The actual possession by defendant of papers of the kind and form customarily used in recording bets on horse races, considered in light of defendant's conduct in attempting to conceal them at the time of arrest constituted a major element of charged offense of keeping and occupying a storeroom with books, papers and paraphernalia for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

8. Criminal law 🔑452(1)

Police officer who in performance of duties over a period of several years had become familiar with papers, books and paraphernalia ordinarily used by bookmakers was qualified to testify regarding manner in which bookmakers operated and it was proper to permit the officer to explain the nature and character of the papers taken from defendant and his place of business, and to state his opinion with reference to the significance attaching to letters and figures which appeared thereon.

9. Criminal law 🔑254

Where trial was by court without a jury, the weight to be accorded the evidence was question for trial judge and it was his function to determine what facts were established by the evidence.

10. Criminal law ⚷260(11)

If circumstances shown in evidence reasonably justify finding of guilt by trial court, a reviewing court is not warranted in disturbing the finding even though those circumstances may also be reconciled reasonably with the innocence of defendant.

11. Criminal law ⚷1030(1)

A party cannot on appeal rely on errors whose consequences could have been avoided by timely protest to the trial court when he remains silent at the trial.

12. Criminal law ⚷260(11)

Where objection was made at preliminary hearing to offer of scratch sheet in evidence and case was submitted to court without jury on transcript of proceedings at preliminary hearing, but objection to scratch sheet was not made at trial, even if the court considered the scratch sheet in evidence, there was no prejudicial error in view of fact that there was sufficient evidence to sustain the conviction.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Joseph Allen was convicted of occupying a storeroom with books, papers and paraphernalia for purpose of recording bets upon horse races, and he appeals.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged by information in three counts with violation of section 337a of the Penal Code as follows: Count I, violation of subdivision 2 in that he kept and occupied a storeroom with books, papers and paraphernalia for the purpose of recording bets upon horse races; Count II, violation of subdivision 3 in that he received and held money bet upon horse races; and Count III, violation of subdivision 4 in that he recorded bets upon horse races. The trial was by the court without a jury and defendant was convicted upon Count I and acquitted upon Counts II and III. His motion for a new trial was denied and judgment was pronounced sentencing him to the county jail for six months; probation was granted and execution of judgment was suspended for three years upon condition that he pay a fine of $200.

Appellant contends that the evidence was insufficient to sustain the judgment, and that the court erred in its rulings on the admissibility of evidence.

By stipulation the case was submitted upon the transcript of the proceedings at the preliminary hearing. That transcript shows that the only witness was a police officer called by the prosecution, and that the defendant did not testify or call any witnesses on his behalf. When the trial judge asked defendant's counsel, after having read the transcript, whether there was anything further as to Count I, it was stipulated that the defendant "would deny it."

The officer testified that on June 19, 1941, at about 2 p. m., he entered a store which had cigars, cigarettes, stationery and soda water for sale, and in which there was also a newstand and a miniature film business; that he saw the defendant standing on the inside of the cigar counter; that he saw one Cosgrove standing on the outside of the counter opposite defendant next to the cash register; that Cosgrove laid some money on the counter and, as the officer came by him, Cosgrove grabbed a piece of paper from the counter and tore it in half; that at the same time, defendant grabbed two pieces of paper and shoved them into his coat pocket; that the money, $2, was left on the counter; that he placed defendant and Cosgrove under arrest and called his associate officer who was in a car a short distance from the store; that there was an open scratch sheet dated June 19, 1941, on the counter in front of appellant and there were other scratch sheets, on the counter, stapled closed; that there were two blank pads on the counter, one by the cash register and the other farther down, which were similar in shape and size to the papers taken from defendant's pocket and to some of the papers in the groups of papers which were removed from the safe; that he took, as evidence, the two pieces of paper which defendant had put in his pocket, the torn pieces of paper which Cosgrove attempted to destroy, the open scratch sheet, the two one-dollar bills and the two blank pads which were on the counter; that he saw a piece of paper in a locked safe which was in the room and, by means of a hook made from a paper clip, he removed the paper from the safe and then he forced the safe open with a chisel and hammer and removed therefrom $174, a "group" of papers and four "packages" of papers. The articles taken by the officer, except the money from the safe, were received in evidence.

He testified further that he had been a member of the vice-squad of the police department of Los Angeles for four and a half years, had arrested persons charged with bookmaking, had testified in court as to the investigations pursuant to the arrests and was familiar with the manner in which bookmaking was customarily conducted in Los Angeles County; that a scratch sheet contains the names, weather conditions at various race tracks, the post time and distance of horse races, the numbers and names of race horses, the jockeys' names, the track odds, the handicapper's selections and the weight carried by each horse; that the open scratch sheet, which was upon the counter, was such a scratch sheet, was known as the "National Scratch Sheet" and was sold in almost every newstand in Los Angeles; that there was a common practice among bookmakers for recording bets and the two pieces of paper which were taken from defendant's pocket conform with that practice and were commonly known as betting markers; that upon one of such papers there were numbers and words as follows: "714, Testa, to 751, West Acres," and under those numbers and words there were the words "Win" and "Place", and after the word "Win" there was the number "1" and under the word "Place" there was the number "1", and after these was the letter "X", and under all of the numbers and words there was a line under which were the initials "C. J."; that the symbols on that paper mean a two-horse parlay, which is a bet on two horses and if the bet on the first horse is won, the proceeds therefrom are then placed on the second horse and, if that horse wins, the better collects the total amount the second horse pays; that the second paper taken from defendant was in the same form as the other one taken from defendant, except with different numbers and names of horses, and it was also a two-horse parlay; that the names of the horses on the betting markers taken from defendant were on the National Scratch Sheet, dated June 19, 1941, which was open on the counter in front of appellant; that the paper taken from the safe by means of the hook was also a betting marker, bearing a number "711" which indicated the number of the horse, a letter "X" which indicated there was no bet in the win position, and the figure "2" which indicated there was a $2 bet on the horse to "place", or run second, but that the numbers and letters on that marker were not on the open scratch sheet which was upon the counter; that another paper, with the names "Little Ruler" and "Wilderbust" thereon, which was among the papers taken from the safe, was also a betting marker in the same form as those taken from defendant, and the names thereon were on the open scratch sheet; that the piece of paper torn by and taken from Cosgrove, bearing the terms "Mad Crusader" and "Southern Belle," was also a betting marker in the same form as those taken from defendant, and the names thereon were on the open scratch sheet; that in a conversation when Cosgrove and the defendant were present, Cosgrove said, in response to a question by the officer, "Allen is my banker, I owed him $2.00 and that's why I put it (the money) down in front of him," and in response to a question by the officer, concerning the reason he tore the betting marker, Cosgrove said, "I had to tear it up, I had to tear that bet up."; that defendant said that was his (defendant's) place of business and "I run it,"; that the officer asked defendant how the bet happened to get into the safe and he said "That bet you took out of the safe must be something I put in there a long time ago."; that the defendant said he never had a key to the safe, that he had moved there about two years ago and the safe had never been opened; that later the officer asked defendant "* * * how that stuff happened to be in there (the safe) for recent dates," and he said, "A bookmaker leaves this stuff every night," and that he did not know the bookmaker's name; that the officer was there from 2 p. m. until 4:15 p. m., during which time there were several incoming telephone calls, and several persons who called would not give any conversation.

Cosgrove was charged, based upon the circumstances above related, with making a bet on a horse race. He was tried jointly with defendant and was acquitted.

Appellant argues that the conviction cannot be sustained because it was not shown (1) that appellant recorded a bet, (2) that there was a horse race or purported horse race on June 19, 1941, or (3) that the premises were used for the purpose of recording bets.

Subdivision 2 of section 337a of the Penal Code provides that every person, "Who, whether for gain, * * * gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, * * building, * * * place, * * * or inclosure, of any kind, or any part thereof with * * *, paper or papers, apparatus, * * * or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, * * * upon the result or purported result, of any * * * contest, * * * of skill, speed or power of endurance of * * * beast, * * *" is punishable by imprisonment. It is provided further in said section 337a that, "This section shall apply not only to persons who may commit any of the acts designated in * * * this section, as a business or occupation, but shall also apply to every person * * * who may do in a single instance any one of the acts specified * * *."

[1] It is not a necessary element of the offense denounced in subdivision 2 of said section 337a that a bet be recorded. People v. Manning, 1940, 37 Cal.App.2d 41, 43, 98 P.2d 748.

[2] In order to prove that said subdivision 2 was violated on a particular day it is not a requirement that it be established there was a race or purported race on that day. People v. Sutherland, 1922, 59 Cal.App. 462, 463, 210 P. 965; People v. Hinkle, 1923, 64 Cal.App. 375, 380, 221 P. 693.

[3] It is the keeping or occupancy of a room or place with paper, papers or paraphernalia *for the purpose* of recording bets on horse races, among other kinds of contests, that is denounced by subdivision 2 of said section 337a. People v. Manning, supra, 1940, 37 Cal.App.2d 41, 43, 98 P.2d 748; People v. Hinkle, supra, 1923, 64 Cal. App. 375, 380, 221 P. 693.

[4, 5] Although it was incumbent upon the prosecution to prove that the place was kept or occupied for the purpose set forth in said subdivision 2 it was not necessary to make this proof by direct evidence. People v. Tuttle, 1938, 27 Cal.App.2d 647, 649, 81 P.2d 571. The purpose in keeping or occupying the place could be determined from the surrounding circumstances shown in evidence. People v. Tepper, 1940, 36 Cal.App.2d 525, 527, 97 P.2d 1002.

The appellant kept and occupied a storeroom. When the officer approached the counter therein, behind which appellant was standing, appellant grabbed two betting markers from the counter and shoved them into his (appellant's) pocket. On the counter, at the place where appellant was standing, there was an open scratch sheet of that date which included the same names of horses as those names on the betting markers which appellant grabbed. Also at that place on the counter there were two one-dollar bills and a blank pad similar in shape and size to the betting markers. A group of papers taken from the locked safe in the room included some papers which were similar in size to the betting markers grabbed by appellant and to the papers in the blank pad on the counter. One of the papers from this group, which was described particularly, was a betting marker and the horse's name thereon was also on the scratch sheet that was on the counter. The paper taken from the safe by means of a hook, before the safe was opened, was a betting marker. In referring to the business defendant said it was his and, "I run it." The safe was in defendant's place of business. In the safe there were betting markers upon which were names of horses corresponding with names of horses on the scratch sheet in front of defendant. He made conflicting statements relative to the opening of the safe. One statement was that he had been there two years and "the safe had never been opened." Another statement was that the bet which was taken out of the safe must be something "I put in there a long time ago." A later statement was (referring to the "stuff" in the safe) "A bookmaker leaves this stuff every night." Several persons who called on the telephone would not give any conversation. Defendant made no response when Cosgrove said, "Allen is my banker, I owed him $2.00 and that's why I put it down in front of him," and "I had to tear that bet up."

In the case of People v. Manning, supra, 1940, 37 Cal.App.2d 41, at page 43, 98 P.2d 748, at page 749, it was said, "It is not the actual making of the bets, but the occupancy of a room with a book or books, paper or papers, etc., for the purpose of recording such bets, which constitutes the offense denounced by subdivision 2 of section 337a of the Penal Code."

[6] The circumstances were sufficient to warrant the trial court in finding that one of the purposes of defendant in occupying the room was to register bets on horse

races. There was direct evidence that appellant, at the time of his arrest, attempted to conceal on his person two papers of the kind and form customarily used in recording bets on horse races. Also there was direct evidence that another paper, known as a scratch sheet, was open on the counter immediately in front of appellant.

[7] The actual possession of such papers by appellant, when considered in the light of appellant's conduct in attempting to conceal them at the time of his arrest, constitutes a major element of the offense charged. People v. Hatfield, 1926, 77 Cal. App. 212, 217, 246 P. 95; People v. Reifenstuhl, 1940, 37 Cal.App.2d 402, 404, 99 P.2d 564.

In this case, as stated in People v. Hinkle, 1923, 64 Cal.App. 375, at page 380, 221 P. 693, at page 695, (which involved a similar charge, a betting marker and similar proof), "It is hardly to be supposed that one innocently in possession of such a paper would seek to conceal it from the police officers, as defendant did."

In addition to the direct evidence, the circumstantial evidence pointed convincingly to the correctness of the conclusion of the trial court. As above shown, such circumstantial evidence included that relating to the ownership and control of the safe, the groups of papers in it which included betting markers and papers referred to by appellant as "stuff" put there by a bookmaker, the contradictory statements by appellant about opening or not opening the safe, the blank pads similar to the betting markers, and the several incoming telephone calls in which there was no conversation.

[8] The police officer, in the performance of his duties over a period of several years, had become familiar with the papers, books and paraphernalia ordinarily used by bookmakers. He was qualified to testify as to the custom or manner in which bookmakers operated and it was proper to permit the officer to explain the nature and character of the papers taken from appellant and his place of business and to state his opinion with reference to the significance attaching to the letters and figures which appeared thereon. People v. Hinkle, supra, 1923, 64 Cal.App. 375, 379, 221 P. 693.

The testimony of the police officer was not contradicted by the defendant except insofar as the stipulation that defendant "would deny it" may be regarded as a contradiction. It is not clear whether it was intended by the stipulation that defendant would deny all of the testimony of the officer or only a part of it. If it was intended by such stipulation that defendant would deny all of the testimony, including such testimony as that defendant was present, it would indicate, under the circumstances here presented, that the trial court would have been justified in disregarding the whole of his testimony. If it was intended that he would deny only a part of the testimony, that part cannot be ascertained and upon the record thus presented, if such denial relates only to an undesignated part of the testimony, it must be regarded that the testimony of the officer was uncontradicted.

[9] The weight to be accorded the evidence in this case was a question for the trial judge. It was his function to determine what facts were established by the evidence. In the case of People v. Tedesco, 1934, 1 Cal.2d 211, at page 219, 34 P.2d 467, at page 470, it was said, "* * * before the verdict * * * which has been approved by the trial court can be set aside on appeal upon the ground of the insufficiency of the evidence * * *, it must be made clearly to appear that upon no hypothesis whatever is there substantial evidence sufficient to support the conclusion of the trial court." Further it was said in that case on the same page (1 Cal.2d at page 219, 34 P.2d at page 470) that the reviewing court "* * * may disturb such a finding only when we can say, as a matter of law, that there was no evidence to support it."

[10] If the circumstances shown in evidence reasonably justify the finding of guilt by the trial court, a reviewing court is not warranted in disturbing the finding even though those circumstances also might be reconciled reasonably with the innocence of defendant. People v. Newland, 1940, 15 Cal.2d 678, 104 P.2d 778.

[11, 12] Appellant asserts that the trial court erred in receiving in evidence a paper referred to as an Ajax Turf Bulletin scratch sheet which was not found in appellant's place of business but was obtained elsewhere. The case was submitted to the trial court, as above stated, upon the transcript of the preliminary hearing. An objection was made at the preliminary hearing to the offer of that bulletin in evidence but such an objection was not made at the trial. "A party cannot on appeal rely on errors * * * whose consequences could

have been avoided by timely protest to the trial court, when he remains silent at the trial." People v. Cohen, 1931, 113 Cal.App. 260, 263, 298 P. 114, 115. However, irrespective of such bulletin, there was sufficient evidence to sustain the finding of the trial court and no prejudicial error resulted by reason of such bulletin even if the trial court considered that it was in evidence.

The judgment and the order denying the motion for a new trial are affirmed.

SCHAUER, P. J., and SHINN, J., concur.

53 Cal.App.2d 825

UNION PAC. R. CO. et al. v. CITY OF LOS ANGELES.

Civ. 13592.

District Court of Appeal, Second District, Division 3, California.

Aug. 10, 1942.

1. Licenses 🔑11(1)

Where flowing oil wells were drilled from locations within the city of Los Angeles directionally so as to penetrate an oil producing zone at points within adjoining city of Long Beach, the wells were "located" within former city within an ordinance of that city requiring payment of a license fee by persons producing oil from any well located in the city, and hence owners of wells were liable to city for such fee.

> The word "locate" ordinarily has reference to the location of an object upon the surface of the ground and means to designate the site or place of; to define the location or limits of, as by a survey; * * * in passive, to have place or seat.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Locate".

2. Licenses 🔑11(1)

An ordinance requiring payment of a license fee by persons producing oil from any well located in the city must be construed in accordance with intention which is discernible from its terms.

3. Licenses 🔑11(1)

An ordinance requiring payment of a license fee by persons producing oil from any well located in the city could not be construed as being inapplicable to production from wells surfaced within city but drawing oil from points outside city on theory that failure to specifically describe such wells in ordinance manifested an intention to exclude them from its operation.

4. Licenses 🔑11(1)

Under an ordinance requiring payment of a license fee by persons producing oil from any well located in the city, it was not the act of producing oil that was licensed but the business of producing oil from wells located within the city.

5. Licenses 🔑6(2)

An ordinance requiring payment of a license fee by persons producing oil from any well located in the city, when construed as being applicable to flowing oil wells surfaced within the city but drawing oil from points outside the city limits, was not void as in excess of authority which might be delegated by legislature to a municipality and as an attempt by city to exact a license tax for a business operated outside of city.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Union Pacific Railroad Company, a corporation, and another, against the City of Los Angeles, a municipal corporation, respecting defendant's right to collect license fees from plaintiffs. From an adverse judgment, defendant appeals.

Reversed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., Clyde P. Harrell, Jr., Deputy City Atty., and Bourke Jones, Deputy City Atty., all of Los Angeles, for appellant.

E. E. Bennett, Malcolm Davis, and Edward C. Renwick, all of Los Angeles, for respondents.

SHINN, Justice.

This case was tried upon stipulated facts. Plaintiff Union Pacific Railroad Company owns and operates a number of oil wells and plaintiff Las Vegas Land and Water Company owns one well, which is operated for it by its co-plaintiff, drilled from locations within the City of Los Angeles directionally so as to penetrate an oil producing zone at points wholly within the adjoining City of Long Beach. The entire production of the wells comes from this zone and from depths of from 3,000 to 4,000 feet. The casing is so perforated and packed that one of the wells produces from a section of the zone in the City of Long Beach 145 feet at the top and 230 feet at the bottom, measured horizontally from the common boundary line of the two cities; the section of the zone from which the second well produces is located at the top 325 feet and at the bottom 409 feet from the Los Angeles boundary and the third well produces from the same zone as the other two in a section which at the top is 170 feet and at the bottom 320 feet within the boundaries of Long Beach. All three are flowing wells and the oil, while coming from the sections of the structure lying wholly within the City of Long Beach, is produced at the surface within the City of Los Angeles. The wells were drilled at their surface locations because the owners at the time were unable, because of a restrictive ordinance and inability to reach an agreement with the City of Long Beach, to obtain permits from that city for the drilling of wells therein. Plaintiffs therefore obtained permits from the City of Los Angeles for the location, construction, maintenance and operation of oil well derricks for said wells and for the drilling for oil in such surface locations, in compliance with the terms of the Municipal Code and upon payment of the fees pertaining thereto. The principal California offices of both corporations and all of the management activities pertaining to the operation of oil lands are located in the City of Los Angeles. The stipulation of facts contains the following:

"Oil produced by the Union Pacific Railroad Company from its wells in the Wilmington Oil Field is gathered and distributed as follows: The oil from each well flows naturally or is pumped through a pipe line to two 250-barrel capacity gauging tanks. With respect to almost all wells, each well is served by its own group of two gauging tanks. In one case only, several wells are served by the same gauging tank. The oil, after being gauged in the gauging tanks, is pumped through connecting pipe lines to a larger group of 2,000 barrel capacity tanks, known as 'shipping stations,' several of which are located in the Wilmington Oil Field. From the shipping stations the oil is pumped through pipe lines to the receivers and purchasers thereof. The surface equipment incidental to the operation of each of the three wells in question consists of a derrick, two gauging tanks and the pipe line connecting the well and the gauging tanks. All this surface equipment for these three wells is located in the City of Los Angeles. The oil produced by LVL&W Well No. 1 is pumped from its gauging tanks into Shipping Station No. 1, which is located in the City of Los Angeles. The oil produced by U. P. Well No. 20 and U. P. Well No. 47 is pumped from their respective gauging tanks to Shipping Station No. 3, which is located in the City of Los Angeles.

"The gathering system, consisting of gauging tanks, shipping stations, power units and pipe lines owned and operated by the Union Pacific Railroad Company in the Wilmington Oil Field for the purpose of gathering the oil produced by its various wells and transporting the same to its purchasers *in* constructed and operated without regard to the common boundary line of the City of Los Angeles and the City of Long Beach. For instance, U. P. Well No. 96 is located entirely within the City of Long Beach and the gauging tanks for this well are located at a distance of approximately 375 feet therefrom and wholly within the City of Los Angeles. Likewise U. P. Well No. 102 is located wholly within the City of Long Beach and its gauging tanks are located 700 feet distant in the City of Los Angeles.

"All oil produced by wells owned and operated by Union Pacific Railroad Company in that portion of the City of Long Beach north of the Cerritos Channel, consisting of 27 wells, is pumped from the various gauging tanks of the said respective wells to Shipping Station No. 3, which is located in the City of Los Angeles. All oil from wells owned and operated by the Union Pacific Railroad Company in that portion of the City of Long Beach lying south of the Cerritos Channel, comprising 32 wells, is pumped from the various gauging tanks of the said respective wells to Shipping Station No. 5, which is located within the City of Los Angeles. All oil produced by Las Vegas Land and Water Company and Union Pacific Railroad Company in the Wilmington Oil Field is delivered to the purchasers thereof from shipping stations located in the City of Los Angeles."

The city is attempting to collect from plaintiffs license fees for engaging in the business of producing oil, measured in part by the production from said three wells, under certain provisions of the Municipal Code which provide that no person shall engage in any business required to be licensed under the ordinance without first obtaining a license authorizing them to engage in the licensed business and that "the fees required to be paid for each of the several businesses licensed under the provisions of this ordinance are prescribed in the following sections." Section 21.124 reads: "For every person producing oil from any well located in the City of Los Angeles, the sum of $2.00 per quarter for each such well producing four hundred (400) barrels or less of oil per quarter, plus ½¢ per barrel of oil produced by each such well in excess of four hundred (400) barrels per quarter."

The judgment of the trial court declares that said section 21.124 "is inapplicable to oil wells drilled from surface locations in the City of Los Angeles in a directional manner so as to, and which, do produce oil from oil-bearing sands or zones which are penetrated by such wells at locations without the boundaries of the City of Los Angeles, and that accordingly

"1. The plaintiff, Union Pacific Railroad Company, a corporation, is not required and shall not be required to pay to the defendant, City of Los Angeles, the license fees provided for in said Section 21.124 with respect to each of those two certain oil wells owned by the said plaintiff known as 'Union Pacific Well No. 20' and 'Union Pacific Well No. 47', or with respect to oil produced or which shall in the future be produced from each of said two oil wells, or for the privilege of producing oil therefrom, each of which wells was drilled from a surface location in the City of Los Angeles in a directional manner so as to and which do penetrate and produce oil from oil-bearing sands or zones located in the City of Long Beach.

"2. The plaintiff, Las Vegas Land and Water Company, a corporation, is not required and shall not be required to pay to the defendant, City of Los Angeles, the license fees provided for in said Section 21.124 with respect to that certain oil well owned by said plaintiff known as 'Las Vegas Land and Water Company Well No. 1', or with respect to oil produced or which shall in the future be produced from said oil well, or for the privilege of producing oil therefrom, which said well was drilled from a surface location in the City of Los Angeles in a directional manner so as to, and which does, penetrate and produce oil from oil-bearing sands or zones located in the City of Long Beach."

[1] Whether these declarations are correct is the first question in the case and this raises the inquiry whether the license fee required by ordinance to be paid for the business in which plaintiffs are severally engaged applies to plaintiffs so far as these three wells are concerned as persons "producing oil from any well located in the City of Los Angeles." Union Pacific Railroad Company owns and operates 59 wells located and producing oil entirely within the adjoining City of Long Beach and 86 wells located and producing oil entirely within the City of Los Angeles, that is to say, the entire bore of each of these wells is so located. The city charges no business license fee measured by the production from the 59 wells located in Long Beach but does charge said plaintiff, computed as provided in the ordinance, for the 86 wells located in the City of Los Angeles. The Municipal Code does not recognize as a special class wells drilled from locations within the city but bottomed and produced from areas outside of the city boundaries. The question therefore is whether within the meaning of the ordinance such wells are located within the city. We think they are. Certainly they are not located outside of the city. They are within the city just as a telephone line would be or an interurban railway, highway or pipe line would be which extended through a portion of the city and into surrounding territory. In ordinary affairs it would be quite customary, we think, to speak of the point where a bore for an oil well was started, from which the work of drilling was carried on, from which the well was operated, and where production came to the surface as the point where the well was located. The word ordinarily has reference to the location of an object upon the surface of the ground. Webster's New International Dictionary, Second Edition, defines the word "locate," in the sense here intended, "To designate the site or place of; to define the location or limits of, as by a survey; * * * in passive, to have place or seat."

[2, 3] The ordinance must be construed in accordance with the intention which is

discernible from its terms. Plaintiffs contend that if it had been intended in computing the license fee to include production from wells surfaced within the city and drawing oil from points outside of the city, such wells would have been specifically described and that therefore it appears to have been the intention to exclude such wells from the operation of the ordinance. We think a contrary view is more reasonable. Considering the purpose of the ordinance, no good reason exists why such wells should have been excluded, with the resulting discrimination in favor of operators of wells like those of plaintiffs. The more reasonable view would seem to be that there was no intention to exclude such directionally drilled wells. Such wells are not uncommon and the fact that no special provision was made for them would indicate that they were considered as wells located at the several points upon the surface from which they were drilled and would necessarily have to produce.

[4] It must be borne in mind that it is not the act of producing oil that is licensed but it is the business of producing oil from wells located within the city. Los Angeles Brewing Co. v. Los Angeles, 1935, 8 Cal. App.2d 379, 48 P.2d 65; McAdams Oil Co. v. Los Angeles, 1939, 32 Cal.App.2d 359, 89 P.2d 729; Barker Bros., Inc., v. Los Angeles, 1938, 10 Cal.2d 603, 609, 76 P.2d 97; Utilities Natural Gas Co. v. State, 1938, Tex.Civ.App., 118 S.W.2d 927. Certainly the business of the plaintiffs of producing oil is carried on in the City of Los Angeles and a part of it consists of the operation of the wells in question; the production only furnishes a basis for measuring the tax on the privilege of carrying on the business.

It is pointed out by the city that oil is "produced" when it is captured and brought to the surface and not until then (see Graciosa Oil Co. v. Santa Barbara County, 1909, 155 Cal. 140, 144, 99 P. 483, 20 L.R. A.,N.S., 211, quoted by the Supreme Court in County of Ventura v. Barry, 1929, 207 Cal. 189, 192, 277 P. 333; Stone v. City of Los Angeles, 1931, 114 Cal.App. 192, 202, 299 P. 838; Callahan v. Martin, 1935, 3 Cal.2d 110, 117, 43 P.2d 788, 101 A.L.R. 871. But we regard the determinative fact to be that the oil from plaintiffs' wells is produced from wells located within the city.

We entertain no doubt that so far as the three wells are concerned plaintiffs are engaged in the business of producing oil from wells located within the City of Los Angeles and that it matters not that the oil itself originates in a section of a zone outside of the city.

[5] It is also contended by respondent, although this point was not decided by the trial court, that a construction of the ordinance making it applicable to these wells which draw oil from outside the city limits would render it void as being in excess of the authority which may be delegated by the legislature to a municipality. The argument assumes that the city by the ordinance is attempting to exact a license tax for a business operated outside of the City of Los Angeles, and it is contended that it has no power to do this. Plaintiffs' business, including the operation of the wells in question, is within the city. Although the product to which the business relates originates outside of the city, it comes into possession of plaintiffs from the wells at the surface. It seems to us that plaintiffs are in the same position as any merchant is who pays a license fee for the privilege of carrying on business in the city and whose business consists in part of handling merchandise which originates at points outside of the city. The receipt of merchandise purchased outside of the city would not be the conduct of business outside of the city, and from the fact that the oil originates from plaintiffs' wells in the territory of Long Beach it does not follow that as to those wells plaintiffs are engaged in business outside of Los Angeles city.

The facts of the instant case are not at all comparable to those in Matter of Application of Smith, 1917, 33 Cal.App. 161, 164 P. 618, relied upon by plaintiffs, in which the court held void an ordinance of the city of Tropico which attempted to exact license fees for the privilege of operating a motor bus through the city of Tropico as an incident to the business of transporting passengers between the cities of Bakersfield and Los Angeles. Even if it were conceded that as to the three wells in question plaintiffs are also engaged in business in the City of Long Beach, their contention is fully answered by the decision in California F. S. Co. v. Santa Monica, 1929, 206 Cal. 714, 275 P. 948.

The judgment is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concur.

53 Cal.App.2d 610

HODGEMAN v. CITY OF SAN DIEGO et al.

Civ. 2858.

District Court of Appeal, Fourth District, California.

July 27, 1942.

Hearing Denied Sept. 24, 1942.

1. Municipal corporations 🔑1000(5)

In taxpayer's action to enjoin execution of contracts for installation of parking meters or to enjoin their performance on ground that another meter manufacturer was the lowest responsible and reliable bidder, trial court properly found that parts to be furnished and the services to be rendered by the successful bidders and by the unsuccessful bidder varied so much that there was no sufficient basis furnished upon which to prepare the bid.

2. Municipal corporations 🔑241

The term "lowest responsible bidder" as used in city charters with respect to competitive bidding means the lowest bidder whose offer best responds in quality, fitness and capacity to the particular requirements of the proposed work, and that where by the use of such term the council has been invested with discretionary power as to which is the lowest responsible bidder having regard to the quality and adaptability of the article to the particular requirements of its use, such discretion will not be interfered with in the absence of direct averment and proof of fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Lowest Responsible Bidder".

3. Municipal corporations 🔑241

The phrase "lowest bidder" as used in municipal charters with respect to competitive bidding means that in determining whether a bid is the lowest among several others there may be cases where the quality and ability of the thing offered may be considered.

See Words and Phrases, Permanent Edition, for all other definitions of "Lowest Bidder".

4. Municipal corporations 🔑241

Where city invited bid for not less than 1,000 parking meters from each bidder and failed to specify that the award might be divided between two or more bidders, each receiving less than the total number, and the awards were so divided between two rival bidders, the result was the same as though there had been no advertisement for a bid.

5. Municipal corporations 🔑236

The nature of parking meters is such that it is impossible to draw specifications to permit any competitive bidding because each meter is covered by a patent and specifications particularly describing one meter would necessarily exclude others.

6. Municipal corporations 🔑236

An exception to the rule requiring letting of contracts by municipalities to lowest responsible bidder is where it is undesirable or impossible to advertise for bids for particular work.

7. Municipal corporations 🔑236

Where evidence failed to show that parking meters had been developed to the point where there was any reasonable basis of comparison between those which operate satisfactorily, advertising for bids by city was not necessary.

8. Municipal corporations 🔑993(2)

Where contracts had already been executed by city they could not be enjoined in taxpayer's action.

9. Injunction 🔑22

An act already performed cannot be prevented by injunction.

10. Evidence 🔑25(2)

The court would judicially notice that meters in plain view had already been installed by a city.

11. Municipal corporations 🔑993(2)

In taxpayer's suit to enjoin execution of contracts for installation of parking meters or to enjoin their performance, injunction would be denied where contracts had been executed and installed and meters would soon be paid for out of earnings.

12. Appeal and error 🔑882(5)

Plaintiff could not complain on appeal of ruling sustaining a demurrer to his third cause of action where court had given him five days in which to amend and no amendment had been attempted.

13. Municipal corporations 🔑1000(5)

Demurrer to third cause of action in taxpayer's suit to enjoin city from executing or performing contracts for installation of parking meters was properly sustained where no facts were alleged showing fraud but only innuendos and legal conclusions were relied on by plaintiff.

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Action by A. E. Hodgeman, etc., against the City of San Diego and others to enjoin the execution of contracts between the City of San Diego and Duncan Meter Corporation and the Karpark Corporation for the installation of parking meters in the City of San Diego, or to enjoin their performance. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Charles B. Provence and William J. Adams, both of San Diego, for appellant.

Jacob Weinberger, City Atty., and Morey S. Levenson and William H. Macomber, Deputies City Atty., all of San Diego, for respondents.

MARKS, Justice.

This is an appeal from a judgment refusing to enjoin the execution of contracts between the City of San Diego and the Duncan Meter Corporation and the Karpark Corporation for the installation of parking meters in the city of San Diego, or, if the contracts had been executed, to enjoin their performance.

The Duncan Meter Corporation is the manufacturer of the Miller Multiple Coin parking meter which is manually operated. The Karpark Corporation is the manufacturer of the Karpark parking meter which is a multiple coin automatic meter. Both companies also manufacture single coin meters. The individual defendants are officers of the city of San Diego.

Plaintiff is a resident and taxpayer of the city of San Diego and the local agent of the Dual Parking Meter Company, the manufacturer of the Dual parking meter which is a multiple coin automatic meter. It also made a single coin meter.

In 1940, the Board of Harbor Commissioners of San Diego had eighty parking meters of different makes installed along the harbor front. In 1941, the city council decided to install parking meters on some of the downtown streets.

Section 94 of the city charter provides in part as follows:

"CONTRACTS. In the construction, reconstruction, or repair of public buildings, streets, utilities and other public works, and in furnishing any supplies, materials, equipment or contractural services for the same, or for other use by the City, when the expenditure therefor shall exceed the sum of one thousand dollars, the same shall be done by written contract, except as otherwise provided in this Charter, and the Council on the recommendation of the Manager or the head of the Department in charge, if not under the Manager's Jurisdiction, shall let the same to the lowest responsible and reliable bidder, not less than ten days after advertising for six consecutive days in a newspaper of a general circulation in the City for sealed proposals for the work contemplated. * * * All contracts entered into in violation of this Section shall be void and shall not be enforceable against said City; * * *."

Specifications for bidders were prepared and a notice of the time and place of receiving bids was published. The specifications were most general in form and designedly so to permit all manufacturers of various types of parking meters to submit bids. The original specifications described only single coin meters. An addendum was prepared calling for bids on multiple coin meters, that is, those operated by both pennies and nickels. This addendum was submitted to all bidders.

Bids were requested on not less than one thousand meters and were to be on the basis of what was in effect an option to purchase rather than an immediate purchase. The meters were to be installed and operated over a period of six months with the right in the city to cancel the contract and require the removal of all meters within a specified time thereafter. The meters were to be paid for out of the revenue derived from their operation rather than from the general revenues of the city. Multiple coin meters were finally selected and installed so we need give no further attention to bids submitted for single coin meters.

Each bidder submitted a sample parking meter which, while not installed on the street, was inspected and operated by city officers. The operation of two makes were found to be unsatisfactory and they were not considered. One of these meters was supposed to be an infringement on the patent of another manufacturer. No point is made of the rejection of the bids to furnish the two unsatisfactory meters.

A committee was selected to investigate and report on the operation of the meters. A majority of this committee recommended the installation of the Dual Automatic Parking Meter. The city manager also recommended the installation of that meter.

The members of the city counsel made further investigation themselves both by inspection and operation of the meters and by consulting others whom they believed qualified to advise them on the problem of the best and most durable meter.

One councilman testified that a man in whom he had confidence as an expert on the mechanism of clocks (all the parking meters were operated with such a mechanical device) after investigation advised him as follows: "And he particularly called my attention to the fact that the Dual, the gears in the Dual clock works were simply stamped out of thin*k* brass, and he said he felt the Dual meter—I believe I am reporting his statement to me correctly—he said that the Dual meter, in his opinion, was a beautiful looking meter and was designed to sell, rather than wear."

The members of the city council were divided on the question of installing manual or automatic meters. After considerable discussion and investigation in which the city manager took part it was decided to divide the contract equally between the manual and the automatic meters. All the councilmen but one voted in favor of this decision. The city manager made no objection to it and concurred in the final awards made.

This decision left the Duncan Meter Corporation, manufacturer of the Miller Multiple Coin parking meter, as the sole bidder offering a manually operated meter after the elimination of the two unsatisfactory meters. It left the meter of the Dual Parking Meter Corporation, represented by plaintiff, and the product of the Karpark Corporation as contestants for the award of the contract for automatic meters.

Contracts were entered into for 500 Miller Multiple Coin parking meters at $61 each, plus 25 free meters with an installation charge on the free meters of $2.50 each; and 500 Karpark meters at $54, plus 25 free meters with an installation charge on the free meters of $2 each. Each contract provided for free servicing of the meters for six months and for furnishing supplies and other services without charge.

The Dual Parking Meter Company offered to supply 1,000 parking meters at $53.50 each, with no free meters, but with a servicing charge of $3 per year per meter.

Plaintiff maintains that the bid of the Dual Parking Meter Company was the lowest and that it was the "lowest responsible and reliable bidder"; that under the provisions of the Charter the Council of San Diego was required to award the contract to it; that the awards to the other corporations were illegal and void acts.

If we regard the price bid as the only measure of which company was "the lowest responsible and reliable bidder" this argument lacks convincing force. The price of $54 per meter which the Karpark Corporation was to receive included six months free servicing of the meters. The bid of the Dual Meter Corporation was $53.50 for each meter with a $3 charge for servicing for one year. If the charge for servicing each meter for six months would be one-half of that sum, it would make the comparable price of the Dual Parking Meter $55 each or $1 higher than the Karpark. Another element enters into the contract price of that meter. There were 25 free meters to be installed at $2 each. The average price of the 525 Karpark meters would be about $51.52 each with six months free servicing which is substantially less than the price bid for the Dual meter.

It is true that the cost of the Dual Parking meter was considerably less than that of the Miller meter. The two meters are not comparable as they operate on different principles, the one being automatic and the other being manually operated. The evidence failed to give the trial judge, and fails to give us, any basis on which to compare the values of these two varieties of meters other than that both seemed to operate satisfactorily in the tests made.

[1] The trial court found, and we think correctly so, that the parts to be furnished and the services to be rendered by the successful bidders, and by the Dual Parking Meter Company, varied so much that there was no sufficient basis furnished upon which to compare the bids.

[2, 3] If price alone, together with the value of the free parts and service, determined which company was "the lowest responsible and reliable bidder" we would have no trouble in concluding that plaintiff had failed to maintain the burden of proving that the bid of the Dual Parking Meter Company was the lowest. It was higher than the bid of the Karpark Corpo-

ration. The proper construction to be given to the phrase in question was thus set forth in West v. City of Oakland, 30 Cal. App. 556, 159 P. 202, 204:

"It is the contention of the appellant that these two sections of the city charter of Oakland are to be read and construed together, and that, when so construed, the term 'lowest responsible bidder,' as used in the body of section 130 thereof, and which has reference specially to the construction and equipment of public buildings, is to be held to mean only that the lowest responsible bidder shall be the lowest bidder who has not been delinquent or unfaithful in any former contract with the city, and that otherwise, in every case of contracts awarded by competitive bidding, the council must either award the contract to the lowest bidder or must reject all bids.

"We are of the opinion, however, that this is altogether too narrow and binding a construction to place upon these provisions of the Oakland city charter. There are many occasions in the experiences of municipal government when the quality of the thing to be supplied in the course of the public service depends upon conditions which differentiate bidders, and require the exercise of a sound discretion on the part of city officials in determining whether the wares or device which each individual bidder offers in the form of his own exclusive design are such as will meet the particular requirements of the intended work. In order to cover such cases it is quite usual in the provisions of city charters to find such terms as 'lowest and best bidder,' or as 'lowest responsible bidder,' and the like; and these phrases have been given by the courts a particular meaning, in which it must be presumed they are used by the framers of city charters, in the absence of other limiting clauses. The term 'lowest responsible bidder' has been held to mean the lowest bidder whose offer best responds in quality, fitness, and capacity to the particular requirements of the proposed work, and that where, by the use of these terms, the council has been invested with discretionary power as to which is the lowest responsible bidder, having regard to the quality and adaptability of the material or article to the particular requirements of its use, such discretion will not be interfered with by the courts, in the absence of direct averments and proof of fraud. 2 Dillon on Municipal Corporations (5th Ed.) § 811, p. 1223, and cases cited. And even when in statutes and charters the term 'lowest bidder' only is employed, the courts have held that, in determining whether a bid is the lowest among several others, there may be cases where the quality and ability of the thing offered—in other words, its adaptability to the purpose for which it is required—may be considered. Clapton v. Taylor, 49 Mo.App. 117; Cleveland Fire Alarm Co. v. [Board of] Metropolitan Fire Com'rs, 55 Barb., N.Y., 288. In fact, it is conceded by counsel for the appellant that if, under a fair and liberal construction of this charter, the city council had discretion, in awarding the contract to the lowest responsible bidder, to consider the quality of the respective devices upon which the several bids were predicated, such discretion, honestly exercised, will not be interfered with. We think it evident that the city charter of Oakland is to be given such a construction * * *."

[4] It seems to be true that as the city of San Diego invited bids for not less than 1,000 parking meters from each bidder and failed to specify that the award might be divided between two or more bidders, each receiving less than the total number, and since the awards were so divided between two rival bidders, the result was the same as though there had been no advertisement for bids.

The trial court found in effect: That it could not be found with any degree of mathematical certainty which bid of the three corporations was most favorable to the purchaser, or which bidder's guarantee clause was most favorable, that this is a matter as to which no exact comparison is possible, but one purely of individual opinion; that which corporation was the lowest responsible bidder "was and is a matter depending in part upon an exercise of discretion confided to the City Council * * *."

"That it is not true that the construction and use of parking meters has been standardized to the degree that they are commodities which can be furnished by competitive bidding.

"That it is true that parking meters vary widely in kind, quality, appearance, and manner of operation; that it is true that the guarantee and service arrangements which parking meter companies are willing to enter into vary greatly in many respects wherein the purchaser's advantage is concerned; that it is true that it is impossible to designate in advance, definite specifications which do not operate to exclude equally responsible and reliable bidders whose meters do not, and cannot in the nature of things, conform to those specifications; that it is true that the best interests of the City of San Diego in obtaining the soundest and most economical meters, require that specifications be left so flexible, and the discretion of the Council of said City of San Diego so broad, that Section 94 of the Charter of said City does not and cannot have practical application, or any application at all."

[5] The trial court's conclusion that the nature of parking meters was such that it was impossible to draw specifications to permit any competitive bidding, must of necessity be true, because each meter was covered by a patent, and specifications particularly and exactly describing one meter would necessarily exclude others. The trial court also concluded that there was a discretion in the city council to determine the type of meter, both in physical appearance and mechanical operation, best adapted to the needs of the city; that an attempt at competitive bidding would work an incongruity, would not affect the final result and would produce no advantage; that the city council exercised its discretion reasonably in selecting parking meters; that section 94 of the city charter did not apply to the purchase of such meters.

[6] In Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 P. 839, 842, 71 A.L.R. 161, the Supreme Court said:

"The charter of the City of Long Beach lays down the general requirement that all contracts, except as otherwise provided in the charter or by general law, must be made by the city manager with the lowest responsible bidder. In the instant case, the contracts were made without the letting of bids. This fact renders them void unless they come within some exception to the rule set forth above. There are two well-recognized exceptions which are, we think, applicable to this situation.

"The first exception is founded on the fact that sometimes it is undesirable or impossible to advertise for bids for particular work. In such cases the statutory requirement is deemed not to apply. In 2 Dillon, Municipal Corporations, 1199, § 802, the law is thus stated: 'It has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where they do not produce any advantage * * * or it is practically impossible to obtain what is required and observe such forms, a statute requiring competitive bidding does not apply.' Our courts have approved this doctrine. Los Angeles Gas & E. Corp. v. [City of] Los Angeles, 188 Cal. 307, 205 P. 125; Miller v. Boyle, 43 Cal.App. 39, 184 P. 421."

[7] The foregoing rule should be applied here. The evidence fails to show that parking meters have been developed to the point where there is any reasonable basis of comparison between those which operate satisfactorily. If the specifications had been drawn strictly there could have been no competitive bidding because but one meter could have been described and there could have been but one bidder under them. Under such circumstances advertising for bids was unnecessary. Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189; Los Angeles G. & E. Corp. v. City of Los Angeles, 188 Cal. 307, 205 P. 125. There being no chance of real competitive bidding, to require it would work an incongruity.

There is no showing of any fraud, connivance or unfairness in the transaction. There is no indication that the councilmen did not act in perfect good faith and that the interests of the city were not well served in the action taken. Further, it is probable that if all the meters installed under the contracts are not now paid for, they will be before the judgment in this case can become final.

[8-11] It is perfectly clear that the execution of the contracts sought to be enjoined cannot be prohibited now. They were executed on July 10, 1941, and on August 26, 1941, respectively. An act already performed cannot be prevented by injunction. All of the meters have been installed. They are in plain view and we may take judicial notice of that fact. Varcoe v. Lee, 180 Cal. 338, 181 P. 223. Perhaps they have been, or soon will be, fully paid for out of revenue produced by them. When paid for title has or will be vested in the city. It would hardly seem reasonable to expect a court of equity to enjoin the performance of a contract that undoubtedly will be fully performed before the case can be retried, should the present judgment be reversed.

[12] Plaintiff urges error in the ruling sustaining a demurrer to his third cause

of action. Five days were given in which to amend. No amendment was attempted.

[13] That cause of action was an unsuccessful attempt, by innuendo and legal conclusion, to hint at fraud and undue influence in awarding the two contracts. No single ultimate fact was alleged upon which fraud or unfair dealings could have been predicated.

Had there been any fraud in the matter of awarding the contracts, proper allegations should have appeared in the pleadings. Plaintiff was given time in which to amend if he knew of any such facts that could have been alleged. He failed to amend. There was no error in the order sustaining the demurrer and no inference of improper action on the part of any councilman may be drawn under these circumstances.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

53 Cal.App.2d 654

MAYO v. INTERMENT PROPERTIES, Inc., et al.

Civ. 13557.

District Court of Appeal, Second District, Division 1, California.

July 29, 1942.

1. Corporations 🔑292, 295

Under statute providing that, if board of directors of corporation accepts resignation of a director to take effect at future time, board or shareholders may elect successor to take office when resignation is to become effective, board may accept such a resignation and elect successor at same meeting, and director who had tendered such a resignation may participate in meeting and fill out a quorum. Civ.Code, § 306.

2. Cemeteries 🔑5

Where one of three directors of cemetery corporation tendered resignation to be effective on qualification of successor, such director and second director elected successor, the third director refusing to vote, and second director and newly elected director, in exercise of honest discretion and over negative vote of third director, approved bill for attorneys' services rendered by director who had resigned and another attorney, election and approval of bill were valid. Civ. Code, § 306.

◆

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Marguerite Madeleine Mayo against Interment Properties, Incorporated, and others, for an injunction, declaratory relief, and removal of the directors of defendant. From an adverse judgment, plaintiff appeals.

Affirmed.

Baldwin Robertson, of Los Angeles, for appellant.

Earle M. Daniels, Julius V. Patrosso, Clayton L. Howland, and Everett V. Prindle, all of Los Angeles, for respondents.

YORK, Presiding Justice.

The instant action was brought by Marguerite Madeleine Mayo, a minority stockholder, for an injunction for declaratory relief and for the removal of directors of respondent Interment Properties, Inc., pursuant to subdivision 3, section 310 of the Civil Code.

From a judgment rendered against her, she prosecutes this appeal upon the grounds:

(1) A resigned director cannot vote upon the choice of his successor;

(2) The affirmative vote of one of two remaining directors does not constitute a majority;

(3) "Inasmuch as an interested officer and director may not himself vote that corporate funds be paid to him, the acts of his substituted director, chosen by him to fill his own vacancy, for the purpose of voting on such resolution, are likewise void."

The following brief resume is taken from the findings of fact of the trial judge:

Interment Properties, Inc., a California corporation, was organized September 12, 1938, and is engaged in the cemetery business deriving its principal income from the sale of cemetery lots by Roosevelt Memorial Park Association. The total authorized capital of said corporation is 2,500 shares of stock issued August 5, 1940. Appellant is the owner of 1,218.75 shares, and the remainder of the issued and outstanding shares of stock is owned by Fred A. Ballin, Jr., Clayton L. Howland, Everett V. Prindle, Aileen Brown and Iola G. Orton. Between July 12, 1939, and February 4, 1941, the directors of the corporation were Fred A. Ballin, Jr., Everett V. Prindle and Luther T. Mayo. Luther T. Mayo did not own any stock and the articles of incorporation provided that no person should be qualified to act as a director unless he was a stockholder of the said corporation. On and prior to February 4, 1941, the officers of the corporation were Everett V. Prindle, president, Fred A. Ballin, Jr., secretary, and Luther T. Mayo, vice-president.

Respondent Prindle is an attorney associated in the practice of law with respondent Howland under the name and style of Howland & Prindle, and on or prior to February 4, 1941, respondents Ballin and Orton were or had been clients and personal friends of respondent Prindle.

On January 28, 1941, at a meeting of the board of directors of respondent corporation, respondent Prindle presented an itemized statement of legal services rendered by him and respondent Howland on behalf of the said corporation amounting to the sum of $5,700, and stated to the board of directors that, in view of the long period of time covered thereby, the matter of fees should be definitely settled; that he was not insistent that the statement be accepted in the amount rendered and that he would abide by whatever determination the board might reach with reference to the amount and the method of payment. At that meeting the bill for attorneys' fees was considered and discussed but no vote was taken thereon, Luther T. Mayo refusing to discuss either the amount or manner of payment of said bill. The special meeting of January 28, 1941, was called for the express purpose of considering the payment of attorneys' fees and due and legal notice thereof was given, as required by law and the by-laws of the corporation. Thereafter, on January 31, 1941, respondent Prindle, as president of the corporation, called a special meeting of the board to be held on February 4, 1941, for the stated purpose of considering the matter of payment of attorneys' fees and other business. At said meeting there were present: Everett V. Prindle, Fred A. Ballin, Jr., Luther T. Mayo and Iola G. Orton, the last named having been requested to be present by Everett V. Prindle. Thereupon respondent Ballin resigned as secretary, respondent Prindle resigned as president, and said Ballin was elected president by the board. Respondent Prindle submitted his written resignation as a director to take effect upon the election and qualification of his successor; said resignation was accepted to take effect as stated, whereupon upon motion of said Ballin, seconded by said Prindle, the respondent Iola G. Orton was nominated to fill the vacancy on the board to be created by the resignation of respondent Prindle. No further nominations were made and upon being put to a vote the nomination of said Orton received the affirmative votes of Ballin and Prindle but Luther T. Mayo refused to vote thereon. Thereafter, at said directors' meeting, respondent Ballin nominated respondent Orton as secretary of the corporation, which nomination was duly seconded by said Orton and upon being put to a vote the said nomination received the affirmative votes of Ballin and Orton and Luther T. Mayo refused to vote thereon. After such elections, the said directors and respondent Prindle proceeded to discuss the matter of the bill for attorneys' fees for services rendered to and on behalf of the corporation. Following such discussion and upon motion duly made and seconded, and upon the affirmative votes of Fred A. Ballin, Jr., and Iola G. Orton, and the negative vote of Luther T. Mayo, a resolution was adopted approving the bill for attorneys' fees rendered to said corporation in the sum of $5,200, with the express provision that the manner of payment of said bill be left to the further discussion and approval of the board of directors. Thereafter, by the unanimous vote of all of the directors, Ballin, Orton and Mayo, a resolution was adopted authorizing the opening of a bank account for said corporation Interment Properties, Inc., in the American Branch of the California Bank, by the terms of which resolution it was further provided that funds on deposit therein might be withdrawn upon checks signed by said Ballin, as president, or Luther T. Mayo, as vice-president, and Iola G. Orton, as secretary. Notice of the adoption of said resolution was thereafter delivered to the said bank.

The court further found that none of the acts as above set forth was unlawful, or that said Prindle, Ballin and Orton, or any of them, unlawfully planned, schemed or conspired among themselves to do or perform said acts or any of them; that it is not true that the said resolution approving the bill for attorneys' fees in the sum of $5,200 "is or was unlawful, illegal, fraudulent or void in whole or in part. That the defendant, Iola G. Orton, is a stockholder of Interment Properties, Inc., owning and holding 101.5625 shares of the issued and outstanding capital stock thereof, and as such was on the 4th day of February, 1941, and ever since has been qualified to act as a director of said corporation, and that at all times since her election as a director of said corporation on the 4th day of February, 1941, said Iola G. Orton has been and now is a duly elected, qualified and acting director of Interment Properties, Inc., and * * * the duly elected, qualified and acting Secretary of said corporation."

The court also found that neither Ballin nor Orton in approving said bill or in any vote cast or action taken by them as directors at said meeting held on February 4, 1941, or at any time, acted under the domination or control of respondent Prindle, or as his agents, or dummies, but that they exercised their own independent judgment and honest discretion.

The prayer of the complaint herein sought a judgment decreeing (1) that respondent Orton is not a director or officer of the corporation; that respondents Prindle, Ballin and Orton be removed as directors and officers thereof and be barred from re-election for a period of seven years; (2) that the purported resolution dated February 4, 1941, approving the attorneys' bill be declared void and that respondents be restrained from paying any moneys of the corporation by reason of or under the authority of said resolution; (3) that said corporation is not indebted to respondents Prindle or Howland & Prindle by reason of any contractual obligation, and that the trial court upon proof adjudge and determine what sums, if any, said corporation owes to said respondents.

As hereinbefore stated, the trial court entered its judgment denying the relief sought by appellant in her complaint.

Section 4, article III of the By-laws of respondent corporation follows verbatim the wording of a portion of section 306 of the Civil Code, to-wit: "The shareholders may elect a director or directors at any time to fill any vacancy or vacancies not filled by the directors. If the board of directors accept the resignation of a director tendered to take effect at a future time, the board or the shareholders shall have power to elect a successor to take office when the resignation is to become effective."

Appellant argues that while a "board may, prior to the actual occurrence of a vacancy, elect a successor, the member of the board whose resignation or expiration of office creates the vacancy cannot vote upon his successor * * * only those members of the board who will be in office upon the occurrence of the vacancy can vote to fill the vacancy."

[1] In discussing section 306 of the Civil Code, it is said in 6A Cal.Jur., 1064, section 590: "The statute now in terms contemplates resignations by directors, and that they may be made effective at a future date. The right to resign is not cut off by provisions that the term shall continue until appointment of a successor. The board of directors has power to accept the resignation of a director, and to elect his successor at the same meeting, but a director who has tendered his resignation to take effect upon acceptance does not cease to be a director until acceptance of his resignation, and may therefore participate in a meeting and fill out a quorum. Seal of Gold Min. Co. v. Slater, 161 Cal. 621, 120 P. 15."

Appellant relies upon a number of decisions announcing the rule that a public board or officer may not appoint one to a public office to fill a vacancy which will not occur until after the expiration of the term of office of the appointing board or officer. Typical of these is the case of People v. Ward, 107 Cal. 236, 40 P. 538, which involved an attempt by a board of supervisors, whose term of office was about to expire, to appoint one to the office of district attorney to fill a vacancy which would not occur until after the expiration of the supervisors' terms of office.

The method of filling vacancies in the boards of directors of private corporations is controlled by the provisions of section 306 of the Civil Code, above referred to, which authorizes the board of directors in office to appoint a director to fill a vacancy which will occur when a resignation tendered to take effect at a future time becomes effective.

[2] Under the rule laid down by said section, respondent Prindle was qualified to act as a director of the corporation until the election and qualification of his successor. As a result, respondent Orton was elected a director by the affirmative votes of two directors, viz: Ballin and Prindle, a majority of the board of directors which was composed of three members.

Having been duly elected to the board of directors by a majority of the membership thereof, it was incumbent upon respondent Orton, a stockholder of record, to use her own discretion in casting her vote approving the payment of attorneys' fees owing to respondent Prindle and his associate. As heretofore noted, the trial court found that neither respondent Ballin nor respondent Orton in approving said bill for attorneys' fees acted under the domination or control of respondent Prindle, or as his agents, or dummies, but that they exercised their own independent judgment and honest discretion. This finding is supported by evidence produced at the trial.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

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53 Cal.App.2d 706

KINKLE v. FRUIT GROWERS SUPPLY CO. et al.

Civ. 6872.

District Court of Appeal, Third District, California.

July 30, 1942.

1. Appeal and error 🔑627(2)

A party desiring to move to dismiss appeal for failure to file transcript within prescribed time should first file motion in trial court to terminate proceedings to obtain transcript, and where no such motion was filed and affidavits show that trial court granted reporter until date after filing of motion to dismiss appeal for completion of transcript, such motion should be denied. Code Civ.Proc. § 953a; Rules of Supreme Court and District Courts of Appeal, rule 1, § 1, and rule 6, § 1.

2. Appeal and error 🔑237(1)

A contention that trial court's orders extending reporter's time to prepare transcript on appeal were not made in accordance with statutory provisions should be presented to trial court on motion to terminate proceedings to obtain transcript in order to be available on appeal. Code Civ.Proc. § 953a.

3. Appeal and error 🔑607(1)

It is appellant's duty to take necessary steps to secure filing of transcript on appeal, and for want of diligence therein, trial court may terminate proceedings to obtain transcript. Code Civ.Proc. § 953a.

4. Appeal and error 🔑607(1)

While giving of notice to prepare transcript on appeal within time provided by statute is "mandatory", statutory provisions as to time for filing transcript are "directory". Code Civ.Proc. §§ 953a, 953c.

See Words and Phrases, Permanent Edition, for all other definitions of "Directory Statute" and "Mandatory Statute".

5. Appeal and error 🔑985

The determination of question whether due diligence was exercised in preparation and filing of transcript on appeal rests largely in trial court's discretion, and appellate court will not interfere, unless it appears that trial court abused its discretion. Code Civ.Proc. §§ 953a, 953c.

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Proceeding between E. A. Kinkle and the Fruit Growers Supply Company and others. From an order of the superior court, the corporation and others appeal. On respondent's motion to dismiss the appeal.

Motion denied.

Farrand & Farrand and Leonard B. Slosson, all of Los Angeles, and Tebbe & Correia, of Yreka, for appellants.

Huston, Huston & Huston and Daniel Dennis, all of Sacramento, and J. Everett Barr, of Yreka, for respondent.

SCHOTTKY, Justice pro tem.

This is a motion to dismiss an appeal upon the ground that appellant has failed to perfect its appeal, that no transcript on appeal has been filed as required by law, and that appellant has not prosecuted its appeal with any diligence whatsoever.

[1] The admitted facts are that notice of appeal was filed on December 12, 1941; notice to prepare transcript was served and filed on December 12, 1941; order requiring reporter to transcribe report of trial was signed, served and filed on December 22, 1941; that satisfactory financial arrangements were made with the reporter by appellant; that on January 12, 1942, the reporter filed an affidavit stating that because of the pressure of other matters,

he could not complete the transcript within the required time, and the court made an order extending the reporter's time for preparing the transcript to March 16, 1942; that on March 14, 1942, a similar affidavit was filed by the reporter, and the court made a further order extending the reporter's time to prepare the transcript to May 16, 1942; that on May 15, 1942, a similar affidavit was filed by the reporter, and the court made still another order extending the reporter's time to August 10, 1942; that none of said affidavits or orders was served upon respondent or his attorneys; that no motion to terminate proceedings to obtain the transcript was filed in the trial court.

We believe that under the rules of the Supreme Court and District Courts of Appeal, the motion to dismiss should be denied. In section 1 of rule 1, it is stated: "If the transcript for use on appeal is prepared under the provisions of section 953a of the Code of Civil Procedure and a notice is filed by the appellant requesting a transcript under said section, the time for filing the transcript of the record on appeal shall not begin to run until such transcript is approved and certified as required by law, or until the proceeding to obtain the same has been terminated in the court below by dismissal or otherwise."

In section 1 of rule VI it is provided: "On motion to dismiss an appeal for failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk of the court below, certifying the names of the attorneys of the respective parties, the nature of the action and the relief demanded by the complaint, the amount and character of the judgment or order appealed from, the fact and date of the filing of the notice of appeal, the fact and date of filing request to the clerk to prepare a transcript, the fact and date of the settlement and filing of the bill of exceptions or the certification of the transcript prepared under section 953a of the Code of Civil Procedure, if any, and the fact and date of the entry of order of termination, if any, by the trial court of any proceeding for the settlement of a bill of exceptions or transcript. It shall be incumbent on the party moving to dismiss to show by such certificate or by affidavit that no proceeding for a bill of exceptions or transcript under section 953a is pending in the trial court, and if no such proceeding was ever instituted that the time to institute the same has expired."

It seems clear that said rules contemplate that a party who desires to move to dismiss an appeal upon the ground that the transcript has not been filed within the prescribed time should first file in the trial court a motion to terminate the proceedings to obtain a transcript. Engstrom v. Atkins, 102 Cal.App. 393, 283 P. 79. No such motion was filed in the instant case and it appears from the affidavits that the trial court signed orders granting the reporter until August 10, 1942, in which to complete the preparation of the transcript.

[2] Respondent contends that the orders were not made in accordance with the provisions of section 953a of the Code of Civil Procedure. But these are matters which should be presented to the trial court upon a motion to terminate proceedings. However, we are constrained to state that there appears to have been undue delay on the part of the reporter in this case, and that trial courts should, in fairness to litigants, insist that court reporters give priority to the work of the Superior Court and not delay the preparation of transcripts on appeal in order to perform other work not connected with the work of the Superior Court. Litigants in appeals should not be compelled to wait upon the convenience of court reporters, and court reporters should bear in mind that their first duty is to report the cases of the Superior Court and that this duty includes the preparation of transcripts on appeal.

[3-5] It is the duty of an appellant, as the moving party, to take the necessary steps to secure the filing of the transcript, and for want of diligence therein it is within the power of the trial court to terminate the proceedings; and while the giving of the notice to prepare the transcript within the time provided by section 953a of the Code of Civil Procedure is mandatory (Des Granges v. Des Granges, 175 Cal. 67, 71, 165 P. 13), the provisions thereof and of section 953c of the Code of Civil Procedure, as to the time for filing the transcript, are directory. Smith v. Jaccard, 20 Cal. App. 280, 128 P. 1023, 1026; Mason v. Straube, 68 Cal.App. 302, 228 P. 872; Fisher v. Oliver, 174 Cal. 781, 164 P. 800; Benson v. Olender, 74 Cal.App. 273, 240 P. 61. The determination of the question of whether or not there has been due diligence in the preparation and filing of the transcript is one resting largely in the discretion of the trial court, and an appellate court will not interfere unless it appears

that the trial court in its action has abused its discretion. Galbraith v. Lowe, 142 Cal. 295, 75 P. 831.

The motion to dismiss is denied.

THOMPSON, J., and ADAMS, P. J., concurred.

53 Cal.App.2d 579

PEOPLE v. ROBBIN et al. (two cases).

SAME v. SADERUP.

SAME v. MATSUSHITA (two cases).

SAME v. HARRAH et al. (two cases).

Civ. 2799, 2796–2798, 2801, 2802.

District Court of Appeal, Fourth District, California.

July 24, 1942.

1. Nuisance 🔑84

In actions to restrain continued operation of an alleged gambling establishment as a nuisance, allegations and proof with respect to the kind of people congregating on the premises and as to disorderly actions on their part were essential to confer jurisdiction upon the court of equity and to support an injunction.

2. Nuisance 🔑84

Complaints, to restrain defendants from continuing the operation of alleged gambling establishments as a nuisance, were sufficient.

3. Nuisance 🔑80

Where the people showed that an alleged gambling game was being conducted at "Bridgo" parlors but produced no evidence as to the type of people frequenting the parlors, or that there was disorder in the operation of the games, operation of the parlors was not restrainable as a "nuisance".

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

Appeals from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Actions by the People against I. E. Robbin and others against H. S. Robbin and others, against Gordon D. Saderup, against Frank Matsushita, and against William Harrah and others to enjoin as nuisances the operation of certain places where gambling games were allegedly carried on. From adverse judgments, the defendants appeal.

Judgments reversed.

Jerry Giesler, Ward Sullivan, and Jerome J. Mayo, all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Judge.

These are actions to enjoin as nuisances the operation of certain places in which it is alleged that gambling games are carried on. All of these were places in what is known as the Venice Amusement Zone. The seven cases were tried together and have been consolidated on this appeal. In so far as material here, the cases are exactly similar and practically identical in all respects. For convenience, they will be discussed as if they were one case.

It is alleged that the defendants, with the knowledge of the owners of the property, have been operating, conducting and maintaining a certain gambling game on the described premises; that this gambling game is conducted in a manner which is described in detail; that the maintenance and operation of this gambling game "does now and will in the future constitute the keeping of a gambling house, a public nuisance, injurious to the health of the People of the State of California, for the reason that it tends to and does in fact debauch and corrupt the public morals, encourage idle and dissolute habits, draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits between them, creates traffic hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life;" and that the maintenance and operation of said gambling game and public nuisance directly affects the entire community surrounding the city of Los Angeles and numerous other communities in Los Angeles County.

The prayer is that the court determine that the maintenance and operation of said gambling game on these premises constitutes a public nuisance, and that the defendants and their agents be forever enjoined and restrained from maintaining or operating said gambling game on said premises. The court found in accordance with the allegations of the complaint and, among other things, found that the game as described in the complaint is a gambling game; that the defendants and their agents threaten to and will continue the operation of said gambling game on said premises unless restrained from so doing; that the maintenance and operation of said gambling game has in the past and will in the future constitute the keeping of a gambling house, a public nuisance; and that the maintenance and operation of said gambling game and gambling house is and will be injurious to the health, public welfare and morals of the People of this state. The judgments order the issuance of injunctions against the operation of such a gambling house on said premises. These appeals followed.

The game here in question is called "bridgo." It seems apparent that it was designed to get around the legal objections to the game of "tango," as pointed out in the case of People v. Babdaty, 139 Cal.App. Supp. 791, 30 P.2d 634. It differs from that game in that here a so-called "skill" game and a so-called "free" game were played alternately. It is freely admitted that the "free" game is dependent upon chance but it is contended that it is not a lottery, as defined in the case just cited, since no charge is made and persons are permitted to play without regard to whether or not they participate in the "skill" game, for which a charge is made. It is argued that the paid game is not a lottery since it depends entirely upon the skill of the player, unaffected by the actions of other players, and that it is not a gambling game under any other statute of this state. The briefs are largely devoted to a discussion of whether or not the operation of these games constitutes a gambling game under any of the laws of this state. While the design of this game for the purpose in view and appellant's arguments in support of its innocent nature are extremely ingenious, although perhaps not entirely convincing, we are forced to conclude that the question of whether or not this is a gambling game is not controlling here.

Assuming, without holding, that this is a gambling game the question remains whether the operation thereof on these premises may be enjoined on the showing here made. In People v. Lim, 18 Cal.2d 872, 118 P.2d 472, 477, the Supreme Court held, in effect, that equitable jurisdiction in such matters must be conferred by the Legislature and should not be assumed by the courts; that the basis for such jurisdiction must be found in the statutes and not by reference to the common-law definitions of a public nuisance; and that in order to confer jurisdiction in such an action, where it is claimed that a particular activity constitutes a nuisance as defined by our statutes, "sufficient facts must be alleged so that the court may conclude that nuisance exists within the provisions of the statute." In that case, involving an attempt to restrain the operation of a gambling establishment it was alleged that this gambling house "draws together great numbers of disorderly persons, disturbs the public peace, brings together idle persons and cultivates dissolute habits among them, creates traffic and fire hazards, and is thereby injurious to health, indecent and offensive to the senses and impairs the free enjoyment of life and property." While it was held that in order to be within the jurisdiction of an equitable proceeding for injunction the act in question must constitute a nuisance within the definition of our statute, it was further held that this allegation was sufficient for that purpose as against a demurrer.

[1] As we view that decision, it holds that the remedy of injunction may not be employed on the mere showing that a gambling game is being conducted on the premises in question, and that further allegations with respect to the kind of people who congregate there and as to disorderly and disturbing actions on their part are essential in order to bring the matter within the statutory definition of a nuisance and to confer jurisdiction upon a court of equity. It necessarily follows that if such matters must be alleged they must also be proved in order to support an injunction issued in such an action.

[2, 3] In the case before us, the allegations of the complaint in this regard are similar to and in almost the exact language of those involved in the case of People v. Lim, supra, and the complaint was, therefore, sufficient. However, at the trial, on the objection of the People, all evidence was excluded as to the type of person who frequented these places and the attorney for the People stated he was making no contention that people of ill repute visited

or frequented them. These cases were entirely tried and these appeals are largely, if not entirely, presented on the theory that all that was necessary was to show that a gambling game was being conducted on these premises. In his brief the attorney general concedes "that no evidence was produced by the plaintiffs as to the type of people who frequented the 'bridgo' parlors or that there was disorder in the operation of the games." We are compelled to hold, therefore, that there was a complete failure of proof upon a material and essential matter, in the absence of which the issuance of an injunction cannot be sustained. The instant case is precisely similar in principle to the case of Monterey Club v. Superior Court, 48 Cal.App.2d 131, 119 P.2d 349, where it was held that the court exceeded its jurisdiction in issuing a temporary injunction under such circumstances.

The judgment in each of these cases is reversed.

MARKS, J., concurred.

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54 Cal.App.2d 46

HOME OWNERS' LOAN CORPORATION v. ENGELBERTSON et al.

Civ. 13548.

District Court of Appeal, Second District, Division 3, California.

Aug. 14, 1942.

1. Appeal and error 🔑113(2)

Where the grounds upon which a party seeks to have judgment vacated existed before the entry of judgment and upon a proper record would have been reviewable on an appeal from the judgment, an appeal does not lie from an order denying the motion to vacate.

2. Appeal and error 🔑113(2)

A party aggrieved by a judgment or order must take his appeal from such judgment or order if an appeal therefrom is authorized by statute and not from a subsequent order refusing to set aside such judgment or order.

3. Appeal and error 🔑113(2)

Where defendants' motion to set aside judgment of foreclosure questioned validity of judgment, jurisdiction of court, and inconsistencies between findings of fact and conclusions of law and judgment, all of which could have been raised on an appeal from judgment, an appeal did not lie from an order denying defendants' motion.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Suit by Home Owners' Loan Corporation against Charles W. Engelbertson and others to foreclose a mortgage wherein plaintiff obtained a judgment of foreclosure. From an order denying defendant's motion to vacate and set aside the judgment, defendants appeal.

Dismissed.

C. W. Engelbertson, of Santa Barbara, for appellants.

Warner Edmonds, Jr., of Santa Barbara, and Ewell D. Moore, of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

Defendants' notice of appeal recites that they appeal "from the order and decree of the Superior Court of the State of California, in and for the County of Santa Barbara, therein made and entered on the 13th day of March, 1941, in Book 63 of Minutes of the Superior Court at page 182, given in favor of the plaintiffs and against the defendants above named, to-wit: Denying motion of defendants to vacate and set aside judgment and decree docketed and entered on the 1st day of February, 1940, and from the whole thereof."

The clerk's transcript constitutes the sole record before us on this appeal, and none of the documents set forth therein bears endorsement showing the date of entry of any of such documents or whether any of them was ever actually entered. Furthermore such record does not purport to show any "order * * * made * * * on the 13th day of March, 1941, * * * denying motion of defendants to vacate and set aside judgment and decree docketed and entered on the 1st day of February, 1940, * * *." We do, however, find in the record an order entitled "Order Denying Motion to Set Aside Judgment," and reading in material part as follows:

"The motion of defendants, * * * to set aside judgment, * * * having been regularly heard on the 10th day of March, 1941, * * * and the matter having been fully argued and the Court having been duly advised and having duly considered the same, it is hereby ordered that said motion to set aside judgment be and the same is hereby denied.

"The Clerk of the above-entitled Court is hereby directed to enter this order.

"Dated: March 10th, 1941.

"Ernest D. Wagner
"Judge of the Superior Court."

Endorsed:
"Filed: March 10, 1941.

"J. E. Lewis, Clerk.
"By C. E. James, Deputy Clerk."

We assume in favor of an intelligible record for appellants, that, in spite of the three-day discrepancy in dates between the "order * * * made * * * on the *13th* day of March, 1941," to which defendants refer in their notice of appeal, and the above order dated and filed on March *10,* 1941, it is from such order of March 10 that defendants intend to appeal.

Defendants' notice of motion to set aside judgment recites that "* * * defendants will move said Court for its order to set aside and vacate the alleged judgments and decrees entered herein in above entitled cause.

"That said motion will be made on the following grounds, to-wit:

"1. That said judgments and each of them, are void.

"2. That the Court had no jurisdiction to render said judgments and decrees.

"3. Inconsistency between Findings of Fact and Conclusions of Law and the Decrees. * * *"

Attached to said notice of motion, but appearing nowhere else in the record, is a copy of an untitled document dated January 17, 1940, and purporting to have been signed by "Ernest D. Wagner, Acting Judge." The character and efficacy of this instrument are problematical but apparently it was intended as a memorandum opinion for the guidance of counsel in preparing the formal decision and judgment. However, in view of our conclusion that this appeal must be dismissed, it is immaterial for the purposes of this decision whether such writing was intended to be, or in substance constitutes, a mere memorandum opinion or a formal judgment. There are also in the record formal findings of fact and conclusions of law, dated January 31, 1940, and a "Decree of Foreclosure" (apparently in customary form) dated January 31, 1940. We assume that it is to the untitled "memorandum opinion" and the decree of foreclosure that defendants refer by their use of the words "judgments and decrees" in the plural, in their notice of motion. In the absence of more significant identification in the record we assume that the decree of foreclosure dated January 31, 1940, is the "judgment and decree" to which defendants refer in their notice of appeal as "docketed and entered on the 1st day of February, 1940."

[1, 2] It has long been settled that if the grounds upon which a party seeks to have a judgment vacated existed before the entry of the judgment and upon a proper record would have been reviewable on an appeal from the judgment, an appeal will not lie from an order denying the motion. (Mantel v. Mantel, (1902) 135 Cal. 315, 67 P. 758; Lawson v. Guild, (1932), 215 Cal. 378, 381, 10 P.2d 459; In re Estate of Richards, (1941) 17 Cal.2d 259, 267, 109 P.2d 923; Nagelmann v. McIntyre, (1938) 27 Cal.App.2d 621, 622, 81 P.2d 466; Barker v. Ackers, (1938) 29 Cal.App.2d 162, 176, 84 P.2d 264; In re Estate of Murphy, (1942) 50 Cal.App.2d 440, 123 P.2d 129; Mather v. Mather, (1942) — Cal.App.2d —, 124 P.2d 625. The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. (2 Cal.Jur. 166; Nuckolls v. Bank of California, (1937) 10 Cal.2d 266, 270, 74 P.2d 264, 114 A.L.R. 708; Reynolds v. Reynolds, (1923) 191 Cal. 435, 437, 216 P. 619.)

[3] From the record before us, as summarized above, there appears no reason why defendants could not have appealed from the judgment itself rather than from the order refusing to set it aside. The grounds upon which defendants sought to have the judgment set aside, as recited in their notice of motion, obviously existed before the entry of the judgment and would have been reviewable on an appeal from the judgment.

We conclude therefore that an appeal does not lie from the "order and decree

* * * Denying motion of defendants to vacate and set aside judgment and decree * * *" herein, and that it is our duty to dismiss the attempted appeal therefrom (see Bessinger v. Grotz, (1942) 52 Cal.App. 2d ——, 126 P.2d 355).

SHINN and PARKER WOOD, JJ., concur.

SHEARER et al. v. COOPER.

Civ. 2837.

District Court of Appeal, Fourth District, California.

July 24, 1942.

Hearing Granted Sept. 22, 1942.

1. Evidence 🔑588

A trial judge may accept part of testimony of witness as true and reject other portions of it.

2. Appeal and error 🔑994(3), 1012(1)

The trial judge is the judge of the weight and sufficiency of the evidence and the credibility of witnesses.

3. Appeal and error 🔑1011(1)

Where trial judge accepts substantial evidence supporting his findings and judgment as true and rejects other evidence conflicting therewith, question of sufficiency of evidence to support findings and judgment is closed as far as appellate court is concerned unless such court may conclude that the evidence is inherently improbable or that witnesses are so untruthful as to be unworthy of belief.

4. Fraud 🔑13(2)

Where purchasers relied on vendor's misrepresentations as to boundaries of land sold and as to character of soil, vendor was liable for "fraud" even if he believed the facts to be as he represented.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

5. Fraud 🔑13(2)

A vendor should inform himself correctly concerning boundaries of land he is attempting to sell before he makes representations concerning their location.

6. Fraud 🔑13(2)

Misrepresentations as to character of soil of land sold, even when made without actual knowledge of their falsity, may constitute actionable "fraud".

7. Fraud 🔑13(3)

Negligence, carelessness and forgetfulness cannot relieve a person from responsibility for results of his misrepresentations, although when he made them he may not have been conscious of violating any obligation he owed to another.

8. Fraud 🔑58(2)

Evidence authorized purchasers' recovery for vendor's fraud in misrepresenting boundaries of land sold, character of soil, cost of well, pump, motor and pipe lines, and possibility of flooding of land by river and wash, which misrepresentations were relied on by purchasers.

9. Fraud 🔑22(1)

Ordinarily, defendant cannot lull plaintiff into security and then maintain that plaintiff should have realized that a fraud was being committed upon him.

10. Appeal and error 🔑1011(1)

An appellate court cannot reverse a judgment because of conflicts in the evidence.

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action for fraud by Douglas G. Shearer and wife against Charles E. Cooper. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Jerry Geisler, of Los Angeles, Gray, Cary, Ames & Driscoll, J. G. Driscoll, Jr., and John M. Cranston, all of San Diego, for appellant.

Gang & Kopp, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from a judgment against Charles E. Cooper awarding plaintiffs damages in the sum of $19,650 for fraud in the sale of 550 acres of land in what was originally known as the Monserate Rancho in the Bonsall District in San Diego County.

Cooper purchased the Monserate Rancho from the Huntington Land and Improvement Company early in 1932. He received various maps and drawings from that company upon some of which various characters and areas of the soils were described. His use of reproductions from some of these maps in the sale of the land to plaintiffs, as well as oral and written representations made by him and by David H. Backus, his agent, form the basis of the fraudulent representations charged to him.

Before attempting a summary of the facts of the case we should dispose of one contention made by Cooper.

The case was originally tried before the Hon. Frank J. Macomber, who died after the conclusion of the trial and before the findings and conclusions were signed. The court reporter also died and only the portions of the record that had been transcribed during the trial were available at the second trial.

The deposition of Douglas G. Shearer had been taken and an attorney who had participated in the former trial testified at considerable length concerning Shearer's testimony at that trial, which, according to the testimony of this witness, varied materially from his evidence at the second trial. The deposition also was used to impeach Shearer.

Counsel for Cooper have stressed these conflicts and the impeaching evidence at considerable length in their briefs. These arguments may have been and probably were properly urged in the trial court as they went to the credibility of Shearer as a witness and the weight to be given his testimony.

[1-3] A trial judge may accept part of the testimony of a witness as true and reject other portions of it. He is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses. If he accepted substantial evidence supporting the findings and judgment as true and rejected other evidence conflicting with it, the question of the sufficiency of the evidence to support the findings and judgment is closed as far as the appellate court is concerned unless we may conclude that the evidence is inherently improbable or that the witnesses are so untruthful as to be unworthy of belief. After studying the record and searching the many exhibits we cannot reach either conclusion in this case. We, therefore, will confine our statement of facts to a summary of the evidence supporting the findings and judgment and will disregard evidence sharply conflicting with it except insofar as that evidence may be necessary to understand certain arguments made by Cooper.

Douglas G. Shearer and Ann Cunningham Shearer are husband and wife. Mr. Shearer conducted the negotiations for the purchase of the property. Mrs. Shearer was a necessary party plaintiff because she was one of the purchasers. Where practicable we will refer to Douglas G. Shearer as the plaintiff, and to Charles E. Cooper as the defendant.

Early in 1934, and prior thereto, plaintiff desired to acquire income ranch property upon which he could live after he had retired from his employment as chief recording engineer of one of the large moving picture producing companies. Prior to March, 1934, he had inspected several ranch properties in various parts of California, none of which proved satisfactory. Some of them were shown to him by Backus.

Early in 1934, Backus contacted defendant who desired to sell about 1,250 acres of the Monserate Rancho which he had renamed the "Rancho San Luis Rey." Backus received a letter from defendant and a map which purported to show the property to be sold and the various characters of soils on it which were indicated in different colors. On the bottom of this map, opposite colored crayon markings which corresponded to the colors on the map, the following legend appears:

"ESTIMATES
ALFALFA NOW IN — 160 ac
ALFALFA LAND — 300
CULTIVATABLE LAND—260
PASTURE LAND — 260
PIPE LINES NOW IN
PIPE LINES PROPOSED
TREES AND BRUSH — 270
WATERWAYS AND LAKE"

The Monserate Rancho was an old Spanish Grant which had not been surveyed by the United States. Its boundaries were not marked on the ground and very apparently were not known to defendant. But one old survey stake was found on the land subsequently sold to Mr. and Mrs. Shearer. It was located at a point marked "M3" on plaintiffs' exhibit 2 (the colored map above referred to) and is about a quarter of a mile west of the easterly boundary line of the property sold to the Shearers.

Backus contacted Shearer shortly after March 10, 1934, showed him a letter from Cooper describing the property and the colored map and had several conferences with him in reference to a prospective sale. The two went to defendant's home on the property about May 13, 1934, where they interviewed Cooper who showed them over a portion of the property. Cooper drove them across the San Luis Rey River over a dirt road and plaintiff observed two wooden culverts in this road as it crossed the river. Defendant told him that since the construction of the Henshaw Dam on the upper reaches of the river a number of years before, the danger of the river flooding during rainy seasons had been removed; that occasionally during heavy rains the culverts would be washed out and the road thereby closed for a few days at a time; that the culverts could be hauled back in place and reset; that other than this inconvenience there was no danger from flood waters.

Defendant took plaintiff to a point an undisclosed distance east of point "M3" and told him that the east boundary of the property was easterly from where they stood. He pointed to some pine trees on a hill about a mile southwesterly from them and said those pine trees marked the southeast corner of the property. This was subsequently found to be an error as the pine trees were not on the property owned by Cooper. The southeast corner of the property was one-quarter of a mile east of the southeast corner of the forty-acre tract on which the pine trees stood.

Defendant drove plaintiff southerly over a dirt road and passed two alfalfa fields which we will designate as the north alfalfa field and the south alfalfa field. Shearer described the growing alfalfa as "lush." The two fields were separated by what we will call the Keys Canyon Wash. It descended in a northwesterly direction from the hills or mountains lying to the east, and flowed into the San Luis Rey River. The wash was then dry and defendant assured plaintiff that it was never more than a little creek, was not dangerous, was free from floods and could do no damage to the land. Defendant also pointed out a pumping plant and well from which water was conveyed through a pipe line to irrigate the two alfalfa fields. Natural monuments were pointed out by defendant as on the exterior boundaries of the 1,250 acre tract.

A short time afterwards Backus took Mrs. Shearer to the property. She discovered an old eight-room adobe dwelling on high ground east of the San Luis Rey River and near the southern boundary of the 1,250 acres of land. The house interested her. She was unwilling to purchase any part of the property unless she could acquire this building.

Negotiatoins for the sale continued over a period of two years. Many conferences were held between plaintiff and Backus and some with defendant. Plaintiff explained that he would not be interested in the property unless it would return a net income to him. He inquired carefully about the number of tons of alfalfa produced annually, its selling price, the cost of production and the power bills for the operation of the pumping plant. He obtained these figures from defendant and no complaint is made of their accuracy. He was positively informed both in writing and verbally that there were 160 acres of growing alfalfa in the two fields.

Plaintiff testified that he made seven or eight trips to the property and went over portions of it each time. Some of defendant's witnesses placed the number of these inspections as high as twenty-two. He flew over the property and caused aeroplane photographs to be made. These show most of the 1,250 acres, as well as property to the north on which stood the home and race track of defendant. Plaintiff examined these photographs through an instrument that brought the topography of the ground into relief to some extent. Light streaks which proved to be sand appear in both alfalfa fields. They are quite apparent in the photograph of the south field. Plaintiff cut these pictures up and pasted them together so that he had two continuous pictures of the land. He gave one to defendant.

Various propositions were made to plaintiff for the sale to him of parts of the 1,250 acres and a long term lease on parts of the balance. One proposition was for the sale of 430 acres which was shown within the purple crayon lines drawn on a colored reproduction of the colored portions of plaintiffs' exhibit 2. The acreage within the purple lines included both alfalfa fields and a sizable tract of land designated as (potential) alfalfa land lying west of the north alfalfa field and northwesterly of the south alfalfa field and the Keys Canyon Wash.

The original map could not be produced so Backus drew purple lines on plaintiffs' exhibit 38 which he said corresponded to the purple lines on the similar map furnished him by defendant which he gave to plaintiff. After the sale was completed this map was returned to Backus who believed he had given it to defendant.

This offer to sell the 430 acres did not include the adobe house and was not acceptable and the parties finally agreed to the addition of 120 acres (which included the adobe) lying north of the south boundary line of the 1,250 acres and joining the 430 acres on the west, making a total of 550 acres. This offer was finally accepted and the property sold to plaintiffs for $61,500, payable, $15,000 in cash and the balance evidenced by a promissory note secured by a deed of trust.

The property actually purchased by plaintiffs is shown on plaintiffs' exhibit 16 which is a colored map identical in coloring with plaintiffs' exhibit 38 and plaintiffs' exhibit 2. There is an unexplained difference in the boundaries of the 430 acres which are drawn on plaintiffs' exhibit 38 in purple, and on plaintiffs' exhibit 16 in pencil. The 40 acre tract containing the pine trees which defendant had pointed out as the southeast corner of his property was not included within the purple crayon lines on plaintiffs' exhibit 38 but was included within the pencil lines on plaintiffs' exhibit 16. The inclusion of this 40 acres in the 430 acres actually sold would necessarily move the purple line bounding the 430 acres on the west an undetermined distance to the east. The property actually purchased by plaintiffs did not include the (potential) alfalfa land we have mentioned lying west of the north alfalfa field and northwest of Keys Canyon Wash. Neither did it include a little over six acres of the south alfalfa field.

Shearer testified that at a conference during the negotiations leading up to the sale of the 550 acres, Cooper represented the acreage and values of the various classes of lands as follows: Alfalfa land planted, 160 acres at $250 per acre; potential alfalfa land, about 95 acres at $100 per acre; cultivatable land, about 150 acres at $50 per acre; pasture land, about 100 acres at $25 per acre; other land, between 40 and 50 acres, at from $5 to $10 per acre.

A contract dated March 10, 1936, for sale of the land was submitted to plaintiff, and by him to his business adviser. This contained detailed descriptions of the property, principally by fractional sections, township and range. Plaintiff told his business adviser and Backus that he knew nothing of legal descriptions and wanted to be sure that the land described was the property which had been shown him and which he had decided to purchase. To meet this situation, and before the contract was executed, the following provision was inserted: "(Above descriptions to be checked against map and title descriptions, and corrected accordingly)." The property was conveyed to plaintiffs on March 24, 1936.

Defendant agreed to take care of the alfalfa fields for half of the crop, which he did in 1936.

In the late spring or early summer of 1936, plaintiff attempted, without success, to locate the exterior boundaries of the property.

After plaintiff acquired title to the property he commenced a scientific investigation of the various characters of soils and climatic conditions. He purchased four thousand orange trees which he expected to plant on about 50 acres of the land shown on plaintiffs' exhibit 2 as "cultivatable land" lying east of the north alfalfa field. When this "cultivatable land" was cleared it was found to be far short of the area shown on plaintiffs' exhibit 2. He was able to plant only about twelve or thirteen acres. A considerable part of the balance of the supposed "cultivatable land" rose sharply up the side of a rocky mountain and was unfit for cultivation, there being only about thirty acres of cultivatable land east of the two alfalfa fields. Plaintiff made this discovery after the middle of July, 1937.

Rain fell in October of 1936 in a sufficient amount so that water ran down Keys Canyon Wash flowing from side to side in the channel which was obstructed with growths of brush and weeds. Plaintiff had workmen clean it out and straighten it for a distance of about 6,000 feet. Cooper told plaintiff that he hoped plaintiff would do more farming and less cleaning; that cleaning the channel "wasn't necessary"; that "the river wouldn't ever bother me."

There were heavy rains early in 1937. Plaintiff testified that "starting around February things began to happen. * * * Well, the Keys River ran heavily and jumped the cleared channel in several spots and went down over the south alfalfa field, depositing heavy layers of sand over large areas of it, as well as eroding barrancas in the west part of the field where the edge of the alfalfa drops off to the level of the San Luis Rey River bed." The extreme width of the Keys Canyon Wash flood was about 1,500 feet. A witness testified that it would be economically unsound to attempt to clear away the great amount of sand which had been deposited over a considerable area of the south alfalfa field. Some damage was done to the north alfalfa field by the flood waters from this wash.

The San Luis Rey River also flooded badly. It was about 600 feet wide at the road crossing we have mentioned. That crossing was not usable for a number of months and water ran in the Keys Canyon Wash until into June, 1937. The floods did very considerable damage to plaintiffs' property. Both the San Luis Rey River and Keys Canyon Wash reached flood stages in the three succeeding years.

Plaintiff had started building his residence on the property before the floods of 1937. He testified concerning that flood: "Well, believing that the flood then was possibly once in a lifetime, I continued building the house. * * *"

Defendant had his property surveyed in the summer of 1937. In August of that year the surveyor, Weeks, established the west and north lines of the property sold to plaintiffs. The west line of the 430-acre tract just cleared the west edge of the north alfalfa field and ran well into the south alfalfa field. The boundaries did not correspond with those plaintiff had been led to believe were the boundaries of his land.

Plaintiff testified that this was his first knowledge of the actual boundaries of the property he had purchased. He then realized for the first time that the representations made to him concerning the land, the areas of the various qualities of soil, and the boundaries of the tract were untrue. He wrote a letter to Cooper in September of 1937 complaining of these discrepancies and asked for some adjustment. Negotiations concerning a settlement of these differences were continued until into December, 1937, when Mr. and Mrs. Shearer gave notice of rescission of the purchase because of fraud and misrepresentation. While the original complaint is not in the record it was probably filed the last of January, 1938. It sought a rescission or damages in case rescission could not be had.

The findings followed plaintiffs' pleadings and were supported by the evidence. The trial court found fraud and misrepresentations which plaintiffs believed and upon which they relied. The findings of the most material false representations may be summarized as follows:

That the land sold contained 160 acres of planted alfalfa, ninety-five acres of potential alfalfa land, 150 acres of other cultivatable land, and 145 acres of pasture and waste land. (The actual acreages conveyed were found to be, 123 acres of planted alfalfa, fifteen acres of potential alfalfa land and 102 acres of other cultivatable land. While the computation was not made, this would leave 310 acres of pasture and waste land instead of between 140 and 150 acres of this land as represented.)

That since the erection of the Henshaw Dam (several years prior to 1932) the San Luis Rey River did not flow heavily and did not flood; that the Keys Canyon Wash was never more than a little creek and could not overflow and damage the land. (Both streams overflowed and caused serious damage after Cooper purchased the property in 1932. Maps furnished Cooper by the Huntington Land and Improvement Company showed that both streams have caused serious damage prior to that year.)

That the property could be reached over the road, already mentioned, leading from the paved highway, except for periods of a few days during heavy rains. (The evidence shows the river could be crossed during the rainy season only on large bridges; that this road was impassable for months at a time.)

That the property was readily accessible over a road from the south which crossed Keys Canyon Wash. (This was untrue, plaintiffs built their residence north of that wash. During one storm Mrs. Shearer and their son were marooned there. Plaintiff had to drop food and supplies to them from an aeroplane.)

That the well, pump, motor, and pipe lines on the property cost $27,000. (Their actual cost was found to be less than $15,000. The evidence shows the cost to have been about $11,329.84.)

[4] Our study of the record leaves us with the impression that Cooper did not

know the boundaries of his own land when he pointed them out to Shearer. This is rather evident from the fact that he pointed to the pine trees as the southeast corner of his property when he did not even own the property on which they were standing and had to buy that property from another in order to consummate the sale to plaintiffs. This lack of knowledge of the east boundary indicated that he believed it to be west of its actual location. This belief, perhaps, might have led him into certain misrepresentations concerning some of the areas of the various kinds of soil. While this might bear on the question of a deliberate and intentional misrepresentation on his part, it cannot relieve him from the legal results of these misrepresentations if they were relied upon by the purchasers and they were actually deceived and damaged thereby.

[5, 6] A seller should inform himself correctly concerning the boundaries of land he is attempting to sell before he makes representations concerning their location. De Bairos v. Barlin, 46 Cal.App. 665, 190 P. 188. Misrepresentation of the character of the soil of the land sold, even when made without actual knowledge of their falsity, may constitute actionable fraud. As was said in Gammon v. Ealey & Thompson, 97 Cal.App. 452, 275 P. 1005, 1009:

"Even if appellants did not know that the Connetto land contained alkali in such excessive quantities as to render the land unfit for agricultural purposes, yet, if they represented to Gammon that the Connetto land contained alkali in such small quantities that the same would not injure or damage crops growing thereon, when, in fact, the alkali existed in such excessive quantities as to render the land unfit for the growing of crops thereon, such representations would have constituted fraud. Subdivision 2, § 1572, Civ.Code; McMahon et al. v. Grimes et al. [206 Cal. 526], 275 P. 440."

[7] Cooper had in his possession means of ascertaining that his representations concerning the flooding from the San Luis Rey River and the Keys Canyon Wash were untrue. The maps delivered to him when he purchased the property showed that floods from both streams had caused serious damage. Another damaging flood occurred after he bought the property. Negligence, carelessness and forgetfulness cannot relieve a person from responsibility for the results of his misrepresentations although when he made them he may not have been conscious of violating any obligation he owed to another. 26 Cal. Juris. pp. 745, 749, and cases cited; 6 Ten-Year Supp. pp. 41, 42, and cases cited.

While not admitting fraud, and arguing there was no actual fraud in the transaction, defendant does not seriously contend that the evidence fails to support the findings on that question. He seeks to escape liability for the reason that plaintiff made a thorough investigation of the land before he bought it and did not rely upon anything he was told but upon what he discovered and actually learned for himself; that prior to the purchase plaintiff knew that at least one material representation made to him was false so that he could rely on no representation made by Cooper.

No question is raised as to the amount of damages awarded nor the measure of damages applied.

Defendant points out that the evidence shows Shearer to be a business man of skill and experience in his own profession, well educated, a clear thinker and possessed of keen powers of observation and a remarkably retentive memory. A study of his testimony bears out these observations.

Defendant's arguments center around four phases of the case. They are, first, the frequent inspections of the property made by Shearer and his study of the aeroplane photographs taken under his direction; second, lines drawn by Shearer on the composite air photograph of the property which correspond closely to the boundaries of the property actually purchased; third, a discovery by Shearer that the two alfalfa fields had an area of 128 acres instead of 160 acres as represented; fourth, a purported reduction in the purchase price because of the discovered shortage in the acreage of the two alfalfa fields.

Before considering these questions in detail it should be remarked that, prior to the purchase, Shearer evidenced a rather surprising simplicity and unawareness and childlike faith in the absolute truth of the representations made to him by others. Had the trial court found that his investigations disclosed the true facts and that he relied upon them rather than on the misrepresentations of Cooper, those findings would have had ample evidentiary support. On the other hand, Cooper stands in the embarrassing position of having made certain untrue representations when he had in his possession evidence of their falsity. If he did not actually know they were untrue he could have ascertained the true facts with slight effort and in a short time. Other representations were made that were contrary to his own experience while he was the owner of the property. Under such circumstances, forgetfulness or carelessness on his part is no excuse for him.

Defendant argues that Shearer was given every opportunity to make all of the examinations of the property he desired; that he went over it many times; that he studied the photographs carefully; that these photographs showed sand streaks and sand deposits on both alfalfa fields indicating they had been flooded; that the steep, broken and rocky nature of much of the land rendering it unfit for cultivation was clearly evident from these photographs; that from this investigation Shearer must have known the character of the land and could not have been misled by any misrepresentations made by Cooper.

[8] The evidence shows that plaintiff came to California in June, 1925; that thereafter he worked for moving picture companies. There is nothing to show that he had any knowledge of farms, farming operations or soils. He testified in effect that his various inspections of the property did not reveal to him the past evidence of damage by floods or danger of future floods because he knew nothing of conditions governing those happenings and because he knew nothing of soils; that while the photographs disclosed much steep, broken and rocky ground he had not been able to locate any boundaries and therefore the pictures did not disclose how much of that character of land was a part of the property he was purchasing. The trial court accepted this evidence as true and it supports the finding based upon it.

It is also pointed out that defendant joined with plaintiff in replacing the two culverts in the road crossing the San Luis Rey River with a small bridge about twenty feet long having a clearance of six or seven feet. Further stress is laid on the fact that plaintiff had the Keys Canyon Wash cleaned out and straightened. From this it is argued that Shearer did not believe and rely on Cooper's statements concerning the small flow of the two streams.

No such deduction need be drawn from such evidence. Plaintiff testified that defendant told him that the two wooden culverts were washed out during rainy seasons so that the road was closed for several days at a time; that he wanted a permanent crossing so he decided to construct a small bridge. This rather supports the contention of plaintiff that he believed the statement of defendant that the flow of the San Luis Rey River was small. Otherwise he would not have designed so small a bridge. It was completely destroyed in the 1937 flood. There is evidence that the flow of the river at that point was 13,000 second feet during the 1932 flood which occurred after defendant had purchased the property. Nor can we attach any great importance to plaintiff's cleaning and straightening the Keys Canyon Wash. Brush and weeds will choke a channel and prevent the flow of water. Cleaning and straightening the wash was an act of common prudence. It was not necessarily evidence of fear of flood.

The lines now appearing on the composite photograph taken from the aeroplane furnish the strongest ground for the argument that plaintiff knew the boundaries of the property, the rugged nature of much of it and that he was not buying all of the south alfalfa field. These lines correspond very closely to the actual boundaries of the land purchased. However, plaintiff explained lines on this photograph to the apparent satisfaction of the trial court.

Plaintiff testified that the aerial photographs were taken in the summer of 1934; that they were assembled into one picture late in 1935 when squares were originally drawn on it; that the scale for the lines drawn on the picture was furnished by Cooper; that if this scale was not correct the computations would prove erroneous. Plaintiff testified concerning the original lines: "I took the 40-acre squares, being based on the figure Mr. Cooper gave me, and I drew some supposedly 40-acre squares over the defendant's exhibit B. Insofar as those squares were concerned, they were dependent on the information I got from Mr. Cooper. When that information so given me, as being in error in some way—When the results therefrom were disputed by Mr. Cooper, then the squares no longer became of any significance." As Cooper disputed the results of plaintiff's computations, plaintiff concluded the scale was wrong and the lines on the photographs meant nothing.

Plaintiff testified that the original lines were erased and the present lines were drawn at a later date after the purchase, just when does not definitely appear. Plaintiff testified that in June, 1937, he established a base for measuring the areas of the alfalfa fields; that he first learned the correct boundary lines during the Weeks survey. The inference may not be unreasonable that the present lines were drawn on the picture during the summer of 1937. The trial court found in favor of plaintiff on this issue and we cannot disturb that finding here.

[9] After the photographs were assembled, and prior to 1936, plaintiff attempted to determine the acreage in the alfalfa fields by means of a planimeter and asked Cooper for the dimensions of any object appearing on the picture as a base for his calculations. Defendant gave him the purported measurements of the oval appearing inside his race course. Using these measurements, plaintiff computed the total acreage of the two alfalfa fields at 128 acres. He communicated this information to Backus who gave it to defendant. Backus reported to plaintiff, in effect, that defendant said plaintiff was "all wet" and his computations were "cock-eyed." The assurance that there were 160 acres planted in alfalfa was repeated. Plaintiff testified that with these statements made to him he concluded that the measurements of the "base" were wrong and that his computations were valueless as a result; that he accepted and believed the representations that there were 160 acres planted to alfalfa. The trial court accepted this explanation as true. Ordinarily a defendant cannot lull a plaintiff into security and then maintain that he should have realized that a fraud was being committed upon him. Curtis v. Title Guar., etc., Co., 3 Cal.App.2d 612, 40 P.2d 562, 42 P.2d 323. What was said in Neff v. Engler, 205 Cal. 484, 271 P. 744, 746, is applicable here:

"In Bishop on Noncontract Law, sec. 330, it is said: That plaintiff is too credulous is not generally a defense. 'The test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect mind, or one weak and too relying.' (See, also, Bigelow on Frauds, 524.) 'Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' (Mead v. Bunn, 32 N.Y. 275.) * * * [Citing cases.]"

[10] Defendant urges that plaintiff received a reduction in the purchase price of the land because of the discovery of the shortage in the acreage of the two alfalfa fields. There is evidence to that effect in the record but this contention overlooks the positive testimony of plaintiff that no such reduction in price was made for that reason. Thus we have a sharp conflict in the evidence which was resolved in favor of plaintiff by the trial judge. We cannot reverse a judgment because of conflicts in the evidence.

Finally, defendant argues that, since plaintiff discovered at least one material representation made by defendant was false, this placed him on notice so that he could not rely on any representation made to him. This argument is based on some of those representations already considered, principally on the acreage of the two alfalfa fields. As the trial court found that plaintiff did not learn of the falsity of these representations until after he had purchased the property, this argument must fail. As there is evidence supporting this finding it is conclusive here.

It may be true that defendant was merely mistaken in some, or perhaps all, of his representations to plaintiff and that he did not deliberately intend to wilfully deceive. However, the representations were positively made as to material facts. Plaintiff believed those representations and acted on them to his injury. The true rule governing cases of this kind is set forth in McMahon v. Grimes, 206 Cal. 526, 275 P. 440, 443, as follows:

"Conceding that Mrs. Grimes honestly thought her statements as to the character of the land were true, she was not justified in making them to the plaintiffs, in order to induce the latter to purchase the land through her, for the reason that she had not, and could not have had, any competent information that they were true.

Had she made an examination of the land for the purpose of ascertaining the depth of its alluvial soil, and the presence or absence of hardpan and clay thereon, she would have discovered its true character, and as such an examination would have revealed the presence of hardpan and clay, and but a thin layer of alluvial soil, she could not have thereafter truthfully made said statements relative to the character of said soil. If she made such statements without this information, or some other of equal merit, then she was guilty of fraud even if she believed they were true. As was said in Muller v. Palmer, supra [144 Cal. 305, 77 P. 954], quoting from the early case of Alvarez v. Brannan, 7 Cal. [503], 504, 68 Am.Dec. 274, 'But it is equally true that "whether a party thus misrepresenting a material fact knew it to be false or made the assertion without knowing whether it were true or false, is wholly immaterial." If a party asserts that as true which he does not know to be true, it is a false representation. If he intends simply to state his belief upon information, then he should state it in that precise form, so as to apprise the other party of the true grounds upon which his statement is made. A party will always be held to make good his statement in the form in which he makes it. If he states a thing as true in general terms without qualification, then he is presumed to do so upon his own knowledge or at his own peril, and must make good his assertion.'"

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

53 Cal.App.2d 716

In re DE SANTI'S ESTATE.

PARDINI et al. v. GIANNINI et al.

Civ. 12024.

District Court of Appeal, First District,
Division 1, California.
July 31, 1942.

1. Wills 🔑736, 832

Where all of estate was disposed of by will, no provision was made for payment of debts or expenses and there was no designation of any particular portion of estate to be appropriated for payment thereof, debts and expenses were payable from residuary estate, as against contention that debts and expenses were payable from property specifically bequeathed to persons not related by blood to decedent. Probate Code, §§ 750, 752.

2. Wills 🔑812

Under statute providing that unless different intention is expressed in will, abatement takes place in any class only as between legacies of that class, even if statute applies to payment of debts of the estate and expenses of administration, preference to relatives, as to payment of debts and expenses, takes place only as between legatees of the same class, and does not require that debts of decedent and expenses of administration should be paid from property specifically bequeathed to persons not related by blood to decedent who by residuary clause disposed of remainder of property to blood relatives. Probate Code, § 752.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Proceeding in the matter of the estate of Lorenzo De Santi, deceased. From an order settling the final account of Mario Giannini as executor, etc., of the will of Lorenzo De Santi, deceased, and directing the debts of decedent and the expenses of administration to be paid from property specifically devised to persons not related by blood to decedent, and that no part thereof should be paid from property disposed of to blood relatives by the residuary clause of the will, Livio Pardini and others appeal.

Reversed, with directions.

Goscoe O. Farley and Arthur J. Manasse, Jr., both of San Francisco, for appellants.

R. L. Husted, of San Francisco, for respondents.

KNIGHT, Justice.

This is an appeal from an order settling the final account of the executor of the will of Lorenzo De Santi, deceased, and involves the validity of that portion of the order directing the debts of the decedent and expenses of administration to be paid from the property specifically devised and bequeathed to persons not related by blood to the decedent, and that no part thereof be paid from the property disposed of to blood relatives by the residuary clause of the will.

The will was holographic, and written in Italian. Translated, the pertinent parts thereof are as follows: "Article 2nd I give to Livio and Carolina Pardini my four lots No. 2, 3, 4 and 5 with my house and furniture which will be found on said lots in Block 5332. Article 3rd I give to Rinaldo and Emilia Bianchi my nephew and niece, my four lots No. 15, 16, 17 and 18 in Block 5332 all of which said lots will be found in my name on the register of the assessor of San Francisco, California. Article 4th All of the rest of my property I give in equal parts to my heirs according to the laws of succession of the State of California." Livio and Carolina Pardini, the appellants herein, and Rinaldo Bianchi are not related by blood to the decedent. The latter is the husband of Emilia Bianchi, the decedent's niece. The heirs of the decedent were his three daughters, namely Erminia Giorgi, Ida Lombardi, and Jennie Pellinacci, to whom the residue of the estate was bequeathed. The estate was appraised at $21,193.76; the specific devise to appellants, consisting of decedent's home and furniture, was valued at $3,050; the specific devise to Rinaldo Bianchi was valued at $300, and to Emilia Bianchi, $300. Hence a residue of $17,543.76 remained in the estate prior to the payment of debts and expenses of administration; and the debts and expenses of administration amounted to $2,463.61. The probate court's order was: "* * * that the sum of $2,463.61, the total disbursements and expenses in said estate, as set forth in said account, be and the same is hereby made charge above against the bequests and legacies of those devisees and legatees not related by blood to said decedent, namely: Livio Pardini, Carolina Pardini and Rinaldo Bianchi, and that no part of said sum be chargeable against the bequests and legacies to Emilia Bianchi, Erminia Giorgi, Ida Lombardi and/or Egizia Pellinacci, also known as Jennie Pellinacci, the kindred of said decedent." The foregoing order is not sustainable.

[1] Section 750 of the Probate Code provides: "If the testator makes provision by his will, or designates the estate to be appropriated, for the payment of his debts, the expenses of administration, or family allowance, they must be paid according to such provision or out of the estate thus appropriated, so far as the same is sufficient. If insufficient, that portion of the estate not disposed of by the will, if any, must be appropriated for that purpose; *and if that is not sufficient, the property given to residuary legatees and devisees,* and thereafter all other property devised and bequeathed *is liable for the same,* in proportion to the value or amount of the several devises and legacies, *but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate."* (Italics ours.) Here all the estate was disposed of by will; no provision is made for the payments of debts or expenses, nor is there any designation of any particular portion of the estate to be appropriated for the payment of them. Therefore the provision that the property given to residuary legatees and devisees is liable next in order for the payment of debts and expenses of administration, is applicable to the present situation, and as appellants contend clearly requires that the debts and expenses shall be paid from the residuary estate. Furthermore, as will be noted, section 750 contains this provision: "* * * but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate"; and in Re Estate of Bacigalupi, 105 Cal.App. 578, 288 P. 122, 123, in construing section 1359 of the Civil Code, the predecessor of section 750 of the Probate Code, it was specifically held that property bequeathed to residuary legatees must be resorted to for the payment of expenses of administration before any resort is made to property specifically devised or bequeathed, in the absence of a contrary intention on the part of the testator. In so holding the court said: "However, the practice has been uniform from the adoption of these various Code sections that specific devises or legacies shall be exonerated from the payment of debts of the deceased, funeral expenses and expenses of administration if, in the absence of other provision in the will for that purpose, sufficient property is bequeathed to a residuary legatee; that is to say, the accepted rule is that the order in which the property of the estate is to be resorted to for the payment of debts of the deceased as prescribed in section 1359 has been the accepted and approved order in reference to the payment of funeral expenses, allowance to the family, and expenses of administra-

tion. Recent authorities in harmony with this practice are [In re] Estate of Babb, 200 Cal. 252, 252 P. 1039, 1042, and [In re] Estate of Daly, 202 Cal. 284, 260 P. 296. In [Re] Estate of Babb, the Supreme Court at page 260 of 200 Cal., 252 P. 1039, said: 'Property bequeathed to a residuary legatee must be resorted to for the payment of the debts of the deceased, funeral expenses, and expenses of administration, prior to any resort being made to property specifically devised or bequeathed. Civ.Code, § 1359; Code Civ.Proc., § 1563.' In that case, as here, the special devise of the life estate to appellants was specific, whereas the bequest to the residuary legatees was general within the definition of section 1357 of the Civil Code. In the Estate of Daly [supra], at page 288 of 202 Cal., 260 P. 296, 298, the Supreme Court reaffirmed the rule that a specific legacy is exempt from the payment of expenses of administration 'if there be other sufficient estate to satisfy them, and it was the intention of the testator that the specific legacy be not so charged.'" Certainly no contrary intention is here expressed in the will; and it is quite obvious that the only reason the testator could have had in making a will at all was to make the specific devises to persons who would not otherwise have participated in his estate had he left no will; and after making such provision for them he left the major part of his estate to his heirs "according to the laws of succession of the State of California."

Respondents concede that section 750 is controlling where all parties taking under a will are kindred of the testator or all are non-kindred; but they contend that where as here a portion of them are kindred and a portion non-kindred, section 752 governs and if so that the provisions thereof require that all debts and expenses of administration shall be charged first to the legacies of non-kindred, before resort may be had to any of the estates bequeathed to kindred. There is no merit in the contention. Section 752 as it read at the time the will was executed, and upon which respondents rely, was as follows: "Unless a different intention is expressed in the will, abatement takes place *in any class only as between legacies of that class,* and legacies to a spouse or to kindred are chargeable only after legacies to persons not related to the testator." (Italics ours.) Assuming, as respondents contend, that the provisions of said section 752 apply to the payment of the debts of the estate or expenses of administration, as well as to abatement of legacies, it is clear that the plan of abatement provided for herein takes place with a preference to kindred only as between the legacies of the same class, as those classes are listed in section 161 of the Probate Code, namely, specific, demonstrative, annuity, residuary, and general. In other words, if certain of the residuary legatees were related to the testator and others not, debts and expenses would be charged first against the interest of the residuary legatees who were not related, and not until such legacies were consumed in the discharge of debts and expenses would the residuary interest of kindred be charged. If the residue was insufficient and it was necessary to go into general and specific legacies, within those classes non-kindred would be charged first.

[2] The foregoing view finds support in the decisions rendered in Re Estate of Wever, 12 Cal.App.2d 237, 55 P.2d 279, and Estate of Apple, 66 Cal. 432, 6 P. 7. While the precise questions presented in those cases were not the same as the one here involved, the language used therein in interpreting the Code sections now under consideration and their predecessors is pertinent to the situation here presented, and doubtless sustains appellants' contention that as to the payment of debts and expenses preference to relatives takes place only as between legatees of the same class. For instance, in Re Estate of Wever [12 Cal.App.2d 237, 55 P.2d 281], the court said: "Reading the sections as a whole, the reasonable interpretation is this: Section 750 makes all property of the estate liable for debts, expenses of administration, and family allowance, with the single exception of property covered by specific devises and legacies under certain conditions. The order in which the property is to be resorted to for that purpose is clearly defined, and no devise or legacy is exempt except as noted. * * * The reasonable interpretation of this section [752] is that abatement takes place equally between all legatees *of a certain class and cannot apply to one only of one class and one of another.* The 'class' mentioned in this section is any one of the five kinds of legacies stated and defined 'according to their nature' in section 161 of the Probate Code. * * * The obvious intention of the sections is that, 'unless a different intention is expressed in the will,' legacies to spouse and kindred shall be preferred over other legacies *of the same class* when the property is insufficient to pay all such lega-

cies in full, but that all property of the estate shall be liable for the debts, expenses of administration, and family allowance, with the single exception of the specific legacies and devises mentioned in section 750." In the Estate of Apple, [66 Cal. 432, 6 P. 13], in referring to former section 1361 of the Civil Code, which with section 1362 was the predecessor of section 752 of the Probate Code, it was said: "* * * legacies to husband, widow, or kindred *of any class* are chargeable for debts only after legacies to persons not related to the testator. To this extent, and to this extent only, are legacies to husband, widow, or kindred given a preference over legacies *of the same class* to strangers." (All italics ours.) The decision in the Wever case will show that the court there refrained from deciding the related question of the apportionment as between the various legatees of the liability for debts, expenses and family allowances because the parties stipulated that such question was not involved in that proceeding. However, the language used in both decisions, in our opinion, may be taken as supporting the contention of appellants.

It is our conclusion, therefore, that the provisions of section 750 alone are here controlling, and that accordingly the property bequeathed to the residuary legatees is liable for the payment of the debts of the decedent and the expenses of administration. The order appealed from is therefore reversed, with directions to revise and reenter the same in accordance with the views herein expressed.

PETERS, P. J., and WARD, J., concurred.

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54 Cal.App.2d 8

MARTIN v. McLAIN et al.

Civ. 2684.

District Court of Appeal, Fourth District, California.

Aug. 12, 1942.

Rehearing Denied Sept. 10, 1942.

1. Mortgages 🔑38(1)

In action based on theory that note and assignment of contract for purchase of land constituted an equitable mortgage upon land, which plaintiff was entitled to foreclose, evidence sustained finding that the note and assignment were executed by defendant as accommodation to plaintiff for purpose of increasing plaintiff's credit standing and to enable plaintiff to obtain credit for conduct of defendants' business and justified denial of relief.

2. Payment 🔑65(3)

There is a presumption that an obligation delivered up to a debtor has been paid. Code Civ.Proc. § 1963, subds. 9, 13.

3. Appeal and error 🔑1011(1)

In action on an open book account, the weight to be given conflicting evidence was matter entirely for trial court, even though the weight of the evidence might appear to appellate court to be otherwise.

4. Account, action on 🔑22

In action on open book account, evidence sustained finding that defendant had fully paid and satisfied all legitimate charges against him.

◆

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action on an open book account and to foreclose a claimed equitable mortgage by Guy S. Martin against Victor C. McLain and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Brittan & Mack, Donald G. Kendall, and Kendall & Howell, all of Bakersfield, for appellant.

Henry E. Schmidt, of Bakersfield, and Carlton H. Casjens, of Bell, for respondents.

GRIFFIN, Justice.

This is an action to recover on an open book account and to foreclose a claimed equitable mortgage alleged to have been given to secure the payment of a promissory note. Plaintiff and appellant was a resident of the state of Illinois for more than 25 years and was such resident at the time this action was commenced. Since 1918 he maintained an office in the State of Missouri wherein he conducted a business of writing insurance and surety bonds and financing contractors. The appellant first met the respondent Victor C. McLain, a contractor, in 1924, and entered into a course of business with him whereby appellant furnished McLain performance bonds and financed him on construction jobs over a period of years extending to and including the year 1934. The respondents Victor C. McLain and L. M. McLain, his present wife, were residents of Illinois from 1924 until 1935. They moved to California in December, 1935, and made their permanent home at Wasco, on the real property (160 acres) the subject of this action. The defendant Maud F. McLain was the former wife of the respondent Victor C. McLain. They were divorced in 1923. The action against her was subsequently dismissed. L. M. McLain was married to Victor C. McLain in 1923. They lived together as husband and wife from said date until the commencement of this action. Victor C. McLain and Maud F. McLain entered into a contract to purchase the land here in question from Arthur and Addie Thresher on March 30, 1922. Maud F. McLain quitclaimed her interest to Victor C. McLain February 21, 1924. Victor C. McLain, on April 7, 1932, conveyed and quitclaimed all his interest in the land to L. M. McLain. The title to the land was finally acquired by L. M. McLain by deed from Louise A. Simms and Vinton D. Simms on January 29, 1935.

From 1924 until April, 1930, the respondent Victor C. McLain operated a construction business under the name of Midwest Engineering Company, a corporation. He was president, L. M. McLain was vice president and E. O. Erickson was secretary-treasurer. The Midwest Engineering Company encountered financial difficulties in April, 1930, and the corporation was abandoned at that time. Victor C. McLain continued business in his own name. In 1925 appellant began to finance some road construction jobs for McLain. This relationship developed into a running account between the parties. Appellant took assignments of moneys due respondents on the respective jobs. He advanced funds to and on behalf of respondents and charged a substantial rate of interest for such advancements. Appellant's record of account extending from July 5, 1924, to May 1, 1937, shows substantial receipts and disbursements and indicates that on May 1, 1937, a balance was due appellant in the sum of $45,047.30.

Appellant's record shows that on May 29, 1929, the Midwest Engineering Company was indebted to him for approximately $12,550.50. He testified that money was needed to finish a road construction job known as the Pinckneyville job, and that he wrote a letter to Mr. McLain on that date, in which he stated:

"Have just had a talk with Mr. Locatel at the bank and while he has not definitely agreed to take care of us, I believe he will see us through on this Pinckneyville job. It might be well for you to make me an assignment of estimates on the job and also of your California land, which I believe we had up with him once before and he knows something about it.

"If you will get these to me right away, I will make all necessary arrangements down there. Am inclosing note, which I thought perhaps would be best to make for $25000.00 and an assignment of estimates."

On May 31, 1929, Mr. McLain wrote to appellant, returning the promissory note for $25,000 signed by himself individually and the Midwest Engineering Company, together with an assignment of the real estate contract dated March 30, 1922, between himself, his then wife, and Arthur and Addie Thresher, and the original contract of purchase. The letter returning these documents reads in part as follows:

"I am handing you herewith the return of the note, $25000.00, you sent me for signing together with a memorandum on 2 sheets, one for each of us to be signed by us, so as to leave the track behind us of just what we were doing. One of them you may return to me after it is signed.

"I am also handing you the signed statement of assignment, which you forwarded, for your use.

"I am also handing you the contract for deed on the California property, together with an assignment of interests, to be attached to it or remain folded with it as I am handing it to you, whichever way the needs of the occasion may require with you.

"I will expect to hear from you very shortly upon your report and returns of the matter."

The memorandum included in the documents forwarded with the foregoing letter is as follows:

"State of Illinois }
"County of Jefferson } ss.

"This mutual contract entered into this 31st day of May, A. D. 1929, by and between Guy S. Martin and Victor C. McLain, WITNESSETH: That on May 29, 1929, dated at St. Louis, Missouri, Victor C. McLain makes to the said Martin his promissory note for Twenty-five Thousand Dollars ($25000.00) due in 90 days, bearing interest from date at six per cent (6%) per annum.

"It is hereby mutually agreed between the parties in the said note that the note is made for a fixed sum of money *not yet advanced* and shall be valid only hereafter for such an amount as shall from time to time be advanced by the said Guy S. Martin, or his principals to the said Victor C. McLain." (Italics ours.)

In April of 1930, the Midwest Engineering Company was in bad financial condition. Mr. McLain executed a bill of sale from the Midwest Engineering Company to George E. Hoffman of all of the remaining equipment of the company for a recited consideration of Seventeen Thousand Dollars ($17,000). The purpose of this bill of sale is disputed. Appellant contends that it was given to prevent the creditors of the engineering company from taking the remaining assets of the company, that it was made but never delivered to Hoffman and that the machinery and equipment covered by the bill of sale was never received by him and that the consideration recited in it was never paid. Guy S. Martin was a stockholder in the Hoffman Construction Company. Respondent Victor C. McLain contends that the bill of sale was executed and that the remaining machinery in the possession of the Midwest Engineering Company was turned over to appellant Guy S. Martin through George Hoffman in satisfaction and payment of all outstanding obligations of himself and the engineering company to appellant.

The record indicates that after the failure of the Midwest Engineering Company, Mr. McLain continued the construction business in his own name and continued to deal with appellant. In April, 1930, one Kirby Smith, who was attorney for McLain and the Midwest Engineering Company, wrote the following letter to Martin:

"McLain tells me that he and you have arrived at an understanding whereby you are to finance him on a certain sub-contract of State Highway making in Missouri. He is very desirous of putting up to you everything he has got for collateral and executing a contract to you for your protection to the last pound that he can pull and the last dollar he can raise. He has asked me to draft a contract and other papers covering this matter and be prepared to deliver to you as quickly as possible when he has secured the contract. He tells me further that he is expecting this contract will be made during the present week.

"In years past through the very friendly relationship of yourself and McLain, I have drawn a number of papers which were executed for your protection. All of them have been lived up to at this time insofar as I know and all of the understandings already entered into have been worked out.

"Now it occurs to me that upon the making and delivery of this new contract all of the old scraps and threads should be picked up and you and he start with a clean slate. To do this I wish you would at once go to your papers and take therefrom every note, mortgage, contract, or other papers which had to do with your past relations and mail them to me. I will treat them as an escrow placed in my hands by you to be held and deposited or whatever may be your order or wish * * *"

Upon receipt of this letter the appellant forwarded to Smith the documents requested which included one demand note dated May 29, 1929, for $25,000 signed by Midwest Engineering Company and by V. C. McLain, also an assignment of the real estate in California, which assignment was dated May 29, 1929. Smith acknowledged the receipt of the documents and stated: "When I wrote you to forward me these papers I expected that these notes would show such credits as had been made or if some of them were paid for then which ones were paid, and then would be able from that to determine exactly how much McLain owed you yet * * *."

Appellant replied in part as follows: "As you surmise, the only record I have of the amount Mac owes me is a ledger account, which shows a balance due at this date of $40,951.52, including interest to date * * *."

Considerable correspondence between Kirby Smith and appellant ensued. On February 15, 1935, Kirby Smith died. Appellant thereafter demanded the assignment of the California land to him and also demanded payment of the $25,000 note. On April 29, 1936, he filed a complaint alleging the execution of the promissory note in the sum of $25,000 by Mr. McLain and that it was secured by the assignment of the real estate contract above mentioned; that it was given as security for "moneys advanced" and to be advanced; that the note has never been paid and is still due and owing; that demand has been made to have the property transferred to his name as security for the promissory note; that the moneys advanced by appellant to Mr. McLain were used in whole or in part in the purchase of the property; that Mr. McLain transferred the real property to his wife L. M. McLain for the express purpose of defeating appellant's rights. Appellant then prayed that the property be declared to be held in trust by L. M. McLain for and on behalf of appellant as security for the loan; and that respondents be ordered to execute a deed of trust in that amount upon the property. The contract of purchase between Arthur and Addie Thresher and Victor and Maud McLain was attached as an exhibit. It contained the following conditional assignment:

"State of Illinois }
"County of Jefferson } ss.

"For value received I hereby assign and transfer the within real estate contract for deed to Guy S. Martin, conditioned also that it shall stand as collateral for the payment by me of a certain promissory note for Twenty-five thousand dollars ($25,000.00) made to the said Guy S. Martin dated at St. Louis, Missouri, May 29, 1929, due in ninety (90) days.

"Victor C. McLain."

No claim was made in the original complaint for any balance due upon an open book account. An amended complaint was filed claiming that the above mentioned assignment constituted an equitable mortgage upon the property described and in addition to the allegations in the original complaint claimed that there was a balance of $45,047.30 due and owing from Victor C. McLain and alleging that appellant has a lien on the respondents' real property described in the original complaint, and that they be enjoined and restrained from asserting any interest in and to that land adverse to that of the appellant.

The respondents answered the complaint. Victor C. McLain admitted the execution of the assignment and the promissory note but denied that the note or assignment was given to the appellant for moneys advanced to the respondent; claimed that title to the property was conveyed to L. M. McLain by grant deed for a valid consideration; alleged that the promissory note was fully paid, satisfied and settled about April 7, 1930, when at the instance and request of the appellant Mr. McLain caused to be transferred certain construction equipment and other property to G. R. Hoffman and the appellant in full satisfaction and payment of any and all indebtedness to appellant. Other special defenses such as lack of consideration, statute of limitations, laches, and community property interests of Mrs. McLain, were alleged and the trial court found in accordance with those defenses. It found that Victor C. McLain and Maud F. McLain entered into the contract to purchase the land as alleged; that Victor C. McLain, in the state of Illinois, executed the promissory note for $25,000 on May 29, 1929, and executed the assignment of the real estate contract to appellant; that there was no money consideration or other thing of value given for the execution and delivery of the instruments; that the respondent Mr. McLain did not agree to pay any past obligation as a consideration for the note or assignment; that he did not advance nor agree to advance any money on the note or assignment; that he did not agree to pay any future debts or obligations of the Midwest Engineering Company or of Victor C. McLain; that he did not part with anything of value or make any agreement to part with anything of value in consideration for the execution of the note or the assignment; that the note and assignment were executed as an accommodation to the appellant for the purpose of increasing his credit standing and/or to enable him to obtain finances; that appellant had not advanced, prior to the execution of the note, any money which was to be secured by the execution of the note and assignment; that he did not agree to make any advances of any money or thing of value in the future and that he did not advance to the respondents or extend or advance on behalf of them from the 29th day of May, 1929, to and including September, 1934, the sum of $45,047.30, or any other sum whatsoever; that during the month of May, 1930, the appellant returned and delivered the promissory note and purported assignment to Mr. McLain and cancelled them; that subsequent to the return of the promissory note and purported assignment Mr. McLain retained possession of them and that appellant is now endeavoring to falsely and fraudulently convert them to his own use contrary to representations made by him at the time they were executed and deposited with him; that by the execution of the assignment Mr. McLain did not intend to give and did not give to the appellant an equitable mortgage; that L. M. McLain is the owner of the property and that appellant has no right, title or interest in it; that at no time did appellant advance any sum of money to respondents for the purpose of paying any of the purchase price of the property either in whole or in part; that the transfer of Victor C. McLain's interest in the property to L. M. McLain was for a valuable consideration; that she had no knowledge, actual or constructive, of any claimed interest of appellant in or to the property; that at no time did he inform her that he had or claimed any interest in the contract of purchase or the land until she was served with a copy of the complaint; that by his acts and declarations he deliberately, knowingly and intentionally induced her to establish herself in and alter her position to her own disadvantage with respect to the matter declared upon; that subsequent to her obtaining an assignment to the contract of sale and the land described therein and prior to the filing of the action, she expended money and erected and constructed improvements on the land; that she believed at all times that he had no interest in the contract nor the land in the contract described; and that plaintiff has been guilty of laches and unreasonable delay in bringing the action.

The court then found that at all times subsequent to May, 1929, up to and including December 4, 1934, the respondents and each of them were residents and citizens of the state of Illinois; that the appellant now is and at all times mentioned was a citizen and resident of the state of Missouri and that at no time was he a citizen of the state of California; that the respondents never were residents or citizens of the state of Missouri; and that the residence of the respondents was at all times known to the appellant since the date of the note and assignment and that Victor C. McLain, throughout his residence in the state of Illinois, visited the appellant from time to time at St. Louis, in the state of Missouri, in his place of business there. The court found that the cause of action was barred by section 361 of the Code of Civil Procedure of the state of California. By its judgment it denied any relief to appellant.

[1] Appellant first contends that because respondent Mr. McLain gave the promissory note and the assignment of the contract for the purchase of the land to appellant and appellant later made advances to McLain upon it, the note and assignment constituted an equitable mortgage upon the land which he was entitled to have foreclosed. The execution of the instruments is admitted. Appellant never recorded the assignment; never credited respondents' account with the amount of the note; the books did not reflect any transaction respecting it; no payments were ever credited on the note; and the note and assignment, together with other notes and mortgages all totaling $91,765.64, were returned to Smith, the attorney, for reasons expressed in the letter above mentioned. Smith is now deceased. Each party claims that his testimony, as to the true facts, would be most valuable to him. The trial court had before it the system and method previously used by appellant in securing notes and mortgages for the purpose of inducing the bank to make loans to appellant. From those transactions it readily appears that appellant did not intend to apply the proceeds to any indebtedness of respondent McLain but merely adopted this method and system for the purpose of deceiving the bank or creditors of McLain. A brief summary of these transactions convinces us that the mortgage and assignment here involved were to be used only for the purpose as found by the court. Victor C. McLain testified that on previous occasions and from time to time the Midwest Engineering Company had executed promissory notes and other evidences of indebtedness and delivered them to the appellant for the purpose of aiding and assisting the appellant in obtaining from other sources the necessary and proper credit to conduct respondents' business and that the $25,000 note and assignment on the California land were for that purpose only. The evidence shows that on April 14, 1926, the Midwest Engineering Company executed in favor of Martin a chattel mortgage in the sum of $25,000 on certain machinery to secure a note in that sum. Martin testified that this note was never paid. No action was taken on it by him. No claim is now being made for it. This was one of the notes and mortgages returned to attorney Smith with the assignment and note here in issue. There was another note dated "1/13/30" for $25,000 enclosed, also one note dated February 15, 1929, for

$16,765.64, and one chattel mortgage dated February 15, 1929, for $16,765.64. No claim is being made for any sums due under them. The note and chattel mortgage dated April 14, 1926, was mailed to Martin with this instruction:

"We enclose herewith our ninety-day note for $25,000 and are attaching a chattel mortgage for like amount, the plan, as per our conversation, being for you to use this note and chattel mortgage in securing a loan for us of $12,000 * * *."

[2] The evidence further discloses that on August 1, 1927, Mr. McLain once before assigned his interest in the California real estate here involved to Martin for some reason which is not apparent from the record. This assignment was unrecorded. At the same time he executed a bill of sale to appellant of a great quantity of machinery owned by the Midwest Engineering Company. There is no record of this transaction on the books of appellant. He testified that he did not recall the transaction. This rather indicates that as far back as 1926, the appellant was obtaining instruments from the Midwest Engineering Company for the purpose of obtaining money from his banker and that the execution of that bill of sale and assignment of the California land dated August 1, 1927, was to increase the financial credit of Martin. Martin claims that those instruments were given to protect Midwest Engineering Company from its creditors; that "Mr. Smith suggested that in order to keep Mr. McLain going. Mr. Smith was always working to keep McLain's credit up. I didn't record it. There wasn't any consideration. I didn't give him any credit on the books." Under date of February 15, 1929, in a letter to Martin enclosing the note and chattel mortgage for $16,765.64, is found this statement by the secretary-treasurer of the Midwest Engineering Company: "Am enclosing herewith note for $16,765.64, dated today, 7%, and due in six months, together with chattel mortgage, signed and acknowledged before justice of peace. I arrived at the amount by adding an even $8,000.00 to the amount of your last statement to us. As I explained to you, Mac wants you to have this for your protection, if necessary, by someone pushing us too hard to raise money on * * *" At that time the record indicates that the Midwest Engineering Company owed only $8,765.67 to the appellant. The evidence clearly shows in that transaction that an inflation of $8,000 was concocted and planned by the parties; that the inflation was apparently for the purpose of presenting the chattel mortgage and note to a banking institution either directly or in a financial statement for the purpose of obtaining credit. Appellant now claims that the personal property represented in that chattel mortgage was in fact only worth $1,600. The trial court had the right to believe from the evidence that the mortgage and assignment here involved were but a similar spasm of executing instruments requested by the appellant for similar purposes. As further evidence that Martin had cancelled the $25,000 note and returned the security therefor, we find that on December 20, 1933, several years after the assignment of the real estate contract was returned to attorney Smith, Martin wrote to Mr. McLain and said: "I would appreciate it, Mac, if you will assign your sales contract to me, not only as additional security for what you owe me, but primarily in order to keep your other creditors from tying it up. * * *" The claimed unpaid note and assignment here involved were found in the possession of the maker. There is a presumption that an obligation delivered up to a debtor has been paid. § 1963, Code Civ.Proc., subds. 9 and 13. The portion of the judgment denying appellant relief in respect to the note and claimed equitable mortgage is fully supported by the evidence.

[3] Appellant next contends that in view of the fact that he introduced a detailed account, checks and vouchers supporting and showing that respondent Mr. McLain was indebted to him, that McLain's denial of such indebtedness and other evidence offered in support of his testimony was not sufficient to support the finding that respondent McLain was not indebted to him. If appellant's record of account is true and correct, as testified to by him, the trial court, in the absence of any defense thereto, might have been fully justified in awarding judgment in appellant's favor against Mr. McLain upon the open book account. This, however, is not the question before us. The trial court found in all particulars in favor of respondent Mr. McLain on this issue. The question is whether there is any substantial evidence supporting the finding of the trial court. The weight to be given that testimony is a matter entirely for the trial court, even though the

weight of evidence may appear to us to be otherwise. Chichester v. Seymour, 28 Cal.App.2d 696, 83 P.2d 301; Bennett v. Chandler, 52 Cal.App.2d —, 126 P.2d 173.

In the light of this rule, we will review some of the evidence on that subject. On April 19, 1930, Martin wrote attorney Smith that McLain then owed him $40,951.42 on his ledger account. It was at about this time that the Midwest Engineering Company encountered financial difficulties and the corporation was abandoned.

Mr. McLain testified that in April, 1930, he went to Martin's office and that Martin and he agreed that upon any settlement of his account and of the account of the Midwest Engineering Company, he would turn over all of his equipment to Martin; that the equipment was "worth a lot more than his account * * * that there was other accounts to be taken care of yet and I explained to him some of those accounts I was going to take care of myself with assignment of balance of payments, unfinished payments on paving jobs." He then testified that Martin told him his account was "nine thousand one hundred and some dollars" but to place it at seventeen thousand dollars which would take care of his claim and more claims that he felt would have to be paid by him; that he gave a bill of sale of his machinery (in which the consideration was fixed at $17,000) to the Hoffman Construction Company, of which Martin was a stockholder, at Martin's request and for Martin's benefit; that he did not owe Hoffman Construction Company any money at any time.

There is some dispute in the evidence as to the amount of machinery that was turned over to Hoffman Construction Company. In the record is a list prepared by Hoffman Construction Company, of certain machinery and fixtures. This list is headed "C. E. Hoffman Construction Co., Lincoln, Illinois. List of Equipment taken over by us from the Midwest Engineering Company for Guy S. Martin, also disposition thereof:" On September 22, 1930, the Hoffman Construction Company was negotiating with attorney Smith about the price it should receive for the McLain equipment. It would therefore appear from this testimony that McLain intended the assignment of the machinery to operate as a satisfaction of all present and future obligations of McLain and the Midwest Engineering Company. If the trial court believed this testimony its finding in this respect cannot be disturbed.

[4] The items of account themselves are open to question. In the group of checks offered in evidence, consisting of 221, only 14 are made payable to Victor C. McLain. These 14 checks aggregate the sum of $3,116. Some of the remaining charges against the McLain account consisted of about 39 checks which were issued by Martin direct to the Tower Grove Bank. They totaled $15,827.86. Respondents argue that as far as the record discloses, these checks may have been issued by Martin to cover his personal indebtedness existing between himself and the Tower Grove Bank or that he may have issued these checks and obtained cash thereon for his own personal use. The witness Martin was indefinite in reference to the proof in respect to these items. On cross-examination he testified:

"Q. Can you tell from the ledger sheets of any advances made? A. I might be able to do that. I wouldn't know where the advances went to.

"Q. Your ledger sheets are recapitulation, that wouldn't show it? A. No."

While the evidence is not entirely satisfactory and convincing that the respondent McLain has fully paid and satisfied all legitimate and legal charges against him, it cannot be said that there is no evidence to support the finding of the court on that subject. In view of this determination, it will not become necessary to decide the other defenses raised by the answer.

Judgment affirmed.

BARNARD, P. J., concurred.

53 Cal.App.2d Supp. 856

PEOPLE v. NEST.

Cr. 1891.

Appellate Department, Superior Court, Los Angeles County, California.

July 31, 1942.

1. Statutes ⚿206

A statute should be construed if reasonably possible so as to give force and effect to every expression used.

2. Statutes ⚿181(2), 188

Words in a statute should be given their ordinary meaning and receive a sensible construction in accord with commonly understood meaning thereof unless a different meaning is clearly intended or indicated. Civ.Code, § 13.

3. Statutes ⚿184

Although intention of legislature must be ascertained from words used to express it, the manifest reason and the obvious design of the law should not be sacrificed to a literal interpretation of such language. Civ. Code, § 13.

4. Master and servant ⚿78

The legislature in enacting the Unemployment Insurance Act did not intend to put a premium on idleness nor to discourage unemployed persons from making early and earnest attempts to reestablish themselves economically to avoid becoming or continuing to be charges on society. Gen.Laws 1937 and Supps.1939, 1941, Act 8780d.

5. Master and servant ⚿78

The word "service", within provision of the Unemployment Insurance Act defining employment, must be given its common meaning, and means the occupation, condition or status of a servant, the performance of labor for benefit of another or at another's command. Gen.Laws 1937, Act 8780d, § 6.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Service".

6. Master and servant ⚿78

Under provisions of the Unemployment Insurance Act that an individual shall be deemed unemployed in any week during which he performs no "services" and with respect to which no wages are payable to him, the word "services" does not include activities of one who is self-employed. Gen. Laws Supp.1939, Act 8780d, § 9.2.

7. Master and servant ⚿84

An accused who on leaving regular employment opened clothing business which he supervised but which was financially unsuccessful from the beginning remained "unemployed" after opening the business within the Unemployment Insurance Act and could not be convicted of withholding "material facts" for purpose of obtaining benefits of the act, because of his failure to disclose his activities in connection with the business. Gen.Laws 1937, Act 8780d, § 6.5; Gen.Laws Supp.1939, Act 8780d, §§ 9.2, 101(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Material Fact" and "Unemployed".

8. Master and servant ⚿84

Evidence was insufficient to establish falsity of statements contained in certificate executed by defendant when he received weekly unemployment insurance check, that he was able to work, available for work and had not refused offer for suitable work, and therefore was insufficient to sustain conviction for making false statement and knowingly failing to disclose material facts for purpose of obtaining benefits under the act. Gen.Laws Supp.1939, Act 8780d, §§ 56(b), 57 (c), 101(a).

◆

Appeal from Municipal Court of City of Los Angeles; James H. Pope, Judge.

George John Nest was convicted of making false statement and representation and knowingly failing to disclose material fact for purpose of obtaining and increasing benefit and payment to him under the Unemployment Insurance Act, and he appeals.

Reversed and remanded for new trial.

Adolph H. Levy, of Washington, D. C., and Maurice Levy, Jr., of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for respondent.

Earl Warren, Atty. Gen. (John J. Dailey, Deputy Atty. Gen., and Maurice P. McCaffrey, of Sacramento, Leonard M. Friedman, of Sacramento, of counsel), amici curiae.

VICKERS, Judge pro tem.

Defendant appeals from the judgment after conviction of violation of section 101 (a) of the Unemployment Insurance Act (Act 8780d, Deering's General Laws Supp. 1939). The complaint follows the language of the statute and charges in substance that defendant did wilfully and unlawfully make a false statement and representation, and knowingly fail to disclose a material fact for the purpose of obtaining and increasing a benefit and payment to him, under the Act in question, in that he certified that he was totally unemployed and partially unemployed and had reported any and all earnings to the Employment Commission for the week ending October 25, 1941.

There was little conflict in the evidence presented. It appears that the defendant left his regular employment in July of 1941, at which time he was receiving a salary of $6,000 per year. He thereafter made many attempts to secure new employment. On October 3, 1941, he opened a clothing business in Inglewood, with his wife and one employee doing the work. The defendant apparently supervised the business and spent from one to five hours each day and most of each evening at the store helping with the trade when necessary. Defendant intended to continue this business permanently but it was financially unsuccessful from the beginning and on December 31, 1941, he closed it, having lost about $1,200 in the venture. Defendant testified that during all of this time he continued his search for work elsewhere, that his presence at the store was not necessary for the running of the business, that he was physically able to work, that he did not refuse an offer of suitable work, and that he truthfully reported all wages that were payable to him for the weeks for which he filed for unemployment insurance benefits. Defendant's testimony was corroborated to a considerable extent and the People introduced no evidence in rebuttal thereof.

The People introduced in evidence an $18 check drawn on the Department of Employment in favor of the defendant, and cashed by him, and the certificate executed by him as a basis for such payment. This certificate in so far as it is of interest to us reads as follows: "I certify that during the week for which I am now filing a continued claim for unemployment insurance (week ending October 25, 1941) I was unemployed, able to work and available for work, and hereby register for work with the California Department of Employment; I did not refuse an offer of suitable work, and I have truthfully reported below all wages that were or are payable to me for the week I am now filing." The defendant reported no wages payable.

The defendant urges that there is no evidence to support any of the implied findings of the court, to wit: That he "wilfully" made a false statement or representation; that any "statement" or "representation" was false; that he failed to disclose a "material fact" for the purpose of obtaining any payment to him. If defendant is correct in such contention, the conviction must be reversed because all of the alleged unlawful acts charged will then be without evidentiary support. The false statements and representations, if any, are contained in the certificate executed by defendant, when he received his weekly check, wherein he declared that he was unemployed, able to work, available for work, had not refused an offer for suitable work and had truthfully reported all wages payable to him for the week in question (none). The implied finding that the defendant failed to disclose a "material fact" depends for support upon the defendant's part-time self-employment at a financial loss being such a "material fact" as would, if disclosed to the California Unemployment Commission, have justified that body in finding that he was not totally or partially unemployed during the period in question.

[1-3] The answers to the legal questions raised by this appeal are found in the interpretation of those sections of the Unemployment Insurance Act (Deering's General Laws 1937 and Supps.1939, 1941, Act 8780d) that apply thereto. In interpreting these sections we are guided by the rules laid down by our Supreme Court in the recent case of County of Los Angeles v. Frisbie, Feb. 1942, 19 Cal.2d 634, 122 P.2d 526. This was a case involving the interpretation of certain sections of the Welfare and Institutions Code and is somewhat comparable to our case since it likewise interpreted remedial statutes. The learned Mr. Justice Curtis, speaking for the court, said (page 641 of 19 Cal.2d, page 530 of 122 P.2d): "A statute should always be so construed, if reasonably possible, as to give

force and effect to every expression used by the legislature. (Citing Brainard v. Brainard, 17 Cal.App.2d 520, 62 P.2d 403.) Excepting when clearly otherwise intended or indicated, words in a statute should be given their ordinary meaning and receive a sensible construction in accord with the commonly understood meaning thereof. (Citing Universal Pictures Corp. v. Superior Court, 9 Cal.App.2d 490, 50 P.2d 500.) Section 13 of the Civil Code provides: 'Words and phrases are construed according to the context and the approved usage of the language; * * *.'" Again, at page 639 of 19 Cal.2d, at page 529 of 122 P.2d, the Supreme Court said: "While the intention of the legislature must be ascertained from the words used to express it, the manifest reason and the obvious design of the law should not be sacrificed to a literal interpretation of such language. (Citing In re Haines, 195 Cal. 605, 612, 234 P. 883.) Hence, in construing a remedial statute, like a law concerning the rendition of charitable aid to indigents and recovery therefor, reason must have its just proportion, * * *."

[4] In applying the above rules to the sections of the Unemployment Insurance Act involved herein we are of the opinion that the while it was the intention of the legislature to protect the fund created under the act from chiselers, it was not its intention to put a premium on idleness, nor to discourage citizens out of employment from making early and earnest attempts to reestablish themselves economically to avoid becoming or continuing to be charges on society.

[5] The only sections of the Unemployment Insurance Act which have been referred to by counsel and whose interpretation we believe affects the questions raised by this appeal are sections 6.5, 9.2, 56(b) and 57(c). Section 6.5 reads: "'Employment,' subject to the other provisions of this act, means service * * * performed for wages or under any contract of hire * * *." The word "service", not being defined in the act, must be given its common meaning, unless the context requires otherwise, which it does not. Merriam-Webster's New International Dictionary defines "service" as, "The occupation, condition, or status of a servant.—Performance of labor for the benefit of another, or at another's command;—hired helper;—duty done or required." Certainly these definitions do not embrace the activities of the defendant in assisting part time in the running of his own clothing establishment. In addition, the defendant's services were not performed for "wages" nor did he receive any compensation therefor. Likewise he was not under "any contract of hire," express or implied.

[6] Section 9.2 of the Act reads as follows: "An individual shall be deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount." This section does not aid the prosecution because in our opinion the word "services" is used in the same sense as in section 6.5 and does not include defendant's activities as so self-employed. Further, the evidence discloses that no "wages" or compensation were "payable to him."

[7] We are therefore of the opinion that during the period in question the defendant was in a class "deemed unemployed" by the Unemployment Insurance Act, and that his self-employment activities did not remove him from such class. Therefore such activities did not constitute a "material fact" the nondisclosure of which constituted a violation of section 101 (a) of the Act, under which the defendant was convicted.

The false statements and representations, other than "unemployment", relied on by the respondent are, as stated above, refusal to accept an offer of suitable work, being able to work and being available for work. The necessity for these statements and representations being truthfully made are set out in sections 56(b) and 57(c) of the Act.

[8] Section 56(b) of the Act reads: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions: * * *

"(b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office." The People made no effort to prove such "refusal" or "failure" and the defendant's testimony was to the contrary.

Section 57(c) reads: "An unemployed individual shall be eligible to receive benefits with respect to any week only if the commission finds that: * * *

"(c) He is able to work and available for work."

Again the People made no effort to prove that defendant was not "able to work" (or that the Commission so found), and the defendant's testimony was to the contrary. However, the Attorney General as amicus curiae strongly urges that the evidence establishes that defendant was not "available for work." With this we cannot agree. The only evidence in the record on the subject other than the defendant's part-time activities was his own testimony, which was somewhat corroborated, to the effect that during all that time (while self-employed) he continued his search for work elsewhere, that his presence at the store was not necessary, that he was physically able to work, that he registered for work with the California Department of Employment, and that he did not refuse an offer of suitable work. In the face of such testimony we find there was no substantial evidence to support the trial court's implied finding that the defendant was not "available for work" during the period in question.

It thus appears that there was no evidential or legal support for any of the implied findings of the court. The judgment is therefore unsupported by any findings and must be and is hereby reversed. The cause is remanded to the Municipal Court for a new trial.

BISHOP, Acting P. J., and FOX, J., concur.

20 Cal.App.2d 746

PEOPLE v. VANDERPOOL et al.

Cr. 4376.

Supreme Court of California.

Aug. 21, 1942.

1. Conspiracy ⚷51

The first penal paragraph of conspiracy section of Penal Code providing for punishment of conspiracy "to commit any felony or to commit any act injurious to public health or public morals, etc., * * * to the same extent as in this code provided for the punishment of the said felony or act, respectively", by virtue of inclusion of the phrase "in this code", is referable only to conspiracies to commit felonies and acts, punishment for the commission of which is prescribed by some provision of the Penal Code. Pen.Code, § 182, subds. 1, 5.

See Words and Phrases, Permanent Edition, for all other definitions of "In This Code".

2. Criminal law ⚷93

Superior court is without jurisdiction over the subject matter of an indictment charging a conspiracy to commit an offense injurious to public morals punishable under the Penal Code, since such conspiracy is a misdemeanor subject to provisions of first penal paragraph of conspiracy statute. Pen. Code, § 182, subds. 1, 5.

3. Criminal law ⚷93

A conspiracy to commit an offense which is not a crime against public morals or, if it is such, is not made punishable under some provision of the Penal Code, is punishable under the second penal paragraph of section of Penal Code relating to conspiracy, and hence is either a felony or a misdemeanor within the jurisdiction of the superior court. Pen.Code, § 182, subds. 1, 5.

4. Pawnbrokers and money lenders ⚷1

The purpose of legislation regulating the operations of persons procuring or making small loans is to protect the public from lenders who would otherwise take advantage of the needy. Gen.Laws 1939 Supp., Act 7700.

5. Criminal law ⚷1208(1)

Penal Code provision for the punishment of misdemeanors generally, except in cases where a different "punishment" is prescribed, uses the quoted word as meaning punishment, such as a fine or imprisonment imposed upon the offender by the state, and does not include a civil penalty redounding to the benefit of an individual, such as a forfeiture of interest. Pen.Code, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Punishment".

6. Criminal law ⚷93

A conspiracy to violate the Small Loan Act prohibiting the lending of money at excessive rates of interest or conducting a loan business without a license was a conspiracy to commit "acts injurious to public morals", the punishment for which is prescribed by the Penal Code within the meaning of the first penal paragraph of the conspiracy statute, and hence superior court had no jurisdiction of prosecution for such conspiracy. Penal Code, § 19; § 182, subds. 1, 5; Gen.Laws 1939 Supp., Act 7700, § 20.

See Words and Phrases, Permanent Edition, for all other definitions of "Acts Injurious to Public Morals".

In Bank.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge Assigned.

H. F. Vanderpool and others were convicted of a conspiracy to violate provisions of California Small Loan Act, Gen. Laws 1939 Supp., Act 7700, and, from judgment of conviction and order denying a new trial, they appeal.

Judgment reversed with direction.

For prior opinion, see 114 P.2d 608.

John B. Ehlen, of San Francisco, and Melvin V. Wood, of Oakland, for appellants.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

EDMONDS, Justice.

The appellants, who were convicted of a conspiracy to violate the provisions of the Small Loan Act, Stats.1939, ch. 1045, Deering's Gen.Laws, 1939 Supp., Act 7700, attack the judgment upon the principal ground that the superior court had no jurisdiction to try them for that offense. They also urge that the evidence is insufficient to support the judgment. Their appeal is taken from an order denying them a new trial as well as from the judgment.

In the first count of the indictment returned by the Grand Jury, it was alleged that they conspired to charge a greater rate of interest than the Small Loan Act, supra, allows, and to require borrowers to purchase merchandise in connection with loans made to them. Eleven overt acts were specified in this count. By the second count, the indictment asserted that they had engaged in the business of making loans in an amount less than $300 without obtaining a permit from the Commissioner of Corporations so to do.

A demurrer to each count of the indictment upon the ground, among others, that it charged them with misdemeanors over which the superior court had no jurisdiction was overruled. After a trial, each of the appellants was found guilty and a motion for a new trial was denied. The appellant Vanderpool was thereupon sentenced to serve one year in the county jail upon each of the counts, the sentences to run concurrently; the appellants Clancy and Allen were each fined $500 upon each count of the indictment and, in default of payment, were ordered to be confined in the county jail at the rate of one day for each $10 of the fine.

Section 182 of the Penal Code provides in part as follows: "If two or more persons conspire: 1. To commit any crime; * * * 5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws. They are punishable as follows: When they conspire to commit any felony, or to commit any act injurious to the public health, or to public morals, or tending to pervert or obstruct justice, or the due administration of the laws, they shall be punishable in the same manner and to the same extent as in this code provided for the punishment of the commission of the said felony or act, respectively.

"When they conspire to do any of the other acts described in this section they shall be punishable by imprisonment in the county jail or state penitentiary not exceeding two years, or by a fine not exceeding five thousand dollars, or both, and cases of such conspiracy may be prosecuted and tried in the superior court of any county in which any overt act tending to effect such conspiracy shall be done." The superior court held that the acts alleged in each count of the indictment constitute a conspiracy defined by subdivision one and punishable under the second penal paragraph of this section.

The appellants argue that the conspiracy charged against them is one defined by subdivision five of the statute, and that as the Small Loan Act, supra, makes a violation of its provisions a misdemeanor, the superior court had no jurisdiction to render judgment against them. They also assert that the offenses for which they were indicted are acts injurious to public morals; that they tend to pervert or obstruct justice and the administration of the laws, and therefore they are punishable only as misdemeanors in accordance with the first penal paragraph of section 182. The attorney general takes the position that violations of the Small Loan Act, supra, are neither offenses against public morals nor acts tending to obstruct justice and the due administration of the laws within the meaning of subdivision five. But assuming that they are such offenses, he says, the first penal paragraph of section 182 applies only to an act made punishable by some provision of the Penal Code. The offenses of which the appellants were convicted, according to the attorney general, are made crimes, not by any provision of the Penal Code, but by the Small Loan Act, supra, a general statute. Under this reasoning, a conspiracy to violate the Small Loan Act, supra, falls within subdivision one of section 182 of the Penal Code and is punishable under the second penal paragraph, which confers upon the superior court jurisdiction to try the offense.

[1-3] The various provisions of the conspiracy statute were considered in Doble v. Superior Court, 197 Cal. 556, 241 P. 852, and this court held that, by virtue of the designation and inclusion of the phrase "in this code," the first penal paragraph is referable to conspiracies to commit felonies and acts injurious to public morals only when the punishment for the commission of such felonies or acts is prescribed by some provision of the Penal Code. Under all other circumstances, said the court, the second penal paragraph controls. The question, then, is whether either the act of loaning money at excessive rates of interest or conducting a loan business without a license, each of which is made a misdemeanor by the Small Loan Act, supra, is an offense injurious to public morals punishable under the Penal Code. If it is such an offense, a conspiracy to commit it is a misdemeanor under the first penal par-

agraph of section 182, and the superior court was without jurisdiction over the subject matter of the indictment returned against the appellants. On the other hand, if the offense is not a crime against public morals, or being such, if it is not made punishable under some provision of the Penal Code, then a conspiracy to commit it is punishable under the second penal paragraph of section 182 as either a felony or a misdemeanor and is one within the jurisdiction of the superior court.

[4] The purpose of legislation regulating the operations of persons procuring or making small loans is to protect the public from lenders who would otherwise take advantage of the needy. It is a matter of public knowledge that the activities of unconscionable lenders operating in this field have created a social problem with serious consequences. See In re Fuller, 15 Cal.2d 425, 102 P.2d 321. The Small Loan Act, supra, of California is substantially the same as legislation which has been enacted in more than thirty states. It denounces, as criminal, the act of lending money at more than a prescribed rate of interest, and also, of conducting the business of making small loans without a license so to do. Considering the field of such legislation and the evils against which it is aimed, the offenses defined by it as misdemeanors may properly be said to be injurious to public morals.

Similar crimes have been so defined and classified by the Legislature of this state. The Penal Code specifies a number of offenses which are classified under Title IX of Part I, as: "Crimes Against the Person and Against Public Decency and Good Morals." Included within that title is section 338, which provides that: "Every person who carries on the business of a pawnbroker, by receiving goods in pledge for loans at any rate of interest above the rate of ten per cent per annum, except by authority of a license, is guilty of a misdemeanor." In People v. Van, 30 Cal.App.2d 663, 87 P.2d 57, it was held that a conspiracy to operate a lottery constituted a misdemeanor punishable under the first penal paragraph of section 182 of the Penal Code. The court reasoned that the substantive offense of conducting a lottery is made a misdemeanor by section 320 of the Penal Code, which the Legislature classified as one of the "Crimes Against the Person and Against Public Decency and Good Morals." There can be no doubt that, under the doctrine of the Van case, a conspiracy to violate section 338 of the Penal Code is a misdemeanor punishable under the first penal paragraph of section 182. A conspiracy to violate the Small Loan Act, supra, should be similarly classified insofar as its punishment is concerned.

But to sustain the contention of the appellants, the court must hold not only that the offenses with which they are charged are acts injurious to public morals, but also that the punishment for them is prescribed by the Penal Code.

Section 20 of the Small Loan Act, supra, reads: "Any person * * * who shall violate or participate in the violation of any of the provisions of this act, or any of the rules, orders and regulations of the commissioner, shall be guilty of a misdemeanor. Any contract of loan in the making or collection of which any violation of this act shall have been committed, shall be void as to interest and charges, and neither the lender nor the broker shall have any right to collect or receive any interest or charges whatsoever." The statute does not specify the punishment to be imposed upon one who has been convicted of a misdemeanor because of the violation of its requirements. However, section 19 of the Penal Code provides: "Except in cases where a different punishment is prescribed by any law of this state, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both."

[5, 6] The attorney general contends that the latter section has no application because section 20 of the Small Loan Act, supra, fixes a "different punishment" for its violation by prescribing a forfeiture of the right of a lender to any interest or charges payable in connection with the prohibited transaction. But if section 19 of the Penal Code is not applicable, the Small Loan Act, supra, has created a crime which is defined as a misdemeanor but with no penalty for its commission. Such a result is contrary to the fundamental rules of statutory construction. Furthermore, the term "different punishment," as used in the Penal Code section, was clearly intended to mean punishment, such as a fine or imprisonment, imposed upon the offender by the state. A forfeiture of interest is a civil penalty redounding to the benefit of the borrower and not to the

state. For these reasons, any act defined as a misdemeanor by the Small Loan Act, supra, is punishable by the Penal Code within the meaning of the first penal paragraph of the conspiracy statute.

The judgment is reversed with directions to the superior court to dismiss the indictment.

GIBSON, C. J., and CURTIS, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 735

GAFFNEY v. STATE BAR OF CALIFORNIA.

Sac. 5509.

Supreme Court of California.

Aug. 20, 1942.

Rehearing Denied Sept. 14, 1942.

1. Attorney and client 🔑52

In disbarment proceeding, amendment of order to show cause to conform to proof was proper.

2. Attorney and client 🔑53(2)

Evidence sustained findings that attorney, who allegedly converted client's money and failed to prosecute an action instituted for client, was guilty of acts involving moral turpitude and dishonesty within meaning of the State Bar Act and the commission of a misdemeanor within meaning of the State Bar Act, warranting disbarment. St.1939, pp. 357, 359, §§ 6106, 6128(b).

3. Attorney and client 🔑53(1)

In proceeding by attorney to review a recommendation of the Board of Governors of the State Bar that attorney be disbarred from the practice of law, burden was on attorney to show that facts and conclusions based thereon were erroneous or unlawful.

In Bank.

Proceeding by James F. Gaffney, petitioner, against the State Bar of California, respondent, to review a recommendation of the Board of Governors of the State Bar of California that the petitioner be disbarred from the practice of law.

Petitioner disbarred.

Archibald M. Mull, Jr., Peter Mannino, Johnson & Curtright, P. H. Johnson, and C. K. Curtright, all of Sacramento, for petitioner.

W. Eugene Craven, of Merced, and William A. Sitton, of Sacramento, for respondent.

PER CURIAM.

This is a proceeding to review a recommendation of the Board of Governors of the State Bar that petitioner be disbarred from the practice of law.

By a notice to show cause issued in June, 1940, and later amended to conform to proof, petitioner was charged with the commission of acts involving moral turpitude and with the violation of his oath and duty as an attorney. Hearings were had before a local administrative committee of the State Bar at which the complaining client, his wife and others testified. Petitioner, who was represented by counsel, testified in his defense and called several character witnesses, all of whom testified to his prior good reputation for truth, honesty and integrity. The committee found that the petitioner had made false and fraudulent representations for the purpose of deceiving J. I. Lowthian, his client; that by reason of such false representations he had received and improperly converted to his own use $1,050 of the client's money; and that for the purpose of concealing his misconduct he had failed to prosecute an action instituted on behalf of Lowthian. The committee concluded therefrom that petitioner was guilty of acts involving moral turpitude and dishonesty within the meaning of section 6106, State Bar Act, St.1939, p. 357, and of the commission of a misdemeanor within the meaning of section 6128, subdivision b, of said act. Two members of the committee recommended that petitioner be disbarred while the third member recommended suspension for three years. The Board of Governors adopted the committee's findings and has recommended that petitioner be disbarred, two members dissenting.

Lowthian, as the complaining witness, testified that on May 2, 1935, he called at petitioner's office to ascertain whether he had a cause of action for slander based on certain statements made to and about him by a Mrs. Williams, proprietress of a hospital where his stepdaughter was confined as a maternity case. Petitioner, after hearing the circumstances, informed Lowthian that he had a good case and agreed to take it on a 40 per cent contingent fee basis, nothing being said about costs. On the following day petitioner suggested that a detective be employed at $50 a day for the purpose of obtaining additional evidence. A check for $50, covering one day's detective work, was given to petitioner. On May 6, 1935, Lowthian called at petitioner's office to get a progress report and was told by petitioner that it would be well to hire the detective for a few additional days, whereupon petitioner was given a check for $100 to cover additional detective service. Approximately two weeks later, petitioner came to Lowthian's home and stated that the first check was a little blurred and that in attempting to "make it better" he had "made it worse" and had therefore brought it back for Lowthian to make out another. Petitioner then stated that it would be necessary to put up a $500 bond and that a cash bond would result in quicker action. Lowthian accordingly gave petitioner a check for $550—$500 to be used as a cash bond and $50 to replace the first "blurred" check for the detective's service. A few days later, petitioner represented to Lowthian that the woman detective he had hired was working on the case. Early in June, 1935, petitioner represented that a few additional days of detective work were essential, whereupon Lowthian gave him a check for $150 to cover the same. Two days later, a similar representation and request by petitioner brought forth another check for $150 from Lowthian. Thus, between May 3 and June 7, 1935, petitioner, according to Lowthian's testimony, had collected from him $450 for detective services and $500 for a cash bond.

During the last six months of the year 1935, Lowthian called at petitioner's office every few days to express his anxiety for a court hearing of his case. Some time in September petitioner told Lowthian that the judge was on vacation and that he did not want the case to come up until that particular judge returned. Later in the same month, petitioner, in response to Lowthian's inquiry, represented that it was difficult to get the case on the calendar and that it would not be heard until the end of October.

Early in December, 1935, petitioner advised Lowthian that it also would be well to sue the hospital and that a bond of $150 was essential. Upon Lowthian's reply that he was short of money, petitioner offered to advance $50 thereof, whereupon Lowthian gave him a check for $100 to be used as a cash bond in the proposed hospital case. Thereafter many conversations were had between attorney and client as to the condition of the case, petitioner repeatedly advancing varying excuses for delaying the action.

When Lowthian first employed petitioner early in May, 1935, the slander action was to be based on a statement made by Mrs. Williams to Lowthian, within the hearing of others, in which she called him a "scoundrel" who had never paid his bills. Petitioner prepared a complaint based thereon, but in June, before it was filed and after petitioner already had received $950 from Lowthian for the purposes above mentioned, petitioner was informed that a second statement had been made by Mrs. Williams of and concerning Lowthian in which she had indicated that he was the father of his stepdaughter's child. Petitioner testified that he then believed that the relationship was that of father and daughter rather than stepfather and stepdaughter. Upon learning of the second statement by Mrs. Williams, petitioner destroyed the complaint originally drafted and prepared a second one, in two counts, based upon the two statements. The complaint so prepared by petitioner in June, 1935, was not filed by him, however, until April 30, 1936, just prior to the running of the statute of limitations. The summons was not served until August 18, 1938, and then only after Lowthian had called upon the district attorney and the latter had telephoned to petitioner and informed him of such fact. Lowthian went from the district attorney's office to petitioner's office and stated that he desired to talk with the woman detective. Petitioner then referred to the detective as a man, and said that he had died.

A demurrer to the slander complaint was filed in August, 1938. No hearing was had thereon, petitioner conceding a weakness in the complaint and agreeing to prepare an amended complaint. Petitioner prepared such amended complaint, but it was never signed, served or filed, and the action is still pending.

The foregoing narrative is taken principally from the testimony of Lowthian, the client. He was corroborated in all essential particulars by the testimony of his wife who was present at several of the meetings with petitioner. In opposition to their showing, petitioner testified that the $500 delivered to him on May 20, 1935, was not to be deposited as a cash bond but was to be held by him as security for the bond required to be filed in the action, and that all other moneys ($550) delivered to him were in payment of fees and costs. He stated that he had taken the case on a 40 per cent contingent fee contract but was to receive $500 as a "retainer," which sum was to be later deducted from his percentage in the event his share upon recovery exceeded that amount. Lowthian, he stated, also was to advance all costs. It would appear unusual that the terms of such a contract were not reduced to writing. Petitioner denied that he had discussed with Lowthian the hiring of a detective, and admitted that none was ever employed. He further denied suggesting the filing of an action against the hospital. In an effort to explain his delay in filing the complaint for a period of approximately ten months, petitioner testified that his client entertained some doubt as to the defendant's financial condition and her ability to respond in damages. Such explanation hardly comports with the admitted money advancement made by Lowthian prior to filing of the complaint. A litigant in the financial position of Lowthian and entertaining serious doubt as to his adversary's financial status would hardly be inclined to make a preliminary advancement or expenditure of $1,050, as was here done, and then request delaying prosecution. Also without compelling force is petitioner's explanation that he withheld service of summons in the slander action until August, 1938, more than two years after filing of the complaint, because he believed from Lowthian's conduct that the latter did not desire to have the action prosecuted until the statute of limitations had run against any criminal charge that possibly might be filed against him (Lowthian) growing out of his stepdaughter's condition. It is difficult to believe that service of summons was delayed for approximately two years in order to prevent any criminal charge being filed against Lowthian when the matter which underlay the slander suit, and which would have constituted the basis for any such criminal charge, had been fully publicized in the newspapers upon the filing of the complaint for slander more than two years earlier. It is questionable, too, that Lowthian fearing a criminal prosecution, as stated by petitioner, would have invited the same by filing a civil complaint which might have had the effect of exposing any criminal responsibility on his part. Moreover, accepting petitioner's explanation, it is difficult to justify his conduct in preparing and filing a slander complaint on behalf of Lowthian based on statements which, if true, as petitioner now indicates he suspected might have been so, would constitute a complete defense to such slander action. Petitioner admits that at no time did he discuss with his client that he entertained a suspicion of the client's criminal responsibility.

As to the $500 delivered to him for the bond in the latter part of May, 1935, petitioner testified that he placed the money, as security for such bond, in an envelope which he kept in his safe from May, 1935, until a few days after March 27, 1940, the date of the preliminary hearing in this disciplinary proceeding, at which time, he stated, he deposited it in a trust account with a bank in order to be in a position to draw a check thereon if required. In rebuttal, it was shown by the bank records that a deposit was made by petitioner on May 31, 1940, of $518, made up of $20 in cash and a check drawn on another bank in the sum of $498.

[1-3] Other discrepancies and weaknesses appear throughout petitioner's testimony. His excuses and explanations for his misconduct are not convincing. Contrary to his contention, petitioner was not deprived of any right in making his defense. Every opportunity was extended to him to present any defense he might have to the charges. He was present in person and was represented by counsel. The amendment of the order to show cause to conform to proof was proper. Woodard v. State Bar, 16 Cal.2d 755, 757, 108 P.2d 407. Examination of the record satisfies us that the preponderance of substantial evidence supports the findings as made by the local committee and adopted by the Board of Governors. Petitioner has not met the burden of showing that the findings and the conclusions based thereon are erroneous or unlawful. Ring v. State Bar, 218 Cal. 747, 751, 24 P.2d 821; Aydelotte v. State

Bar, 209 Cal. 737, 740, 290 P. 41; Propp v. State Bar, 20 Cal.2d 387, 125 P.2d 825.

It is ordered that petitioner be disbarred from the practice of law, effective thirty days after the filing of this order.

WEST KEY NUMBER SYSTEM

20 Cal.App.2d 741

COBER et al. v. CONNOLLY et al.

Sac. 5415.

Supreme Court of California.

Aug. 21, 1942.

Rehearing Denied Sept. 14, 1942.

1. Bills and notes 🔑120

Where note secured by trust deed contained only the unqualified general promise of makers to pay, to three designated payees or orders, a stated amount, the note created a joint right in favor of the three payees. Civ.Code, § 1431.

2. Payment 🔑8(1)

The statute providing for extinguishment of an obligation by performance in a particular manner directed by a creditor or any one of two or more joint creditors, even though benefit of such performance is not received by creditor, is directed to the manner of transmission and not to payment of something other than originally bargained for by the parties to the agreement. Civ. Code § 1476.

3. Payment 🔑5
Trusts 🔑33

If one of two or more joint creditors accepts payment of the obligation, he holds the proceeds as a "trustee" or "agent" for them and is directly accountable to them as such; but, so far as the debtor is concerned, the co-obligee is more than an agent and is the owner of the obligation.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Trustee".

4. Accord and satisfaction 🔑3(3)
Payment 🔑5
Release 🔑4

Since each of several joint obligees is interested in the entire claim, he has the power to discharge the entire claim, either by release or by accord and satisfaction, and so payment or other performance of the whole obligation to one obligee discharges it.

5. Release 🔑4

A discharge of the promisor by an obligee in fraud of a co-obligee is inoperative to discharge the promisor's duty to the extent of the co-obligee's interest in the performance, if the promisor gives no value, or knows, or has reason to know, of the fraud.

6. Mortgages 🔑298(2)

Under statute providing that an obligation in favor of several persons is extinguished by performance rendered to any of them, where co-payee of note secured by trust deed ordered supplies and services from a maker with understanding that they should be credited on note, maker's performance discharged co-payee's individual right against maker, and where other co-payees did not claim that maker had not given value, or that maker had had knowledge of their co-payee's failure to account, such performance discharged debt as to all obligees, it being immaterial that much of the supplies went to others than co-payee, that co-payee made gifts thereof, or that note had not been surrendered. Civ.Code, § 1475.

◆

In Bank.

Appeal from Superior Court, Mendocino County; Donald Geary, Judge Assigned.

Action by Benjamin A. Cober and others against P. Connolly and others to quiet title to realty which has been conveyed in trust by plaintiff as security for a promissory note, and to compel a reconveyance thereof by the trustee. From a judgment for plaintiffs, defendants appeal.

Affirmed.

For prior opinion, see 121 P.2d 55.

Preston & Gibson, of Ukiah, for appellants.

Hale McCowen, of Ukiah, for respondents.

EDMONDS, Justice.

In an action to quiet title and to require a reconveyance of real property, judgment was rendered for the respondents when they proved that they had rendered services and delivered merchandise to one of the payees of a promissory note under an agreement that the value of the services and merchandise should be credited upon the note. The appellants, one of whom is also a payee of the note and the other the trustee named in the deed of trust securing it, contend that the makers of a promissory note providing for payment in cash may not extinguish the obligation by the performance of such an agreement with one of several joint payees.

The respondents Cober, husband and wife, executed their promissory note in the sum of $850, in favor of Keith C. Eversole, W. D. L. Held, and the appellant Connolly. As security for its payment, they conveyed certain real property to the appellant Mendocino County Title Company, as trustee. The payees of the note were named as the beneficiaries of the deed of trust. Later, Eversole agreed to accept from the respondents job printing, the publication of legal notices, hotel cards, and newspaper subscriptions, as ordered by him, in payment of the obligation.

During the next five years Cober furnished to Eversole, upon his order, printing and advertising to the value of $1,255. About $290 of that amount represented goods delivered to Eversole; the remainder of the charges was for printing delivered to other persons. Cober also paid $25 or $30 in cash. The respondents did not tell Connolly of this arrangement and he had no notice of it. Eversole did not account to Connolly and is now insolvent.

The respondents subsequently demanded a reconveyance of the property from the appellant corporation. Upon the latter's refusal to comply with their demand, they commenced the present action, alleging that the promissory note had been paid in full. By their answer, the appellants denied payment of the note by the respondents and prayed for judgment against the Cobers for the full amount of the principal sum with accrued interest. The trial court found that the respondents had paid the note in full, and gave judgment as demanded by them.

According to the appellants, although section 1475 of the Civil Code provides that payment to one of two or more payees extinguishes the obligation, the basis for the statutory rule is founded upon principles of agency. Since one co-payee acts as an agent for the other payees, payment to him is payment to all. But, argue the appellants, where the obligation calls for payment in cash, an agent may not accept payment in goods or services without the consent of his principal. Similarly, they assert, one co-payee may not extinguish an obligation as to his co-payees by accepting, without their consent, a performance in a manner not bargained for by them. The appellants further contend that even if performance can be made by delivering goods and furnishing services to one of the co-payees, the respondents should not be credited with merchandise supplied to one not a party to the note. They also rely upon the rule that where one of two innocent parties must suffer by the act of a third person, which caused a loss, the one who enabled the latter to perform that act must bear the loss.

In reply, the respondents assert that the question presented by the appeal does not depend upon section 1475 of the Civil Code, but rather upon section 1476 of that code, which provides: "If a creditor, or any one of two or more joint creditors, at any time directs the debtor to perform his obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of such performance." Measuring the judgment by the standards found in that section, they say, Eversole, one of three joint creditors, directed Cober to perform in a particular way and Cober did so. And even though Eversole did not directly receive all of such performance, under the terms of the section, the obligation is extinguished. The respondents agree that a joint creditor in accepting performance is acting in the capacity of an agent, but they contend that since the other joint creditors selected Eversole as a business associate and invested him with the authority of an agent, thereby enabling him to act in a manner which has resulted in a loss, the appellants cannot recover from them.

Objecting to the respondents' construction of section 1476, the appellants maintain that this section does not permit a debtor to pay something other than the exact consideration called for in the obligation, but allows the obligation to be extinguished only after the debtor has followed the directions of the creditor as to how the consideration called for in the obligation shall be transmitted to the creditor. Section 1476, they say, codifies the common law rule that the risk of employing a manner of transmitting payment is on the debtor, unless one of the creditors directs a particular method to be used, in which case the risk of transmission shifts to the creditor. Thus, if a creditor directs the money to be sent in the ordinary course of the mail, and the debtor mails the money but the payment is lost in transit, the obligation is satisfied "even though the creditor does not receive the benefit of such performance."

[1] A right created in favor of several persons is presumed to be joint, and not several, and this presumption can be overcome only by express words to the contrary. Civ.Code, § 1431; Brady v. Reynolds, 13 Cal. 31. The note in the present action contains only the unqualified general promise of the respondents "to pay to Keith C. Eversole, W. D. L. Held and P. Connolly, or order" a stated amount. A note in this form creates a joint right in favor of the three payees. Lasky v. Lissik, 140 Misc. 826, 251 N.Y.S. 753.

[2] Section 1476 was enacted in 1872, but has never been construed by an appellate court of this state. The wording of the section is identical with that of section 702 of the Field Draft of the Civil Code of New York enacted in 1865. The Code Commissioners of New York, in their ninth and final report, said of the provision: "Thus, if the creditor directs money to be sent to him by mail, it is at his risk Graves v. American Exch. Bank, 17 N.Y. [205] 207; Eyles v. Ellis, 4 Bing. 112." In a preliminary draft of the same code prepared by the code commissioners in 1862 and submitted for examination prior to revision, the section read: "Payment is complete, and the debt extinguished, upon the debtor's making payment in the manner directed by the creditor, even though the thing paid should never reach the creditor." The code commissioners based the wording of this section on the two cases cited in the annotation to the final draft of 1865. From this legislative history, it is apparent that the statute was directed to the manner of transmission and not to the payment of something other than originally bargained for by the parties to the agreement.

[3-5] Section 1475 is, however, determinative of this appeal. "An obligation in favor of several persons is extinguished by performance rendered to any of them * * *." Applied in Bailes v. Keck, 200 Cal. 697, 254 P. 573, 51 A.L.R. 930; Hoover v. Wolfe, 167 Cal. 337, 139 P. 794; Delano v. Jacoby, 96 Cal. 275, 31 P. 290, 31 Am. St.Rep. 201; Wright v. Mix, 76 Cal. 465, 18 P. 645; Barnes v. Osgood, 103 Cal.App. 730, 284 P. 975. None of the California cases construing this section was decided upon facts such as those before the court in the present action, and it is true, as contended by the appellants, that when one of two or more joint creditors accepts payment of the obligation, he holds the proceeds as a trustee or agent for them and is directly accountable to them as such. But so far as the debtor is concerned, the co-obligee is more than a mere agent; he is the owner of the obligation. "Since each of several joint obligees is interested in the entire claim, he has the power to discharge the entire claim either by release or by accord and satisfaction, and so a payment or other performance of the whole obligation to one obligee discharges it; and a tender to one is legally a tender to all." 2 Williston on Contracts, Rev. Ed. 1938, § 343, p. 1014 (and see cases there cited in footnotes 2, 3 and 4). Section 130 of the Restatement of the Law of Contracts provides: "Except as the rules of this Section are qualified by section 131 * * * a discharge by a joint obligee of his individual right operates as a discharge of the joint right of all." Section 131 reads: "* * * A discharge of the promisor by an obligee in fraud of a co-obligee is inoperative to discharge the promisor's duty to the extent of the co-obligee's interest in the performance, if the promisor gives no value or knows, or has reason to know of the fraud."

[6] The appellants do not claim that the Cobers did not give value, or that they had any knowledge concerning Eversole's failure to account to the other payees of the note. The fact that much of the printed matter went to others than Eversole, or that Eversole made gifts of many subscriptions of Cober's newspaper, is immaterial, as all such services and supplies were ordered by Eversole with the understanding that they should be credited by him on the note. The performance of the services and the furnishing of the supplies effectually discharged Eversole's individual right against the respondents, and, under the general rule, also discharged the debt as to all of the obligees. The fact that the note was not surrendered to the maker is immaterial. Wheeler v. Bull, 131 Cal. 421, 425, 63 P. 732.

The judgment is affirmed.

GIBSON, C. J., SHENK, CURTIS, and CARTER, JJ., and WARD, Justice pro tem., concurred.

20 Cal.2d 713

WENNERHOLM et al. v. STANFORD UNIVERSITY SCHOOL OF MEDICINE et al.

S. F. 16648.

Supreme Court of California.
Aug. 19, 1942.
Rehearing Denied Sept. 14, 1942.

1. Druggists 🔑10

Complaint, alleging blindness induced by taking of the drug dinitrophenol in reliance on published representations which defendants, engaged in the manufacture, distribution, and sale of the drug, knew or should have known were false, stated a cause of action for "fraud".

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

2. Druggists 🔑10

A complaint, seeking recovery for blindness induced by taking of the drug dinitrophenol in reliance on defendants' false representations, was not inadequate to state a cause of action for fraud because of failure specifically to allege that representations were made with intent to deceive plaintiff, where it could be inferred from the facts alleged that such representations were made with the intent to induce the public to purchase the drug.

3. Fraud 🔑50

One who intends to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in the class who is actually misled.

4. Pleading 🔑252(1)

If any verified pleading contains an allegation that renders a complaint vulnerable, the defect cannot be cured simply by omitting such allegation, without any explanation, in a later pleading.

5. Druggists 🔑10

In actions for blindness induced by taking of the drug dinitrophenol, allegation in fifth amended complaint that drug was taken in reliance on false representations of defendants engaged in the manufacture, sale, and distribution of the drug, was a sufficient showing of "reliance" on defendants' allegedly false representations, notwithstanding allegation in prior pleading that the drug was prescribed by plaintiff's physician.

See Words and Phrases, Permanent Edition, for all other definitions of "Reliance".

6. Fraud 🔑20

In actions for fraud, where a defendant's representations were a substantial factor inducing plaintiff to act, even though he also relied in part on the advice of others, "reliance" is sufficiently shown, since it is not required that the defendant's representations be the sole cause of the damage.

7. Druggists 🔑10

One who manufactures and sells a drug dangerous to health, knowing it to be dangerous, should be held liable for damage resulting from the taking thereof where both physician prescribing such drug and patient relied upon the representations made concerning the drug.

8. Limitation of actions 🔑127(2)

Unless amended complaint sets forth an entirely different cause of action from the original complaint, the amended complaint for the purposes of the statute of limitations must be deemed filed as of the date of the original complaint.

9. Limitation of actions 🔑127(2)

Where it is sought to amend complaint after the statute of limitations has run, amended complaint will be deemed filed as of the date of original complaint so long as recovery is sought in each complaint upon same general set of facts, and a mere change in legal theory will not subject amended complaint to bar of statute of limitations.

10. Limitation of actions 🔑127(14)

Where the only substantial difference between factual situations stated in original complaint seeking recovery for blindness induced by taking of drug dinitrophenol, and that stated in fifth amended complaint filed after the statute of limitations had run, was that the former charged that representations relied on were negligently made, while latter charged that representations were made with knowledge of their falsity, amended complaint seeking recovery on the theory of fraud did not state an entirely "different cause of action" so as to render it barred by limitations.

See Words and Phrases, Permanent Edition, for all other definitions of "Different Cause of Action".

11. Constitutional law ⚷111

Whether appellate court could consider question of whether denial of leave to amend constituted an abuse of discretion in the absence of a special request by plaintiff for leave to amend was a question of "procedure", and hence there were no "vested rights" which would be impaired by a change in the applicable rule of law with respect thereto.

See Words and Phrases, Permanent Edition, for all other definitions of "Procedure" and "Vested Right".

12. Appeal and error ⚷236(2)
Pleading ⚷225(2)

Where complaint was sufficient as against general demurrer, trial court abused its discretion in sustaining demurrer without leave to amend, even though there was no request for leave, and even though complaint may have been subject to special demurrer because of ambiguities therein.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Cecilia Wennerholm and another, husband and wife, against Stanford University School of Medicine, a corporation, and others, for loss of eyesight of named plaintiff as the result of taking a drug falsely represented by defendants to be harmless, and for consequential damages to the husband. From judgment for defendants, entered following the sustaining of demurrers to plaintiffs' fifth amended complaint without leave to amend, plaintiffs appeal.

Judgment reversed.

For prior opinion, see 113 P.2d 736.

Vincent W. Hallinan, Emmett R. Burns, and Carey Van Fleet, all of San Francisco, for appellants.

Hester W. Webb, James D. Adams, John J. Healy, Jr., Cooley, Crowley & Supple, Charles V. Barfield, Hadsell, Sweet, Ingalls & Lamb, and McCutchen, Olney, Mannon & Greene, all of San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiffs appeal from a judgment entered in favor of defendants after an order sustaining defendants' demurrers to the fifth amended complaint without leave to amend. Plaintiffs' original and first four amended complaints charged the defendants with negligence. In these complaints it was alleged that the plaintiff, Cecilia Wennerholm, consulted her family physician in regard to her obesity and that he prescribed dinitrophenol for her on a written prescription which was filled by a pharmacy. While under the care of her physician, plaintiff took the drug, which was manufactured by one of the defendants. As a result thereof, it was alleged, she lost her sight. Plaintiffs charged that the defendants published statements in medical journals and elsewhere that dinitrophenol was harmless; that these statements were read and relied upon by plaintiff and her physician; that defendants knew or should have known of the dangerous character of the drug but negligently failed to disclose that fact; and that, by reason of the negligence, fault and want of care of defendants, plaintiff suffered the loss of sight of both her eyes.

The fifth amended complaint charges the defendants with fraud. It is alleged, in substance, that the defendants are in the business of manufacturing, distributing, selling and dispensing drugs and medicines for human use; that by means of articles in newspapers, medical journals, pamphlets and circulars disseminated to the public, these defendants falsely represented that the drug would relieve obesity, was harmless and could be taken internally by human beings, and that defendants knew that the drug was inherently dangerous to human life and liable to cause blindness. It is further alleged that defendants manufactured, sold and dispensed the drug throughout the state; that the plaintiff Cecilia Wennerholm read, believed and relied on the false representations; and that, in reliance thereon, she purchased and took the drug internally. The plaintiff husband, J. V. Wennerholm, also seeks recovery for moneys expended and indebtedness incurred by reason of his wife's injuries. General and special demurrers to the fifth amended complaint were sustained without leave to amend. No request was made for leave to amend and judgment was entered for defendants.

[1-3] Although somewhat inartistically framed, the fifth amended complaint states a cause of action for fraud. Defendants contend it lacks an essential element of a cause of action because it does not specifically allege that the false representations were

made with an intent to deceive plaintiff, citing Harding v. Robinson, 175 Cal. 534, 166 P. 808; Vandervort v. Farmers, etc., Nat. Bank, 7 Cal.2d 28, 59 P.2d 1028. The intent to deceive sufficiently appears, however, by the facts alleged, from which it may be inferred that the alleged false statements were made with the intention of inducing the public to purchase the drug. One who intends to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in the class who is actually misled. Civ. Code, § 1711; Gill v. Johnson, 125 Cal.App. 296, 13 P.2d 857, 14 P.2d 1017.

[4-7] Defendants also argue that the allegation in the earlier complaints that the drug had been taken on prescription of a physician, which was omitted from the fifth amended complaint, must be read into the latter complaint. If this allegation is read into the complaint, defendants urge, it shows conclusively that plaintiff did not act in reliance upon the representations of defendants. If any verified pleading contains an allegation which renders a complaint vulnerable, the defect cannot be cured simply by omitting the allegation, without explanation, in a later pleading. See Williamson v. Joyce, 137 Cal. 151, 69 P. 980. If, however, the allegation that plaintiff took the drug on advice of her physician be read into the fifth amended complaint, it sufficiently alleges reliance by plaintiff upon defendants' representations. In actions for fraud it is not required that a defendant's representations be the sole cause of the damage. If they are a substantial factor in inducing the plaintiff to act, even though he also relies in part upon the advice of others, reliance is sufficiently shown. See Elliott v. Federated Fruit & Veg. Growers, 108 Cal.App. 412, 291 P. 681; Jones v. Elliott, 111 Wash. 138, 189 P. 1007; Prosser, Torts, p. 746; 23 Am.Jur. 946. In this case there was no allegation in the earlier complaints that plaintiff relied solely upon the advice of her physician; in fact, it is alleged in the second amended complaint that "plaintiff and her said physician believed and accepted the recommendations of defendants * * * and relied upon the same and the said physician in reliance thereon, prescribed for plaintiff, and the said plaintiff in reliance thereon and upon the advice of her physician, formed upon such recommendation of the defendants, used said dinitrophenol." In the fifth amended complaint it is alleged that plaintiff "relying upon * * * the aforesaid representations of said defendants, and not otherwise, purchased and took internally" the said drug. Accepting this statement as qualified by the allegations with respect to the physician in the earlier complaints, it sufficiently alleges that plaintiff relied, at least in substantial part, on the representations of defendants. The mere fact that a physician prescribed the drug does not establish, as a matter of law, a lack of reliance on the part of the plaintiff which would absolve the defendants from liability. No cases have been cited to us which support the proposition advanced by defendants that in circumstances such as those alleged here a prescribing physician must accept sole responsibility for the treatment which he chooses for his patients. It seems to us a more reasonable view that one who manufactures and sells a drug dangerous to life and health, knowing it to be dangerous, should be liable where, as here alleged, both physician and patient rely upon the representations made concerning the drug.

[8-10] The ground of general demurrer principally urged by the defendants is that the cause of action is barred by the statute of limitations. This contention is based on the theory that the fifth amended complaint charging fraud states a new and different cause of action from that for negligence stated in the original complaint. Unless the amended complaint sets forth an entirely different cause of action from the original, however, the amended complaint, for the purposes of the statute of limitations, must be deemed filed as of the date of the original complaint. Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am.St.Rep. 53; Work v. County Nat. Bank, etc., Co., 4 Cal.2d 532, 51 P.2d 90; Jones v. Wilton, 10 Cal.2d 493, 75 P.2d 593; Day v. Western Loan & Bldg. Co., 42 Cal.App.2d 226, 108 P.2d 702; 16 Cal.Jur. 547; 34 Am.Jur. 211. The modern rule, where amendment is sought after the statute of limitations has run, is that the amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought in each complaint upon the same general set of facts. See Frost v. Witter, supra; Stockwell v. McAlvay, 10 Cal.2d 368, 375, 74 P.2d 504; Day v. Western Loan & Bldg. Co., supra; Clark, Code Pleading, p. 514. A mere change in legal theory will not subject the amended complaint to the bar of the statute of limitations. See

Wells v. Lloyd, 6 Cal.2d 70, 56 P.2d 517; United States v. Memphis Cotton Oil Co., 288 U.S. 62, 67, 53 S.Ct. 278, 77 L.Ed. 619. In the present case the only substantial difference between the factual situations set forth in the original and the fifth amended complaint is that the former charged that the representations were negligently made while the latter charges that they were made with knowledge of their falsity. Despite the change in legal theory from an action for negligence to one for fraud, it cannot be said that an entirely different cause of action is stated. Therefore the latter complaint is not barred by the statute of limitations. Any contrary intimations contained in the cases of Spellacy v. Young, 44 Cal.App. 174, 186 P. 368, and Lambert v. McKenzie, 135 Cal. 100, 67 P. 6, relied upon by defendants, are inconsistent with the theory of the more recent cases cited above and should not be followed. It must be held, therefore, that the trial court improperly sustained the general demurrers to plaintiff's fifth amended complaint.

Various grounds of special demurrer also were advanced before the trial court. Defendants contend, relying upon such cases as Haddad v. McDowell, 213 Cal. 690, 3 P.2d 550, that plaintiffs' failure to request leave to amend requires that this court affirm the judgment of the trial court if any of the grounds of special demurrer are well taken. Where a complaint is sufficient against a general demurrer, however, and any uncertainties or ambiguities in the pleading can be corrected by amendment, it is apparent that denial of leave to amend results in a disposition of the cause upon technical grounds alone. The plaintiff who has stated a cause of action in such a case is denied a trial on the merits of his action if any of the grounds of special demurrer are well taken, despite the fact that the deficiencies can be corrected. It has been held, under such circumstances, that denial of leave to amend constitutes an abuse of discretion even though it be conceded that the trial court had authority to sustain the special demurrer because of defects in the form of the pleading. Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1; Olivera v. Grace, 19 Cal.2d 570, 579, 122 P.2d 564; and cases cited therein.

It is true that the Haddad case, supra, and others (see Aalwyn v. Cobe, 168 Cal. 165, 142 P. 79; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 706, 16 P.2d 268; Fitzpatrick v. Fidelity & Casualty Co., 7 Cal.2d 230, 60 P.2d 276; California Trust Co. v. Gustason, 15 Cal.2d 268, 101 P.2d 74), followed a judicially established rule of procedure which precluded an appellate court from considering whether denial of leave to amend constituted an abuse of discretion unless there was a special request by the plaintiff for leave to amend. This rule was eliminated as to future actions by the Legislature in 1939. Section 472c of the Code of Civil Procedure, which was added in that year, provides: "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made; provided, however, that this section shall not apply to any pending action or proceeding." If this section were applicable to the present action, it would be necessary for us to hold that the trial court abused its discretion in denying leave to amend, since it is clear that plaintiffs could so amend their complaint as to state a proper cause of action. Cf. Guilliams v. Hollywood Hospital, supra, 18 Cal.2d page 104, 114 P.2d 1. But this cause was pending at the time the statute became effective, and thus it is one of a limited group to which the old rule can still be applied because of the express proviso of the statute.

[11, 12] We are convinced, however, that under the circumstances now existing, the rule in the Haddad case should be rejected as to cases pending when Code of Civil Procedure, section 472c was enacted. The provision that this section should not apply to pending proceedings was intended, we think, to avoid any problem of retroactive application rather than to codify an existing rule as to pending cases. The problem is one of procedure and there are no vested rights which would be impaired by a change in the applicable rule of law. Furthermore, since the rule of the Haddad case was judicial in its origin, there is no impropriety in our conclusion that it should no longer be followed. The fact that the Legislature saw fit to exclude pending cases from the operation of the statute does not prevent this court from modifying its rule so as to secure uniformity in procedure. We therefore hold that it was an abuse of discretion for the trial court to sustain the demurrer without leave to

amend. We do not decide, however, that the complaint was not subject to special demurrer, and the trial court may in its discretion require the clarification of uncertainties or ambiguities in the complaint. Guilliams v. Hollywood Hospital, supra, 18 Cal.2d page 104, 114 P.2d 1.

The judgment is reversed.

SHENK, CURTIS, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 640

MOSS v. MOSS.

S. F. 16188.

Supreme Court of California.

Aug. 3, 1942.

1. Appeal and error 🔑917(1)

On appeal from judgment sustaining demurrer to complaint without leave to amend, allegations of complaint must be regarded as true.

2. Husband and wife 🔑278(2)

A contract for property settlement between husband and wife conditioned upon agreement to procure a divorce is invalid as against "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

3. Pleading 🔑214(1)

A demurrer admits allegations of complaint.

4. Action 🔑6

Husband's allegations that sole consideration for property settlement between husband and wife was an agreement by wife to procure a divorce were sufficient to state a cause of action for declaratory relief seeking determination of husband's obligation under the property settlement agreement and would have justified trial court in granting a declaratory judgment. Code Civ.Proc. § 1060.

5. Action 🔑6

Where facts appear from face of complaint which would justify trial court in concluding that if determination is not necessary or proper, court may sustain a general demurrer to complaint for declaratory relief. Code Civ.Proc. §§ 1060, 1061.

6. Action 🔑6

While it might be better practice for trial court to overrule demurrer and exercise its discretion in denying declaratory relief by some other procedure, the fact that it did so in ruling upon general demurrer cannot be held reversible error. Code Civ.Proc. §§ 1060, 1061.

7. Action 🔑6

That husband was a party to unlawful contract providing for settlement of property rights in consideration of wife's agreement to procure a divorce, of equal fault with wife, and was therefore in "pari delicto", was a fact which could properly have been considered by trial court as sufficient reason for declining to grant husband declaratory relief to effect that contract was void. Code Civ.Proc. §§ 1060, 1061.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Delicto".

8. Action 🔑6

Declaratory relief is not strictly legal or equitable but is sui generis in nature. Code Civ.Proc. § 1060.

9. Contracts 🔑138(1)

The doctrine of in "pari delicto" is not ordinarily applied to the executory portion of an illegal agreement.

10. Action 🔑6

Where sole consideration for contract providing for settlement of property rights between husband and wife was an agreement by wife to procure a divorce which wife procured without contest, denying husband declaratory relief to effect that contract was void was not an abuse of discretion. Code Civ.Proc. §§ 1060, 1061.

11. Limitation of actions 🔑39(1)

The statute specifying a four-year limitation upon an action for relief not otherwise provided for applies to all suits in equity not strictly of concurrent cognizance in law and equity. Code Civ.Proc. § 343.

12. Limitation of actions 🔑39(7)

A husband's action for cancellation of contract providing for settlement of property rights between husband and wife on ground of illegality because contract was based on consideration that wife would procure a divorce, which action was brought more than

ten years after separation contract was made and more than five years after modification thereof, was barred by four-year limitation statute. Code Civ.Proc. § 343.

In Bank.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Monroe L. Moss against Emily M. Moss seeking a declaration that a contract executed by plaintiff and defendant and modification thereof were illegal, void, and against public policy. From a judgment for defendant after trial court sustained a demurrer to the complaint without leave to amend, plaintiff appeals.

Affirmed.

For prior opinion, see 116 P.2d 650.

Livingston & Livingston, of San Francisco, and Allen H. Barr, of Berkeley, for appellant.

Manson & Allan, Dudley F. Miller, and Letitia R. Farber, all of San Francisco, for respondent.

GIBSON, Chief Justice.

Plaintiff brought this action against his former wife for declaratory relief seeking a determination of his obligations under a property settlement agreement executed in 1928 and a modification thereof executed in 1932. The trial court sustained a demurrer to the complaint without leave to amend, and plaintiff appeals from the judgment entered for defendant.

[1] The following allegations of the complaint must be regarded as true for the purposes of this appeal. Plaintiff and defendant, who were married in 1919, separated from one another on or about December 24, 1927. At that time, plaintiff alleges, it was agreed that defendant would obtain the divorce, and that "in consideration of such divorce and for no other consideration whatsoever, [plaintiff] would enter into a property settlement agreement with defendant to settle and determine their respective property rights and to provide for defendant's support and maintenance until she should remarry." In conformity with this plan, plaintiff and defendant entered into a separation agreement on March 21, 1928, by which, among other things, plaintiff was to pay to the defendant, Emily M. Moss, the sum of $250 per month during the period of her natural life until her remarriage. Thereafter the defendant wife brought an action for divorce, which plaintiff did not contest. An interlocutory judgment was entered on March 31, 1928, and a final judgment was entered on April 18, 1929. No reference was made to the separation agreement in either of the decrees. The modification of the agreement, made in October, 1932, reduced the monthly payments to $200 per month, but it provided that plaintiff's failure to meet any payment would result in a reinstatement of the original sum of $250 per month. Plaintiff alleged that an actual controversy exists between the parties as to his duties under these agreements. A judgment was sought declaring that the contract and modification thereof are void as against public policy and that he has no obligations or duties thereunder.

[2, 3] The law is settled that where a property settlement between husband and wife is entered into, conditioned upon an agreement to procure a divorce, the contract is against public policy and is invalid for that reason. Brown v. Brown, 8 Cal.App.2d 364, 47 P.2d 352; Newman v. Freitas, 129 Cal. 283, 61 P. 907, 50 L.R.A. 548; Pereira v. Pereira, 156 Cal. 1, 103 P. 488, 23 L.R.A.,N.S., 880, 134 Am.St.Rep. 107; see Restatement, Contracts, § 586; 6 Williston, Contracts, Rev.Ed.1938, § 1743, p. 4933. Under the allegations of the complaint, which are admitted by defendant's demurrer, the sole consideration for the property settlement here involved was an agreement by the defendant wife to procure a divorce. Since the case arises on demurrer, there is no need upon this appeal to consider whether it ultimately might be found that this agreement could be sustained because not actually promotive of divorce but merely incidental thereto. Cf. Howard v. Adams, 16 Cal.2d 253, 105 P.2d 971, 130 A.L.R. 1003; Cookinham v. Cookinham, 219 Cal. 723, 28 P.2d 1045; Queen v. Queen, 44 Cal.App.2d 475, 483, 112 P.2d 755. Assuming the property settlement agreement to be invalid, the question is whether plaintiff is entitled to a declaration to that effect.

[4-6] We are of the opinion that the allegations are sufficient to state a cause of action under the statute, Code Civ.Proc. § 1060, and would have justified the trial court in granting a declaratory judgment. Pacific States Corp. v. Pan-American

Bank, 213 Cal. 58, 63, 1 P.2d 4, 981; Oldham v. Moodie, 94 Cal.App. 88, 89, 270 P. 688; Andrews v. W. K. Company, 35 Cal. App.2d 41, 45, 94 P.2d 605. Declaratory relief, however, may be refused in the discretion of the trial court if it appears that the determination is not necessary or proper at the time and under all the circumstances. Code of Civ.Proc. § 1061. Where facts appear from the face of the complaint which would justify a trial court in concluding that its determination is not necessary or proper, it has been held that the court may sustain a general demurrer to the complaint for declaratory relief. Communist Party v. Peek, 20 Cal. 2d 536, 127 P.2d 889; City of Alturas v. Gloster, 16 Cal.2d 46, 104 P.2d 810; Stenzel v. Kronick, 102 Cal.App. 507, 283 P. 93; Rapaport v. Forer, 20 Cal.App.2d 271, 66 P.2d 1242; A. Hamburger & Sons v. Kice, 129 Cal.App. 68, 18 P.2d 115. Plaintiff urges that the discretion of the court in refusing to grant the relief sought should not be exercised in ruling upon a general demurrer, but only after sufficient facts are before the court to justify the entry of such a judgment on the merits. See Miller v. Currie, 208 Wis. 199, 242 N. W. 570; Bruckman v. Bruckman Co., 60 Ohio App. 361, 21 N.E.2d 481; Anderson, Declaratory Judgments (1940), p. 271. It is true that an order sustaining a general demurrer to a complaint for declaratory relief does not indicate to the appellate court whether the trial court concluded that relief was inappropriate or that there was failure to state a cause of action. While it might be better practice for the trial court to overrule the demurrer and exercise its discretion in denying declaratory relief by some other procedure, as, for example, upon a motion to dismiss (cf. Cutting v. Bryan, 206 Cal. 254, 274 P. 326), the fact that it did so in ruling upon the general demurrer cannot be held reversible error in view of the decided cases in this state.

[7-10] Since we have held that this complaint was sufficient to authorize a declaration of plaintiff's obligations under the contract, we must now consider whether the trial court abused its discretion in denying declaratory relief under the circumstances here presented. Plaintiff urges that the trial court abused its discretion and that there is no basis upon which its determination can be sustained. It is not necessary for us to consider each of the various grounds advanced by defendant in support of the trial court's conclusion. The fact that plaintiff was a party to the unlawful bargain of equal fault with defendant and is therefore in pari delicto, is a consideration which could properly have been considered by the trial court as a sufficient reason for declining to grant declaratory relief. It is contended by plaintiff that such an action is not strictly an action in equity and, therefore, that the doctrine of in pari delicto should not be applied. It is also contended that the defense of in pari delicto has no application where the plaintiff is merely seeking to relieve himself from the executory portion of an illegal agreement, citing Wassermann v. Sloss, 117 Cal. 425, 49 P. 566, 38 L.R.A. 176, 59 Am.St.Rep. 209, and National Stone Tile Corp. v. Voorheis, 93 Cal.App. 738, 270 P. 286. It is true that declaratory relief is not strictly legal or equitable, but is suis generis in nature (Gore v. Bingaman, 20 Cal.2d 118, 120, 124 P.2d 17; see Borchard, Declaratory Judgments (2d ed. 1941), pp. 238, 248, 399, 439) and that in pari delicto is not ordinarily applied to the executory portions of an illegal agreement. Cases supra, and see 3 Pomeroy, Equity Jurisprudence, 5th Ed. 1941, sec. 940, pp. 728-733. Assuming, however, as contended by plaintiff, that the doctrine of in pari delicto should not be treated as an absolute bar to this action, it is nevertheless an element which the trial court in its discretion could consider in deciding whether or not to grant declaratory relief under the circumstances presented here. Cf. Borchard, supra, pp. 239-240, 304-305. It cannot be said, therefore, that the trial court abused its discretion, and we find no error in its conclusion that declaratory relief was not proper under the facts of this case.

It is contended that the complaint also alleges facts stating a cause of action for cancellation of the agreement. The defendant, however, specified the statute of limitations as one of the grounds of her demurrer, and although there is no section of the code that expressly limits the time within which an action must be brought for cancellation of an instrument because of its illegality, section 343 of the Code of Civil Procedure provides that "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." It appears from the face of the complaint that this action was brought more than ten years after the separation agreement was made and more than five years after the modification thereof; thus it is obvious that if section 343 is applicable to an action for cancellation for illegality, plaintiff is precluded thereby.

[11, 12] It is well settled in California that, as stated in Piller v. Southern Pac. R. R. Co., 52 Cal. 42, 44, "the four years' limitation of sec. 343 applies to all suits in equity not strictly of concurrent cognizance in law and equity." See, also, Sherman v. S. K. D. Oil Co., 185 Cal. 534, 545, 197 P. 799. This section has been considered applicable, for example, to actions based upon express and constructive trusts (Scott v. Symons, 191 Cal. 441, 456, 216 P. 604; Wrightson v. Dougherty, 5 Cal.2d 257, 264, 54 P.2d 13), to actions for an accounting (McArthur v. Blaisdell, 159 Cal. 604, 115 P. 52; West v. Russell, 74 Cal. 544, 16 P. 392), to an action in the nature of a creditor's bill against holders of watered stock (Sherman v. S. K. D. Oil Co., supra), to an action to set aside deeds made under undue influence (Trubody v. Trubody, 137 Cal. 172, 174, 69 P. 968), and to a proceeding under section 708 of the Code of Civil Procedure to set aside a satisfaction and revive a judgment after an execution and sale made thereunder had been found void. Merguire v. O'Donnell, 139 Cal. 6, 9, 72 P. 337, 96 Am.St.Rep. 91. In Hynes v. M. J. & M. M. Consolidated, 168 Cal. 651, 144 P. 144, it was held that the section barred a suit in equity to vacate a judgment for lack of due service of process. It has been held, also, that section 343 bars an action to recover money illegally paid by a city official brought on the theory that the defendant was an involuntary trustee. City of Petaluma v. Hickey, 90 Cal.App. 616, 266 P. 613. This court has indicated, although without expressly so stating, that a lapse of time beyond the period of the statute would prevent relief in an action to cancel void bonds. Wenban Estate, Inc., v. Hewlett, 193 Cal. 675, 705, 706, 227 P. 723; Sechrist v. Rialto Irrigation Dist., 129 Cal. 640, 645, 646, 62 P. 261. Further, as the court said in Bogart v. George K. Porter Co., 193 Cal. 197, 201, 223 P. 959, 961, 31 A.L.R. 1045: "The Legislature has * * * specified the limitations applicable to a wide variety of actions, and then, to rebut the possible inference that actions not therein specifically described are to be regarded as exempt from limitations, it has specified a 4-year limitation upon 'an action for relief not hereinbefore provided for' (section 343); and where it has intended that an action shall be exempt from limitations it has said so in clear and unmistakable language. Code Civ.Proc., § 348; Civ.Code, § 309." Although plaintiff contends that laches and lapse of time cannot be defenses in an action to cancel an instrument void because contrary to public policy, citing Colby v. Title Ins. & Trust Co., 160 Cal. 632, 117 P. 913, 35 L.R.A.,N.S., 813, Ann.Cas.1913A, 515, the equitable factors considered in that decision may not be used as a means of avoiding the express mandate of the statute of limitations. We must hold, therefore, that if plaintiff had a cause of action for cancellation, it is now barred by section 343 of the Code of Civil Procedure.

The judgment is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 684

SACRAMENTO MUNICIPAL UTILITY DIST. v. PACIFIC GAS & ELECTRIC CO.

Sac. 5408.

Supreme Court of California.

Aug. 11, 1942.

Rehearing Denied Sept. 10, 1942.

1. Courts 🔑259

Generally the jurisdiction of federal courts over cases within the field of their jurisdiction cannot be enlarged, diminished or impaired by state statutes or regulations.

2. Courts 🔑357

The matter of costs in federal courts is controlled exclusively by the federal statutes or rules of federal courts where such statutes or rules exist.

3. Costs 🔑4
Courts 🔑259

The statute making one bringing suit to enjoin issuance of bonds by political subdivision of state for purpose of acquiring public utility works, liable for necessary expenses resulting to a defendant by reason of filing of such suit, if injunction is denied, which is applicable to suits brought in state as well as federal courts, is not unconstitutional as applied to corporation which unsuccessfully sought such an injunction in federal court, as impairing corporation's right to resort to federal courts for redress, and as invading field belonging to exclusive jurisdiction of federal courts. Code Civ.Proc. § 526b; U.S.C.A.Const. art. 3, § 2; art. 6, cl. 2.

4. Courts 🔑361

The federal courts apply state law in matters of substance, except as to matters controlled by the federal constitution and statutes.

5. Courts 🔑361

Federal statutes covering matter of costs are controlling in federal actions and the matter may not be regulated by state statutes which result in penalizing the free access to the federal courts in proper cases. 28 U.S.C.A. §§ 571, 572; U.S.C.A.Const. art. 3, § 2; art. 6, cl. 2.

6. Courts 🔑259

Where corporation brought federal court suit to enjoin issuance of bonds by municipal utility district for purpose of acquiring electric works, and injunction was denied, application of state statute relating to recovery of necessary expenses resulting from filing of such a suit, so as to entitle district to recover attorney's fees, was not unlawful as an attempt to regulate practice and procedure in relation to "costs" in federal courts, even if subject of costs was wholly covered by federal statutes, in view of distinction between ordinary costs and counsel fees. 28 U.S.C.A. §§ 571, 572; Code Civ. Proc. § 526b.

See Words and Phrases, Permanent Edition, for all other definitions of "Costs".

7. Constitutional law 🔑208(1), 211
Statutes 🔑71, 79(1)

A statute containing classification of persons or things is not void as lacking "uniformity", within constitutional provision requiring laws of general nature to have uniform operation, or as granting "special privileges" within constitutional provisions prohibiting the granting of privileges not granted to all citizens, or the passage of special laws granting special privileges, or as denying "equal protection of the law", if the classification is not arbitrary and is based on some difference in the classes having a substantial relation to the purpose for which the legislation was designed. Const. art. 1, §§ 11, 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of the Law", "Special Privilege" and "Uniformity".

8. Constitutional law 🔑208(1), 211
Statutes 🔑72, 79(1)

A law to be "general" in its scope need not include all classes of individuals in the state nor is a classification void because it does not embrace within it every other class which might be included. Const. art. 1, §§ 11, 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "General Law".

9. Constitutional law 🔑48

Wide discretion is vested in legislature in making a statutory classification and every presumption is in favor of validity of the statute, and decision of the legislature concerning what is sufficient distinction to warrant classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. Const. art. 1, §§ 11, 21; U.S.C.A.Const. Amend. 14.

10. Constitutional law 🔑208(1), 211
Statutes 🔑71, 79(1)

A distinction in legislation is not "arbitrary" if any set of facts reasonably can be conceived that would sustain it. Const. art. 1, §§ 11, 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Arbitrary".

11. Constitutional law 🔑208(1), 249
Costs 🔑4
Statutes 🔑72, 79(1)

The statute making a person or corporation bringing suit to enjoin issuance of bonds by political subdivision of state for purpose of acquiring public utility works, liable for all necessary expenses resulting to a defendant by reason of filing such suit, if injunction is finally denied, is not void as lacking "uniformity", within constitutional provision requiring laws of general nature to have uniform operation, or as granting "special privileges" within constitutional provisions prohibiting the granting of privileges not granted to all citizens, or passage of special laws granting special privileges or as denying "equal protection of the laws". Code Civ.Proc. § 526b; Const. art. 1, §§ 11, 21; art. 4, § 25; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Uniformity".

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action under section 526b of the Code of Civil Procedure by the Sacramento Municipal Utility District against the Pacific Gas and Electric Company to recover attorney's fees expended by the plaintiff in an action brought by the defendant to enjoin the issuance of bonds for the purpose of acquiring electrical works. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

For prior opinion, see 115 P.2d 582.

Thos. J. Straub and John C. Wood, both of San Francisco, for appellant.

Robert L. Shinn, Stephen W. Downey, Marshall K. Taylor, John F. Downey, and Downey, Brand & Seymour, all of Sacramento, for respondent.

CARTER, Justice.

Defendant, a California corporation engaged in the operation of electric works and the distribution and sale of electric energy as a public utility within the plaintiff Sacramento Municipal Utility District, appeals from a judgment of the Superior Court of Sacramento County rendered against it in favor of plaintiff for attorney's fees incurred by plaintiff in the defense of an action in the United States District Court and the United States Circuit Court of Appeals, and in opposing the issuance of a writ of certiorari by the United States Supreme Court, which action was prosecuted by defendant to restrain plaintiff from issuing, selling and delivering its bonds voted for the purpose of financing the acquisition and construction of a competing system for the supply of electric energy to the inhabitants of plaintiff district. The instant action was commenced pursuant to the provisions of section 526b of the Code of Civil Procedure.

On November 6, 1934, the electorate of plaintiff, a municipal utility district of this state organized under the Municipal Utility District Act of 1921, Stats.1921, p. 245, as amended, Deering's Gen.Laws, 1937, Act 6393, authorized the issuance of $12,000,000 in bonds for the acquisition and construction of works for the supply of electric energy to the inhabitants thereof. On January 2, 1935, pursuant to section 16 of said act, plaintiff commenced a proceeding in rem in the Superior Court of Sacramento County to determine the validity of those bonds. Defendant appeared in that proceeding and contested the validity of said bonds on the ground that the taxation by the district of defendant's property situated within said district to pay the bonds would constitute a taking of its property without due process of law. It was ultimately determined by this court on appeal in that proceeding that the bonds were valid, and it was also determined that the ground of invalidity above mentioned advanced by defendant therein could not be properly considered in that proceeding. Sacramento M. U. Dist. v. All Parties, etc., 6 Cal.2d 197, 57 P.2d 506.

Thereafter defendant commenced an action in the United States District Court against plaintiff seeking to have enjoined the issuance and sale of said bonds, attacking their validity upon the ground above mentioned. No temporary restraining order or preliminary injunction was ever issued and the District Court refused to grant a permanent injunction. Pacific Gas & Electric Co. v. Sacramento M. Utility Dist., 17 F.Supp. 685. That judgment was affirmed by the United States Circuit Court of Appeals on defendant's appeal. Pacific Gas & Electric Co. v. Sacramento M. Utility District, 9 Cir., 92 F.2d 365. Defendant's petition to the Supreme Court of the United States for a writ of certiorari was denied on February 14, 1938. Pacific Gas & Electric Co. v. Sacramento M. Utility Dist., 303 U.S. 640, 58 S.Ct. 610, 82 L.Ed. 1100. The judgment in the instant action, here appealed from, establishes plaintiff's claim for attorney's fees incurred by it in its successful defense of the action in its course through the various federal courts.

That judgment is based upon the right of action created by section 526b of the Code of Civil Procedure which reads:

"Every person or corporation bringing, instigating, exciting or abetting, any suit to obtain an injunction, restraining or enjoining the issuance, sale, offering for sale, or delivery, of bonds, or other securities, or the expenditure of the proceeds of the sale of such bonds or other securities, of any city, city and county, town, county or other district organized under the laws of this state, or any other political subdivision of this state, proposed to be issued, sold, offered for sale or delivered by such city, city and county, town, county, district or other political subdivision, for the purpose of acquiring, constructing, completing, improving or extending water works, electric works, gas works or other public utility works or property, shall, if the injunction sought is finally denied, and if such person or corporation owns, controls, or is operating or interested in, a public utility business of the same nature as that for which such bonds or other securities are proposed to be issued, sold, offered for sale, or delivered, be liable to the defendant for all costs, damages and necessary expenses resulting to such defendant by reason of the filing of such suit."

It is not questioned that plaintiff's claim for attorney's fees upon which the judgment is based comes within the terms of that section, defendant's sole contention being that said section is unconstitutional as it impairs its right to resort to the federal courts for redress and invades a field belonging to the exclusive jurisdiction of those courts (U.S.Const., art. VI, par. 2; art. III, § 2); that it is a general law without uniform operation, is a denial of equal protection of the laws, and a grant of special privileges. U.S.Const., Fourteenth Amendment; Cal.Const., art. I, §§ 11, 21; art. IV, § 25.

[1, 2] It is not questioned that as a general rule the jurisdiction of federal courts over cases within the field of their jurisdiction cannot be enlarged, diminished or impaired by state statutes or regulations; and a person may not be deprived of his right to resort to the federal courts by state legislation. United States Const., art. VI, par. 2; art. III, § 2; Home Insurance Co. v. Morse, 20 Wall. 445, 22 L.Ed. 365; Harrison v. St. Louis & San Francisco R. R., 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621, L.R.A.1915F, 1187; Cowles v. Mercer County, 7 Wall. 118, 19 L.Ed. 86; Chicot County v. Sherwood, 148 U.S. 529, 13 S.Ct. 695, 37 L.Ed. 546; Com. of Pennsylvania v. Williams, 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841, 96 A.L.R. 1166; Kline v. Burke Constr. Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077; Blake v. McClung, 172 U.S. 239, 19 S.Ct. 165, 43 L.Ed. 432; Barron v. Burnside, 121 U.S. 186, 7 S.Ct. 931, 30 L.Ed. 915. Nor is it doubted that the matter of costs in federal courts is controlled exclusively by United States statutes or rules of the federal courts where such statutes or rules exist. Missouri Pacific Ry. Co. v. Larabee, 234 U.S. 459, 34 S.Ct. 979, 58 L.Ed. 1398; Tullock v. Mulvane, 184 U.S. 497, 22 S.Ct. 372, 46 L.Ed. 657.

[3] However, we believe it is clear that section 526b does not deprive plaintiff of access to the federal courts or impair or restrict the jurisdiction of those courts. That section creates a liability for attorney's fees in the type of actions specified therein regardless of whether the action in which the fees are incurred is in the state or federal courts. No attempt is made to keep parties out of the federal courts by singling out those courts alone as the forum in which the liability for the attorney's fees is incurred, while imposing no liability when the action is prosecuted in a state court. It is only in the event the one upon whom the fee is imposed is unsuccessful in his action that he becomes responsible for the fee. Thus his position is no different than any other litigant. If he chooses to litigate the question, he runs the risk of being required to reimburse his opponent for the latter's expenses. The obligation is an independent one created by statute which in no wise purports to regulate or limit the jurisdiction of the federal courts. If the allowance of fees were confined to actions in state courts, the inequitable result would follow that a penalty would be imposed upon a resort to those courts, and an inducement created to seek relief in the federal courts. The substantive right created by the state Legislature in enacting section 526b should not be made dependent upon the court in which the action is prosecuted. In the case of People of Sioux County v. National Surety Co., 276 U.S. 238, 243, 48 S.Ct. 239, 241, 72 L.Ed. 547, which involved a state statute creating a right to attorney's fees in an action on a surety bond, the court said:

"Disregarding mere matters of form it is clear that it is the policy of the state to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. *It would be at least anomalous if this policy could be thwarted and the right so plainly* *given destroyed by removal of the cause to the federal courts.*" (Emphasis added.)

It must be remembered that the right created by the statute in question is an independent one. It is not dissimilar, with respect to the contention that there is interference with the jurisdiction of the federal court, from a state statute of limitation. No one would doubt that such statute would apply to an action which reached the federal court by reason of diversity of citizenship. It would not be considered as impairing the right of access to that court.

Defendant relies upon such cases as Harrison v. St. Louis & San Francisco R. R., supra, which involve statutes declaring forfeited a permit issued to a foreign corporation to transact business in the state when it commences an action in or has one transferred to the federal court. See cases collected 21 A.L.R. 188. Those cases are manifestly distinguishable from the case at bar inasmuch as a direct penalty is established by the statutes involved therein which singles out and attaches only to the right of access to the federal courts. In the instant case the statute is equally applicable to all courts, and defendant is not prevented from having its constitutional rights protected in the federal courts. It is merely obligated to pay the expenses incurred by its opponent in defending such a suit when it is unsuccessful; that is, when an invasion of its constitutional rights was incorrectly assumed by it as the basis for its action whether instituted in the state or federal courts.

[4] It must be kept in mind that, generally speaking, the policy of the Supreme Court of the United States is to look with disfavor upon attempted restrictions on the legislative authority and policy of a state. See Palmer v. Com. of Massachusetts, 308 U.S. 79, 60 S.Ct. 34, 84 L.Ed. 93; Railroad Comm. v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971. And except as to matters controlled by the United States Constitution and statutes the federal courts apply state law in matters of substance. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487. The state policy creating the substantive right to counsel fees declared by section 526b should not, in conformity with those rules, be lightly brushed aside as imposing restrictions on the jurisdiction of the federal courts, merely because the right arises upon unsuccessful action being taken in either the federal or state courts. If every time there is some connection between a state created substantive right and an action in the federal courts it would be determined that there was unlawful interference with the jurisdiction of those courts or the right of access thereto, there would be little left of such rights and anomalous results would follow.

[5, 6] Another phase of this same question is manifested in the rule that, as to matters of costs in actions in the federal courts, the United States statutes when they cover the subject are controlling, and may not be regulated by state statutes which result in penalizing the free access to the federal courts in proper cases. In that connection defendant refers to the federal statutes on the subject of fees and costs in actions in the federal courts. 28 U.S.C.A. §§ 571, 572. Assuming that the subject of costs is wholly covered by the federal statutes, it does not follow that section 526b is a regulation or provision for costs contrary to those statutes. The essence of the matter is, as we have seen, that that section creates an independent substantive right, and implies no attempt to regulate the practice and procedure in relation to costs in the federal courts. This is brought out in the case of People of Sioux County v. National Surety Co., supra, involving a state statute authorizing the recovery of attorney's fees by a successful plaintiff in an action on a surety bond. The action on the bond was in the federal court. The statute provided that the fees were to be allowed and *taxed as costs;* that is, the fees were to be allowed by the court hearing the action, rather than in an independent action. Nevertheless, the Supreme Court of the United States held the statute providing for counsel fees to be valid and enforceable, stating at page 241 of 276 U.S., at page 240 of 48 S.Ct., 72 L.Ed. 547:

"In striking down so much of the judgment as allowed an attorney's fee the court below was persuaded that section 7811, which provides for an attorney's fee, authorized it only as costs to be taxed in the state court. As costs in the federal courts are regulated exclusively by R.S. §§ 823 and 824 (28 U.S.C.A. §§ 571, 572), the court concluded that other costs, authorized only by a state statute, could not be included in the judgment. See United States v. Sanborn, 135 U.S. 271, 282, 10 S.Ct. 812, 34 L.Ed. 112; The Baltimore, 8 Wall. 377, 388 et seq., 19 L.Ed. 463. Compare Ex parte Peterson, 253 U.S. 300, 314–319, 40 S.Ct. 543, 64 L.Ed. 919.

"Both in an earlier case, Globe Indemnity Co. v. Sulpho-Saline Bath Co., [8 Cir.], 299 F. 219, certiorari denied 266 U.S. 606, 45 S.Ct. 92, 69 L.Ed. 464 (see, also, Spring Garden Insurance Co. v. Amusement Syndicate Co., [8 Cir.], 178 F. 519, [102 C.C.A. 29]), and in a later case, Business Men's Assurance Co. v. Campbell, 8 Cir., 18 F.2d 223, the same court applied the Nebraska statute allowing the recovery of attorneys' fees in suits upon insurance policies. When it was argued that no other costs can be taxed in a court of the United States than those authorized by federal statute, the Circuit Court of Appeals said in the latter case ([18 F.2d] page 224) that the objection *'applies only to ordinary costs, and not to allowances for attorney's services provided by state statutes.'* * * *

"That the statute directs the allowance, which is made to plaintiff, to be added to the judgment as costs are added *does not make it costs in the ordinary sense of the traditional, arbitrary and small fees* of court officers, attorneys' docket fees and the like, allowed to counsel by R.S. §§ 823, 824.

"The present allowance, since *it is not costs in the ordinary sense, is not within the field of costs legislation covered by R.S. §§ 823, 824.* That the particular mode of enforcing the right provided by the state statute—i. e., by taxing the allowance as costs—is not available to the federal courts under R.S. §§ 823, 824, does not preclude the recovery. Since the right exists the federal courts may follow their own appropriate procedure for its enforcement by including the amount of the fee in the judgment." (Emphasis added.)

The distinction between ordinary costs and the counsel fees involved in the action in the case at bar is emphasized in the case of Henkel v. Chicago, etc., Ry., 284 U.S. 444, 52 S.Ct. 223, 76 L.Ed. 386, involving a state statute authorizing the taxing as costs of fees for expert witnesses, the court deciding naturally that such fees were ordinary costs and therefore controlled by the United States statutes where the action was in the federal court. The case of People of Sioux County v. National Surety Co., supra, was distinguished on that ground, but the rule there stated was approved.

Defendant refers to cases holding that in actions on injunction bonds in the federal courts attorney's fees should not be allowed even though the state law permitted such recovery. Bein v. Heath, 12 How. 168, 13 L.Ed. 939; Tullock v. Mulvane, supra. It is doubtful that those cases are still the law since the decision in Erie R. Co. v. Tompkins, supra, in spite of the holding to the contrary in Travelers Mut. Casualty Co. v. Skeer, D.C., 24 F.Supp. 805, but in any event they are clearly distinguishable. They involved bonds given in federal court actions, and naturally the terms thereof would be controlled by the federal law. Such bonds related exclusively to matters involved in the actions pending in the federal courts and were given in the light of and pursuant to the laws and conditions pertaining to those particular actions. There was no statute creating an independent cause of action in any of those cases. Nor do we believe that the case of Missouri Pacific Ry. Co. v. Larabee, supra, relied upon by defendant, is controlling. There a state statute authorized attorney's fees to defendant in a mandamus proceeding. The state court allowed such fees for services rendered in a writ of error proceedings in the United States Supreme Court taken from the decision of the state court. Although the Supreme Court in determining that the fees could not be properly allowed, discussed the proposition that to allow them would deprive a person of access to the federal courts, the allowance was treated entirely as a part of ordinary costs throughout, and the thought was repeatedly expressed that a state statute could not control the procedure of a federal court with reference to such costs. The later case of People of Sioux County v. National Surety Co., supra, recognized the distinction between counsel fees and ordinary costs which, as above seen, was also later recognized in Henkel v. Chicago, etc., Ry., supra. Numerous more recent federal court decisions have recognized the distinction. See Orlando Candy Co. v. New Hampshire Fire Ins. Co., D.C., 51 F.2d 392; Associated Mfrs. Corporation v. De Jong, 8 Cir., 64 F.2d 64; Business Men's Assur. Co. v. Campbell, 8 Cir., 18 F.2d 223; Benash v. Business Men's Assur. Co., 8 Cir., 25 F.2d 423; Missouri State L. Ins. Co. v. Jones, 290 U.S. 199, 54 S.Ct. 133, 78 L.Ed. 267.

[7-10] The contention that the section in question lacks uniformity, grants special privileges and denies equal protection of the laws, is also without merit. None of

those constitutional principles is violated if the classification of persons or things affected by the legislation is not arbitrary and is based upon some difference in the classes having a substantial relation to the purpose for which the legislation was designed. San Bernardino County v. Way, 18 Cal.2d 647, 117 P.2d 354; Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717. A law to be general in its scope need not include all classes of individuals in the state. Nor is a classification void because it does not embrace within it every other class which might be included. Heron v. Riley, 209 Cal. 507, 289 P. 160; Powers Farms v. Consolidated Irr. Dist., supra. Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. In re Weisberg, 215 Cal. 624, 12 P.2d 446; Rainey v. Michel, 6 Cal. 2d 259, 57 P.2d 932, 105 A.L.R. 148; Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595; Natural Milk, etc., Ass'n v. City and County of San Francisco, 20 Cal.2d 101, 124 P.2d 25. A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it.

[11] Applying those rules to section 526b, it cannot be said that the classification provided by the Legislature was palpably wrong and had no reasonable basis. When a municipality or public agency such as plaintiff in the case at bar engages in the business of producing and distributing electricity it necessarily comes into competition with any private utility distributing electricity in the same area; that competition may be partially or even totally destructive to the private utility's business. The private utility is without legal redress based upon constitutional guaranties for the results of such competition; its constitutional rights have not been thereby invaded. Puget Sound, etc., Co. v. City of Seattle, 291 U.S. 619, 54 S.Ct. 542, 78 L.Ed. 1025. Nevertheless, the Legislature might reasonably have assumed that by reason of the threat to its business by such competition it would be naturally driven by a compelling motive, different and greater than other persons, to prosecute, with less scrutinizing of the merits thereof, litigation to hamper and interfere with the development and operation of a public utility by a public agency, and thus either delay or forestall the day when its business would be wholly or partially destroyed by such threatened competition. It would be especially tempted to prosecute such litigation, and the Legislature in order to protect the public agency in engaging in a pursuit which it had deemed necessary to the public welfare, might reasonably have required, as it did, that a private utility with such a probable motive should reimburse the public treasuries for expenses incurred in unjustifiable litigation prosecuted by the utility. It is no answer to these circumstances to assert that private utilities do not prosecute actions of this character more frequently than others, inasmuch as the Legislature's determination that because of the motive involved the probabilities that they would prosecute more of such actions is binding upon this court where it has some reasonable basis for such determination. The section establishes as a prerequisite to the recovery of those expenses that the private utility be unsuccessful, thus indicating that its action was without legal foundation. It is not prevented from obtaining access to the court; if its action is meritorious it need not bear the expenses of the defendant. This basis for classification particularly removes any doubt that it is proper, in including only private utilities and such of those as operate within the area embraced by the public agency. But it is obvious that it also applies to the claimed discrimination between different kinds of litigation between plaintiff and the defendant in the actions contemplated by the section, and between actions enjoining the issuance and sale of bonds and other actions inasmuch as the issuance and sale of such bonds is usually a fundamental initial step in the acquisition and operation of utilities by a public agency. In connection with the allowance of attorney's fees to the public agency if the private utility is unsuccessful, but not to the latter if it is successful, the statement in Missouri, Kansas & Texas Ry. v. Cade, 233 U.S. 642, 650, 34 S.Ct. 678, 681, 58 L.Ed. 1135, is pertinent:

> "If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause. This is not a discrimina-

tion between different citizens or classes of citizens since members of any and every class may either sue or be sued. Actor and reus differ in their respective attitudes towards a litigation; the former has the burden of seeking the proper jurisdiction and bringing the proper parties before it, as well as the burden of proof upon the main issues; and these differences may be made the basis of distinctive treatment respecting the allowance of an attorneys' fee as a part of the costs."

It is of interest to observe that the courts have practically uniformly held constitutional statutes requiring that insurance companies, under varying circumstances, pay attorney's fees in successful actions to recover from them claims they have refused to pay, although plaintiff need not pay their fees if unsuccessful, the necessity of bringing the action being vexatious. Farmers', etc., Ins. Co. v. Dobney, 189 U.S. 301, 23 S.Ct. 565, 47 L.Ed. 821; People of Sioux County v. National Surety Co., supra; cases collected 90 A.L.R. 530; 11 A.L.R. 884. Defendant urges that those cases are distinguishable on the ground that the theory upon which they are based is that the statute providing for attorney's fees becomes part of the insurance contract, while no contract is involved in the instant case. They also may be predicated on the proposition that insurance companies are inclined to litigate claims without having a meritorious defense. As we have pointed out hereinabove, we cannot say that the Legislature was not justified in concluding that private utilities, under the conditions and circumstances specified in section 526b, and in light of the motive generated by the threat of competition, would be inclined to prosecute unmeritorious litigation by means of the particular actions contemplated by that section. Even if those cases do proceed on a contractual theory, that is, that when the company writes the policy it assumes the obligation imposed by the statute, that is no basis for a distinction, because, if the law was invalid as violating the equal privileges and protection clauses, it would be none the less invalid by requiring in effect that insurance policies and no other contracts should provide for attorney's fees. They could not be compelled to embody in their policy a provision for attorney's fees if the requirement was discriminatory.

Defendant relies particularly upon the case of Black v. Hilliker, 130 Cal. 190, 62 P. 481, as announcing that it is against public policy that an unsuccessful plaintiff shall be mulcted in damages by reason of his failure to obtain judgment. But here the Legislature has declared the policy under the specified circumstances that attorney's fees be allowed and under that policy the plaintiff is not being "mulct" in damages. Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982, 17 L.R.A.,N.S., 909, 119 Am.St.Rep. 193, 11 Ann.Cas. 712, and Gulf, Colorado & Santa Fe Ry. Co. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666, invalidating statutes allowing attorney's fees to certain creditors or against certain debtors, are cited by defendant. But suffice it to say that no basis for a proper classification existed in those cases as does in the case at bar. It was said in Engebretsen v. Gay, 158 Cal. 30, 32, 109 P. 880, 881, 28 L.R.A.,N.S., 1062, Ann.Cas.1912A, 690, concerning the Builders' Supply case:

"There is, however, nothing in the opinion in Gulf, etc., Ry. Co. v. Ellis, supra [165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666], or in our own Builders' Supply Depot v. O'Connor, supra [150 Cal. 265, 88 P. 982, 17 L.R.A.,N.S., 909, 119 Am.St.Rep. 193, 11 Ann.Cas. 712], to suggest that attorneys' fees may not be allowed a successful plaintiff in certain classes of cases, even though no such allowance be made to the defendant in the event that he prevails. The right to classify in this respect, as long as the classification is 'based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted,' was conceded by the opinion in Gulf, etc., Ry. Co. v. Ellis, supra [165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666] (see Atchison, etc., R. R. Co. v. Matthews, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909), and is recognized by all the authorities."

No useful purpose may be served by an analysis of all the cases relied upon by defendant. Cases considering the particular constitutional guarantees here in question must each be determined upon its particular circumstances.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and WARD, JJ. pro tem., concurred.

20 Cal.2d 599

DILLARD v. CITY OF LOS ANGELES et al.

L. A. 18221.

Supreme Court of California.
Aug. 24, 1942.

Appeal and error ⇨832(4)

Contention that Supreme Court erroneously determined appeal on the basis of affidavits filed in support of motion for new trial was not sustained, where affidavits referred to were embraced in the portion of transcript stipulated to be a full, true and fair transcript of the papers, considered "on the hearing at the trial" of the cause, and facts contained in such affidavits were discussed in briefs of both parties without any suggestion that Supreme Court could not consider them because contained in affidavits on motion for new trial.

EDMONDS, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 127 P.2d 917.

Cryer & Jones, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and Robert J. Stahl and Edward J. Olstyn, Deputy City Attys., all of Los Angeles, for respondents.

PER CURIAM.

By petition for rehearing in this cause respondents contend that "this court has erred in determining this appeal upon the strength of statements and opinions expressed in affidavits filed in support of a motion for a new trial", contrary to the rule announced by this court in Lucci v. United Credit and Collection Company, 220 Cal. 492, 31 P.2d 369. This contention cannot be sustained for the reason that on the last page of the transcript the following stipulation appears: "We hereby stipulate the foregoing (pages 22 to 77, inclusive) to be a full, true and fair transcript of the papers, and all of the papers, used or considered on the hearing at the trial of the within cause (in addition to the record contained in the clerk's transcript of the judgment roll herein)." The affidavits referred to in the opinion of this court are embraced within the pages contained in the record referred to in the above-mentioned stipulation, and the facts contained in such affidavits were discussed in the briefs of both parties without any suggestion that such facts could not be considered by this court because they were contained in affidavits on motion for a new trial.

Other contentions made in respondents' petition for a rehearing are disposed of in the opinion of this court.

Respondents' petition for a rehearing is denied.

EDMONDS, J., dissenting.

20 Cal.2d 652

LOS ANGELES COUNTY v. RILEY, State Controller, et al.

L. A. 18249.

Supreme Court of California.
Aug. 3, 1942.

As Modified on Denial of Rehearing
Sept. 2, 1942.

1. Statutes ⇨205

A statute must be construed as a whole.

2. Paupers ⇨39(1)

The provision of section 1554 of the Welfare and Institutions Code that for each needy child the amount granted by federal government for such child shall be deducted from the total amount granted for the child pursuant to section 1511 and two-thirds of remaining sums shall be paid to county by state treasurer as reimbursement, includes not only the $22.50 mentioned in the first paragraph of section 1511, but such additional sums as the county may pay from its own funds as authorized by the second paragraph of section 1511, except that the state shall not pay more than $15 per month. St. 1937, p. 1072, § 1553; St.1939, pp. 2842, 2846, 2847, §§ 1510, 1511, 1554, 1555(a), 1556.

3. Paupers ⇨52(2)
States ⇨193

The obligation of the state to reimburse counties for aid furnished by the counties to needy children is imposed by statute and hence counties are not given permission to sue the state for reimbursement for such aid, by statute providing that any person

who has a claim on express contract against the state is authorized to bring suit against the state on such claim. Pol.Code, § 688.

4. States ⚿191(1)

Statutes authorizing persons to sue the state, being in derogation of sovereignty, are strictly construed.

5. Mandamus ⚿3(6)

Since county was without legal remedy to enforce its claim against the state for reimbursement for aid furnished to needy children, county could resort to remedy of mandamus to compel state officials to perform duties enjoined on them by law with reference to reimbursement.

6. States ⚿197

An action merely to compel a state officer to perform a duty expressly enjoined on him by law is not a "suit against the state" within meaning of statute requiring presentation of a claim against the state to the Board of Control as a prerequisite to the institution of suit against the state. Pol. Code, § 688.

See Words and Phrases, Permanent Edition, for all other definitions of "Suit Against the State".

7. Mandamus ⚿13

The statute requiring the presentation of a claim against the state to the Board of Control as a prerequisite to the institution of suit against the state, had no application to mandamus proceeding by county against state officials to compel reimbursement of the county for aid furnished by county to needy children, since the proceeding was not a "suit against the state". Pol.Code, § 688.

EDMONDS, J., dissenting.

◆

In Bank.

Mandamus proceeding by the County of Los Angeles, petitioner, against Harry B. Riley, as State Controller, and others, to compel the respondents to reimburse the petitioner for aid furnished to needy children.

Writ issued.

Rehearing denied; Edmonds, J., dissenting.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and L. K. Vobayda, Deputy Co. Counsel, all of Los Angeles, for petitioner.

Earl Warren, Atty. Gen., and T. A. Westphal, Jr., and Lawrence S. Fletcher, Deputy Attys. Gen., for respondents.

CURTIS, Justice.

This proceeding was instituted to compel by writ of mandate certain state officials in charge of the finances of the state, respondents herein, (a) to recalculate the credits to which, it is contended by petitioner, the County of Los Angeles is entitled to have credited to its account "upon each and every report of aid to needy children presented to the Respondents herein by said County of Los Angeles since September 13, 1939, and which said reports have been audited and allowed by the State Department of Social Welfare and the State Controller as proper cases of child aid; and that Respondents in the making of said recalculation shall first deduct from the total of all aid given in each individual case by the combined contribution of the state, the county and the federal government, the amount of aid granted in the particular case by the federal government, and shall then divide the remainder into thirds and shall allow to the County of Los Angeles as a credit to apply against the advances made to said county, pursuant to the provisions of subdivision (a) of section 1555 of the Welfare and Institutions Code, St.1939, p. 2846, two-thirds of said remainder unless said two-thirds shall exceed the sum of $15, in which event the credit given to the County of Los Angeles shall be $15 and no more, and that Respondents having made said recalculation as aforesaid shall thereupon forthwith allow to the County of Los Angeles as a credit to apply against the advances made to said county, pursuant to the provisions of subdivision (a) of section 1555 of the Welfare and Institutions Code, the difference between the sums so recalculated as hereinbefore provided, and the sums which said Respondents have heretofore allowed to said county as a credit against said advances by the calculations which the Respondents have heretofore made; (b) That they hereafter calculate the credits to which the County of Los Angeles is entitled upon each and every report of aid to needy children presented to the Respondents herein, pursuant to the provisions of section 1556 of the Welfare and Institutions Code, St.1939, p. 2847, by utilizing the formula of calculation hereinbefore described in subdivision (a) of this prayer."

The money provided for the support and aid of dependent or needy children in this state is derived from three different sources: the federal government, the state, and the county. That portion of said money derived from the federal government is provided in section 403 of the Social Security Act approved August 14, 1935, 49 U.S.Stats. p. 627, as amended in 1939, 53 U.S.Stats., p. 1380, 42 U.S.C.A. § 603. This section as amended in 1939, effective January 1, 1940, provides that the federal government will pay for each needy child who is the only child in one family, a sum equal to one-half of the aid granted, not to exceed, however, nine dollars for each calendar month; for each needy child in one family beyond the first child, one-half of the aid granted to each said subsequent child, not to exceed, however, the sum of six dollars for each calendar month.

In our discussion of the questions herein involved we will consider only the case where there is but one needy child in a family. The case of a subsequent child or children would be governed by the same rule, but, of course, the amounts to be paid by the federal government would be proportionately less, or two-thirds of that paid the first needy child in a family.

The support of needy children in this state by the state and several counties is governed by the provisions of the Welfare and Institutions Code (Stats. of 1937, p. 1005, Chap. 369), as amended in 1939 (Stats. of 1939, pp. 1574, 2840, Chaps. 302, 1037). It is agreed by each of the parties, however, that the proper solution of the problem before us involves the correct construction of section 1554 of the Welfare and Institutions Code, St. 1939, p. 2846. Respondents, however, suggest that this section must be construed in connection with other sections of said code, and particularly in connection with sections 1510, 1511, 1553 thereof, St.1939, p. 2842, St.1937, p. 1072. In line with this suggestion we will set forth the applicable provisions of these four sections with the purpose of construing section 1554 in the light of the other three sections.

By section 1510 "there is * * * provided * * * for the support and maintenance of needy children and to each county maintaining such needy children, aid not in excess of" fifteen dollars per month for each such needy child residing in said county.

By section 1511, as amended, it is provided: "For each needy child * * * there shall be paid the sum of twenty-two dollars and fifty cents per month, or so much thereof as is necessary for the adequate care of the child. The State shall pay 66⅔ per cent and the county shall pay 33⅓ per cent of the aid furnished for the adequate care of any needy child who has a county residence, but the State shall not pay more than fifteen dollars per month for any needy child who has such county residence.

"Any county may pay from its own funds additional sums for the care of any needy child, and the State and county may pay such aid as is needed for the adequate care of the family from other State or county funds."

Section 1553 provides, in part, as follows: "During such time as grants in aid are made available by the United States Government for aid to dependent children in this State, and accepted by this State, the State Treasurer, shall, from the sums so granted, pay to each county (a) an amount which shall be used exclusively as aid to dependent children, equal to that proportion specified by the United States Government in so granting or making the sums available, not counting so much of such expenditure with respect to any child for any month as exceeds the maximum fixed by the United States Government in granting or making such sums available * * *."

Section 1554, as amended, insofar as it relates to the question before us, reads as follows: "From the sums appropriated in section 1510 of this code, the State Treasurer shall pay to the county, for each child to whom aid is given under the provisions of this chapter, an amount not to exceed the amount appropriated for each child in section 1510 of this code. The amount to be paid by the State Treasurer for any needy child shall be computed as follows:

"(a) For each child who has residence in the State as defined by section 1525 and residence in the county as defined by section 1526 of this code, the amount granted by the United States Government and paid by the State Treasurer under the provisions of subdivision (a) of section 1553 for such child shall be deducted from the total amount granted for the child pursuant to section 1511 of this code, and two-thirds of the remaining sums shall be paid to the county by the State Treasurer. In no event shall this amount exceed the amount appropriated for a needy child by subdivision (a) of section 1510 of this code."

Taking up the first sentence of section 1554, we find it refers to section 1510 in the following language: "From the sums appropriated in section 1510 of this code, the State Treasurer shall pay to the county, for each [needy] child to whom aid is given under the provisions of this chapter, an amount not to exceed the amount appropriated for each child in section 1510 of this code." By section 1510 there is provided out of money in the state treasury for the support of and maintenance of three separate classes of needy children, not in excess of the several amounts stated therein. We are concerned only with the first class, that is, those children whose residence in the state and county entitle them to support both from the state and the county. For this class of needy children the maximum amount provided by section 1510 is fifteen dollars per month. Accordingly, the first sentence of section 1554 quoted above authorizes the payment by the state to the county for each such needy child a sum not exceeding fifteen dollars per month. Section 1554 then provides for the method of computing the amount to be paid by the state treasurer for any such needy child as follows: For each such needy child whose residence entitles it to receive both state and county aid "the amount granted by the United States Government and paid by the State Treasurer under the provisions of subdivision (a) of section 1553 for such child shall be deducted from the total amount granted for the child pursuant to section 1511 of this code, and two-thirds of the remaining sums shall be paid to the county" not exceeding the sum of fifteen dollars per month. In all cases in which there is any dispute between the county and state involved in this proceeding, this maximum amount of nine dollars federal money is conceded to be the proper amount to "be deducted from the total amount granted for the child pursuant to section 1511 of this code." The problem, therefore, before us is narrowed down to the determination of "the total amount granted for the child pursuant to section 1511 of this code," from which amount the nine dollars federal money is deducted, and two-thirds of the remaining sum shall be paid to the county by the state treasurer, not exceeding the sum of fifteen dollars per month.

The state contends that the total amount granted for the child is the sum of twenty-two dollars and fifty cents, as specified in the first paragraph of section 1511, while the county contends that in addition to the sum of twenty-two dollars and fifty cents, there is included the further sum which "any county may pay from its own funds additional sums for the care of any needy child," provided that the state in no event shall pay more than fifteen dollars per month for such support.

Let us first consider the contention of the state. If the sum of twenty-two dollars and fifty cents is the total amount granted for the child pursuant to section 1511, then by deducting from this amount the nine dollars federal money, there would remain thirteen dollars and fifty cents, two-thirds of which would be nine dollars or the state's proportion, the county paying the remaining one-third or four dollars and fifty cents. Under this construction of the section the state would never be called upon to pay more than nine dollars for the support of such needy child. If this is the correct construction of the section, why did the legislature provide therein that "the state shall not pay more than fifteen dollars per month for any needy child who has such county residence"? If the maximum amount that the state is required to pay is only nine dollars per month, what was the object of stating that it should never exceed fifteen dollars per month? Furthermore, what purpose would there be in appropriating fifteen dollars per month for the support of a needy child in one section of this code, and in another limiting the amount that may be expended for that purpose to nine dollars per month? The only explanation the state makes to this unusual condition is that the federal aid is not granted to needy children cared for in private institutions, and aid for such children falls entirely on the state and county, and when the sum of twenty-two dollars and fifty cents, the maximum amount granted for aid to needy children, is given to children cared for in private institutions, said sum is divided between the state and county on the basis of two-thirds or fifteen dollars to be borne by the state and one-third or seven dollars and fifty cents to be borne by the county. Section 1554, which, it is agreed by each party to this action, determines and fixes the maximum amounts to be paid by the state and county, respectively, for aid of needy children, requires that from the total amount of aid granted there shall be deducted the amount granted by the United States Government, and after specifying the several amounts which the state and county shall contribute, it expressly provides that in no event shall the amount paid by the county exceed the sum of fifteen dollars per month, provided for by section 1510. Returning to section 1511, from the discussion of which we digressed to make the above reference to section 1554, there is the same limitation upon the amount the state may contribute in section 1511, as just noted in section 1554, that is, a maximum amount of fifteen dollars per month.

It appears, therefore, that the legislature expressly appropriates the sum of fifteen dollars per month in section 1510 for aid rendered to needy children possessing the required state and county residence; and just as positively in sections 1511 and 1554 limits such aid to the maximum amount of fifteen dollars per month for each such child. In the face of the positive provisions of these sections the state contends that the said sum of fifteen dollars per month can only be paid for aid rendered to that limited class of needy children maintained in private institutions and for whose support the federal government does not participate. We are unable to agree with this contention, as such a construction of these sections of the code seems unreasonable and not sustained by the various express provisions thereof set forth above.

[1, 2] The county, on the other hand, contends that the words "from the total amount granted for the child pursuant to section 1511," as found in section 1554, include not only the twenty-two dollars and fifty cents mentioned in the first paragraph of section 1511, but such additional sums as the county may pay from its own funds for the support of a needy child as authorized in the second paragraph of said section, provided that "the state shall not pay more than fifteen dollars per month for any needy child." When construing section 1511 as a whole, as it is our duty to do, we think the position of the county must be sustained. As stated before, if we take the amount of twenty-two dollars and fifty cents as "the total amount granted for the child pursuant to section 1511," the state can never be called upon to pay more than nine dollars per month. If the state can be called upon to pay only nine dollars per month, as provided in the first sentence of the first paragraph of this section, why the necessity in the second sentence of this paragraph of placing a limitation of fifteen dollars per month on the state's share of this expense? This maximum amount of fifteen dollars which the state is authorized to pay can only arise when the cost of maintenance exceeds the sum of twenty-two dollars and fifty cents, and the requirement thereof that the state should not pay more than fifteen dollars per month for the support of a needy child is inconsistent with the construction which the state places upon the preceding provision fixing the maximum amount the state is required to pay at nine dollars per month. Such a construction, which fixes said maximum amount at nine dollars, would be inconsistent with the provisions of section 1510, by the terms of which the state has appropriated fifteen dollars per month for the support of needy children having the proper state and county residence.

Another consideration which not only supports the conclusion just stated, but which renders such conclusion practically conclusive is the exact wording of section 1554. It will be noted that this section expressly states that the amount granted by the United States Government is first to be deducted from "the total amount granted * * * pursuant to section 1511 of this code." There is no dispute but that by the first paragraph of section 1511 the state and county are granted authority to contribute toward said support the sum of twenty-two dollars and fifty cents, mentioned in the first paragraph of said section. It is equally clear that by the second paragraph of said section the county is given authority to pay from its own funds additional sums for the care of any needy child. So far as we are informed this is the only law of this state which authorizes a county to contribute to the support of such a needy child. Therefore, these "additional sums" are granted by the county pursuant to section 1511; so that not only the sum of twenty-two dollars and fifty cents provided for in the first paragraph of said section is granted pursuant to section 1511, but the additional sums provided for in the second paragraph of said section which a county may pay from its own funds also are granted pursuant to section 1511. These two amounts must be combined for the purpose of determining the "total amount granted * * * pursuant to section 1511," and this total amount less the nine dollars contributed by the United States Government must be paid by the state and county in the proportion set forth in section 1554 provided the county shall not pay more than fifteen dollars per month for the support of such needy child. In our opinion the words fixing "the total amount granted * * * pursuant to section 1511" can be given no other construction. We are, therefore, of the conclusion that by following the construction contended for by the county we obtain the correct formula to determine the respective amounts which the state and county must pay for aid rendered to such needy children.

It is argued that the total amount contributed by the county under section 1511 cannot be included in the computation contemplated by section 1554 for the reason that section 1511 designates appropriations made by a county "from its own funds." If the total amount of such appropriations were included in the base the county would be reimbursed by the state to the extent of ⅔ and the appropriation could not therefore be said to be out of its own funds. Section 1554, however, in fixing the proportion that state and county shall ultimately bear and in providing the base figure, i. e., total amount under 1511, necessarily contemplates that the county is to be reimbursed to the extent authorized by section 1554 for amounts that it has advanced out of its own funds.

The present proceeding, as we have seen, is one in mandamus to compel the respondents, officers of the state, to recalculate the credits to which petitioner alleges the County of Los Angeles is entitled, upon certain reports of aid to needy children, and thereupon to allow the County of Los Angeles a credit equal to the difference between the sums so recalculated and those previously calculated by respondents, and that the respondents hereafter calculate the credits to which petitioner contends the county is entitled upon like reports which may in the future be made by the petitioner to respondents, by using the county formula hereinbefore referred to. It is the contention of respondents that the present proceeding in mandate will not lie for the reason that the obligation of the state to pay the county for the maintenance of needy children under the provisions of the Welfare and Institutions Code is in the nature of a contract, that under the provisions of section 688 of the Political Code the county is given the right to sue the state upon said contract, and that the petitioner is barred from maintaining this action to recover the sums claimed to be due prior to the filing of this action by its failure to present any claim for said sums to the State Board of Control, as required by section 688 of the Political Code.

By reference to section 688 it will be seen that it is provided therein, among other things, that any person having a claim on an express contract must present the claim to the State Board of Control, and on its disallowance by the Board of Control the person is given authority to bring suit against the state on such claim. It is conceded that the petitioner has not presented any claim to the Board of Control for any money claimed to be due it from the state on account of aid furnished to needy children as set forth in its petition herein.

In support of their contention just stated, respondents rely upon the case of County of San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174. That action was instituted by the County of San Luis Obispo against the State Board of Examiners to obtain a writ of mandate compelling the board to allow and approve certain claims in favor of the county against the state for money alleged to have been expended by the county for the maintenance of orphans, half-orphans, and abandoned children, residents of the county, under the provisions of an act of the Legislature of date March 25, 1880. Stats. 1880, p. 13. It was held in that action that a claim against the state for the maintenance of orphans, half-orphans, etc., under said act is a claim resting upon contract within the meaning of the act of 1893 (Stats.1893, p. 57), and no action could be maintained on said claim unless it was presented to the Board of Examiners (the predecessor of the present Board of Control), as provided in said act. From this statement of that case respondents contend that the petitioner had an adequate remedy at law for the recovery of any amounts due it and therefore mandamus will not lie to compel the respondents to perform the duties which the petitioner alleges they are required by law to perform.

[3-7] The act of 1893 permitted any person who had a claim on contract or for negligence against the state to bring suit thereon against the state. The authority to sue the state is now found in section 688 of the Political Code which provides that "Any person who has * * * a claim on *express* contract or for negligence against the State * * * is hereby authorized * * * to bring suit against the State on such claim." (Italics ours.) It will be noted that under the present statute the right to sue the state on a contract is limited to *express* contracts. The obligation of the state to reimburse counties for aid furnished by the latter to needy children is imposed by statute. Statutes authorizing persons to sue the state being in derogation of sovereignty are strictly construed. 23 Cal.Jur. 578; Miller v. Pillsbury, 164 Cal. 199, 128 P. 327, Ann.Cas.1914B, 886; State of California v. Royal Consolidated Mining Co., 187 Cal. 343, 202 P. 133. It follows therefore that petitioner is not given permission by section 688 of the Political Code to bring suit on its present claim against the state. Accordingly, it is without legal remedy to enforce its claim. It may therefore resort to this statutory remedy of mandamus to compel the respondents as officials of the state to perform the duties enjoined upon them by law. The rule is well established in this state that where the action is one simply to compel an officer to perform a duty expressly enjoined upon him by law, it may not be considered a suit against the state. 23 Cal.Jur. 583; Board of Directors v. Nye, 8 Cal.App. 527, 97 P. 208; Kingsbury v. Nye, 9 Cal.App. 574, 99 P. 985; U'Ren v. State Board of Control, 31 Cal.App. 6, 159 P. 615. As the present action is not one against the state, the provision of section 688 of the Political Code, requiring the presentation of a claim to the Board of Control as a prerequisite to the institution of suit, has no application to actions of this character. The action was properly commenced and petitioner has the legal right to maintain the same.

For the reasons stated above, we are of the opinion that the writ prayed for herein should issue. It is therefore ordered that a writ of mandate issue out of this court directed to the respondents as prayed for by petitioner.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, Justice (dissenting).

Although I agree with the mathematical result reached in the opinion of my associates, I cannot concur in their construction of the applicable sections of the Welfare and Institutions Code.

By section 1510, there is provided, out of money in the state treasury not otherwise appropriated, to each county maintaining needy children aid not in excess of $15 per month. The next section fixes the amount of the total aid at $22.50 per month "or so much thereof as is necessary for the adequate care of the child," of which the state shall pay two-thirds and the county one-third, the maximum liability of the state being $15 per month. But under this section "any county may pay from its own funds additional sums for the care of any needy child."

Although before 1937 the state had reimbursed the counties for part of the amount expended by them in the care of needy children, the present plan for supporting these persons was adopted in 1937 when the Welfare and Institutions Code was enacted. Unquestionably, in fixing the amount to be appropriated, the legislature took into consideration the then and present policy of the federal government, for section 1553 provides that "During such time as grants in aid are made available by the United States Government" the state treasurer shall pay to each county the specified amount "which shall be used exclusively as aid to dependent children." And the next section carries the amount of the federal aid into the formula by which the state's proportion of the total cost shall be determined. First, the amount of federal aid "shall be deducted from the total amount granted for the child pursuant to section 1511 * * * and two-thirds of the remaining sums (not in excess of $15 per month) shall be paid to the county by the State Treasurer."

Under these provisions, as I read them, the aid for dependent children is made up of money appropriated by the federal government, the state, and the county in specified amounts, and, insofar as aid over a total of $22.50 per month is concerned, in determining the amount which the county shall contribute, it is necessary to determine how much of that excess it has paid "from its own funds." Under the construction adopted by my associates, in the event that the county paid a total of $36 per month "for the adequate care of the child" or $13.50 more than the basic amount of $22.50, in making its settlement the state would first deduct the federal aid of $9 per month at the present rate. But as two-thirds of the remainder, $27, amounts to more than $15, the state's proportion would be limited to that amount. The result would be that the county had added $13.50 to the $22.50 base aid but eventually only had to pay $12 of that amount.

A more logical construction, it seems to me is to say that the federal aid is never a part of the county's "own funds," but that it is a component part of the total aid given to the dependent child. On this basis, and using the same example, the county, with the knowledge that it will receive $9 of federal aid for each dependent child, decides that it will use that amount and $4.50 of its own funds to make up $36 for "adequate care." The state would pay to the county the $9 of federal aid and its own proportion of $15. The balance, or $12, represents the county's proportion of $7.50 of the basic aid of $22.50, plus the additional $4.50 which it has paid "from its own funds." This construction harmonizes the language found in each pertinent section of the code.

But if the obligation of the state to reimburse counties for aid furnished by the latter is an implied contract, then the writ should require the respondents to recalculate the petitioner's accounts for the period of two years prior to the commencement of this proceeding. Code Civ.Proc. § 339.

The nature of the right asserted in a mandamus proceeding determines which statutory provision, in regard to limitation of actions, applies. Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 116 P.2d 37, 136 A.L.R. 800.

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54 Cal.App.2d 36

Ex parte CASE.

Cr. 3632.

District Court of Appeal, Second District, Division 2, California.

Aug. 13, 1942.

Guardian and ward ⚿4, 25

An order revoking letters of guardianship and restoring custody of minor child to his father was "self-executing" and the father in assuming custody of the child acted in the proper exercise of his duties as the natural guardian of the child.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing".

◆

Habeas corpus proceeding to secure custody of Louis H. J. Case, a minor.

Writ discharged.

William Bronsten, of Los Angeles, for petitioner.

Jack W. Walling and C. E. Christopher, both of Alhambra, for respondent.

PER CURIAM.

This matter came on for hearing upon the writ of habeas corpus issued on the 6th of August, 1942.

From the findings and decision on file it appears that the subject has been for some years the ward of Clara Rungie, and that on the 28th day of July, 1942, her letters of guardianship were revoked and it was ordered that the custody of the child be restored to his father, Howard L. Case. Inasmuch as such order was self-executing, the father acted in the proper exercise of his duties as the natural guardian in assuming custody of the child. Hibernia Savings & Loan Society v. Belcher, 4 Cal.2d 268, 273, 48 P.2d 681.

The writ is therefore discharged.

53 Cal.App.2d 625

HALL et al. v. CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES et al.

Civ. 12010.

District Court of Appeal, First District, Division 2, California.

July 28, 1942.

As Modified Aug. 26, 1942.

Hearing Denied Sept. 24, 1942.

1. Abatement and revival 🔑35

Revival of corporation's suspended corporate powers after interposition of, but before hearing on, plea in abatement, raising question of corporation's incapacity to maintain action commenced during period of such suspension, was sufficient avoidance of plea.

2. Mortgages 🔑338
Trusts 🔑94

A corporation, to which land was conveyed on understanding that it would issue all of its stock to grantors concurrently, became "constructive trustee" for grantors on total failure of consideration for deed because of revocation of corporation's permit to issue stock before transfer thereof to grantors, so that they were "real parties in interest" and "proper parties plaintiff" in suit to enjoin trustee's sale under trust deed securing corporation's note for money subsequently borrowed by it from bank.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Trustee", "Proper Parties Plaintiff" and "Real Parties in Interest".

3. Parties 🔑14

A corporation, asserting any actual interest in land conveyed to it, would be "proper party defendant" in grantor's suit to enjoin trustee's sale of land under trust deed, and hence may be brought before court as party plaintiff, in absence of objection by corporation, regardless of effect of its reconveyance of land to grantors during period of suspension of corporation's powers.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party Defendant".

4. Judgment 🔑256(2)

In suit by two individuals and corporation to enjoin trustee's sale of land, which court found that individual plaintiffs owned, provision of judgment for plaintiffs that each of them was entitled to have trustee perform duties imposed thereon by trust declaration was erroneous with respect to corporation as not supported by fact findings.

5. Banks and banking 🔑63½

The authority of superintendent of banks to dispose of assets of bank taken over for liquidation is not limited to sale thereof, but extends to transfer of bank's beneficial interest in trust declaration to corporation in compromise of litigation instituted thereby against superintendent as liquidator of bank. St.1909, p. 87; St.1929, p. 471, § 136.

6. Banks and banking 🔑63½

In proceedings for liquidation of bank, authority of superintendent of banks emanates entirely from provisions of Banking Act, but they must be given liberal, not strict, construction. St.1909, p. 87.

7. Banks and banking 🔑63½

Inadequacy of notice of hearing on petition of superintendent of banks for authority to execute assignment of insolvent bank's beneficial interest in trust declaration to corporation in compromise of litigation instituted by it against superintendent as such bank's liquidator does not render order authorizing such assignment subject to collateral attack. St.1909, p. 87.

8. Banks and banking 🔑63½

A description of trust declaration by date, trustee's name and trust number in court's order, authorizing superintendent of banks to transfer insolvent bank's beneficial interest in such declaration to corporation in compromise of liquidation instituted thereby against superintendent as bank's liquidator, was sufficient to enable court to identify trust property and hence not inadequate.

9. Banks and banking 🔑63½

The description of trust property in petition by superintendent of banks for authority to transfer insolvent bank's beneficial interest in trust declaration to corporation in compromise of litigation instituted thereby against superintendent as bank's liquidator is sufficient, if it contains reasonable means for identification of property.

10. Mortgages 🔑105

A trust declaration and trust deed, given to secure same obligation as part of same transaction, must be construed together, but all provisions of each must be given full effect, except insofar as they may be completely repugnant.

11. Mortgages ⟹333

Where trust declaration and trust deed, given to secure same obligation as part of same transaction, each contained express provision for sale of trust property in case of default in payment of principal, interest or taxes, court's finding that trustee had no power to declare default under trust declaration for such failure because any such default could be remedied solely by sale under trust deed was erroneous, as fact that the two instruments contained cumulative remedies for same defaults did not constitute irreconcilable repugnancy between them.

12. Mortgages ⟹335

Amendments of trust declaration by merely reducing release prices of various parts of trust property cannot be construed, under guise of "estoppel", as extending maturity of note secured by such declaration and trust deed, though parties may have waived past defaults by executing amendments.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

13. Mortgages ⟹335

Where owners of trust property were in default in payment of taxes and interest, as required by trust declaration, when corporation, to which insolvent bank's beneficial interest in declaration was transferred by superintendent of banks, notified trustee not to permit sales of such property without corporation's approval, such owners were not entitled to benefit of declaration and notice did not constitute breach of agreement, so that trustee and such corporation were not "estopped" to assert such defaults.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

14. Mortgages ⟹48(1)

References in trust declaration and trust deed to date and place of record of deed describing trust property constituted sufficient description thereof.

15. Mortgages ⟹338

Where remedies under trust declaration and trust deed for same defaults were cumulative, judgment enjoining trustees' sale of trust property was not erroneous as against trustee under trust deed, though complaint alleged that such trustee was not threatening to sell under such instrument, as beneficiary's threat to require sale under trust declaration was in substance equally a threat to demand sale under trust deed.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Frank D. Hall and others against the Citizens National Trust and Savings Bank of Los Angeles and others for injunctions against trustees' sale of trust property and declaration of default in payment of principal of or interest on indebtedness secured by a trust declaration and trust deed. Judgment for plaintiffs, and defendants appeal.

Reversed.

Hearing denied; EDMONDS, J., not participating.

Richard L. North, of Los Angeles, Rosenshine, Hoffman, Davis & Martin and Elbert W. Davis, all of San Francisco, and Arch H. Vernon, Earl E. Johnson and Gilbert E. Harris, all of Los Angeles, for appellants.

Goudge, Robinson & Hughes and David A. Sondel, all of Los Angeles, and Hagar, Crosby & Crosby, of Oakland, for respondents.

NOURSE, Presiding Justice.

Defendants have appealed from a judgment perpetually enjoining a proposed trustee's sale pursuant to a notice of sale theretofore given; and temporarily enjoining any such sale under either a declaration of trust or a deed of trust securing the same obligation for a period of one year from the date of entry of the judgment for failure to pay interest between February 9, 1939, and November 13, 1939, or subsequent to entry of the judgment and enjoining them for eighteen months subsequent to entry of the judgment from declaring any such default for failure to pay principal or interest prior to February 9, 1939, or between November 13, 1939, and entry of the judgment, or for failure to pay taxes prior to the entry of judgment. The judgment further declared that appellant Pacific States Corporation had not and never had had any interest in said declaration of trust or said deed of trust or in the obligations secured thereby.

The property encumbered by the instruments involved consisted of 300 acres in

Leona Valley, Los Angeles County. Prior to January 13, 1927, it had been owned by respondents Frank D. Hall and Marguerite S. Hall, his wife (hereinafter collectively designated as "the Halls"); on the last mentioned date the Halls caused respondent corporation (hereinafter designated "Farm Builders") to be incorporated for the purpose of holding legal title to the land which was thereafter transferred to said corporation, upon the understanding that it would issue to the Halls all of its capital stock. A permit to issue the stock in exchange for the land was obtained but was revoked before the stock had been transferred and on December 12, 1932, Farm Builders purported to re-transfer the property to the Halls.

On July 30, 1927, Farm Builders borrowed $45,000 from Pan American Bank of California (hereinafter designated "Pan Am. Bank") evidenced by its promissory note payable on July 30, 1932, and secured by the deed of trust wherein Title Insurance and Trust Company (hereinafter designated "Title Co.") was trustee. Concurrently, Farm Builders entered into a declaration of trust with Pan Am. Bank wherein the latter was trustee and a beneficiary. On December 2, 1929, this was supplanted by declaration of trust No. 5873 wherein Citizens National Trust and Savings Bank (hereinafter designated "Citizens Bank") was trustee and Pan Am. Bank was a beneficiary. By liquidation proceedings commenced July 19, 1929, the superintendent of banks of California took over Pan Am. Bank. On January 7, 1930, the superintendent, through a deputy, executed a grant deed to Citizens Bank.

Declaration of trust 5873 provided for release prices of the lots comprising the encumbered property. On October 28, 1935, it was amended to reduce the release prices; this amendment was executed by Farm Builders, the Citizens Bank as trustee, and Pan Am. Bank in liquidation, but not by the Halls. On February 9, 1939, the declaration was again amended to further reduce the release prices; this amendment was executed by the same parties; however, it was also signed by the Halls though they were not named as parties.

Farm Builders' corporate powers were suspended June 26, 1930, and were not revived until November 22, 1940. (The transfer from Farm Builders to the Halls, the two amendments of October 28, 1935, and December 9, 1939, of the declaration of trust No. 5873, and the commencement of this action all occurred during the period of suspension.)

On November 2, 1939, in the proceedings for the liquidation of Pan Am. Bank the court, after petition filed on October 27, 1939, followed by five days notice by posting, authorized the superintendent of banks to transfer to Pacific States Corporation, among other assets, all the beneficial interest of Pan Am. Bank in declaration of trust 5873 in compromise of certain litigation instituted against him as liquidator of Pan Am. Bank by said Pacific States Corporation. On the same day the superintendent purported to make said transfer. On November 13, 1939, Pacific States Corporation notified Citizens Bank not to permit sales under the declaration of trust (pursuant to the release provisions) without its approval and thereafter Pacific States Corporation and Citizens Bank refused to approve sales. On June 4, 1940, Pacific States Corporation directed Citizens Bank to declare all obligations under the declaration of trust due and proceed to a trustee's sale. Notice of sale was given on July 3, 1940, and the sale was noticed for November 13, 1940. This action was commenced November 4, 1940.

The permanent injunction was based upon the finding that the transfer to Pacific States Corporation was void because (1) the superintendent of banks lacked the power to make such a transfer, (2) the notice of hearing of the petition was inadequate, and (3) the description of the declaration of trust was defective, and that therefore said corporation could not properly require either of the trustees to proceed to a sale; and upon the further finding that the declaration of trust (despite contrary express provision) did not authorize a sale for failure to pay principal or interest so that appellant Citizens Bank lacked authority to proceed on its own initiative as trustee.

The injunction for the limited period was based upon alleged estoppels to assert the defaults mentioned and claimed to arise out of the amendments of the declaration of trust and the notice of November 13, 1939, from Pacific States directing that further sales under the release provisions not be made. The court declined to make any finding as to the amount due for principal, interest and taxes.

Appellants first contend that respondent Farm Builders lack capacity to maintain the action because of the suspension of its corporate powers and that the Halls could not maintain the action because the deed from Farm Builders to them was void, having been executed during such period of suspension.

[1] The action, as aforesaid, was commenced November 4, 1940, and the corporate powers were revived November 22, 1940, subsequent to the filing of the answer but before trial of the cause. The precise question presented is whether a revival subsequent to the interposition of a plea in abatement raising the question, but before the hearing of the plea, is a sufficient avoidance of the plea.

Commencement of the action during the period of suspension is not a nullity and a revival of the corporate powers prior to the interposition of the plea is sufficient. Maryland Casualty Co. v. Superior Court, 91 Cal.App. 356, 267 P. 169. Appellants do not question this rule; it is their contention that the revival must come before the defendants have raised the point. It is true that language used in some cases would support that view but each of the cases cited by appellants is quite clearly distinguishable.

Boyle v. Lakeview Creamery Co., 9 Cal. 2d 16, 68 P.2d 968, did not involve the question of revival of corporate powers at all. In Smith v. Lewis, 211 Cal. 294, 295 P. 37, the court was concerned with the validity of a judgment made and entered prior to a revival of the plaintiff's corporate powers; even on that question the language is dictum insofar as the opinion expressly states that there was nothing in the record to show that there had been a revival at any time. In Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446, the court held that the filing of a notice of intention to move for a new trial is jurisdictional for the hearing of the motion and that a notice given during the suspension was not validated by a subsequent revival prior to the hearing. That case is not analogous for, as is pointed out above, the filing of an action during a period of suspension is not a nullity. The distinction of Ransome-Crummey Co. v. Superior Court made by this court in Maryland Casualty Co. v. Superior Court, supra, is equally applicable here. Cleveland v. Gore Bros., Inc., 14 Cal.App.2d 681, 58 P.2d 931, is most nearly parallel to this case and is primarily relied upon by appellants. However, the holding in that case must be confined to the facts there presented. That action was commenced during the period of suspension; shortly thereafter the period of the statute of limitations expired; the defendants in their answer pleaded the suspension of the corporate powers. After the running of the statute and the filing of the answer the corporate powers were revived. The court held that the revival could not be given a retroactive effect so as to permit the filing of the action at a time of incapacity to toll the running of the statute of limitations; it was the intervening fact of the expiration of the statute of limitations that controlled the decision. In truth the plea was not one in abatement but a defense to the action on the merits.

The question presented is controlled by the decision in Rudneck v. Southern California M. & R. Co., 184 Cal. 274, 193 P. 775, wherein the court held that the publication of a certificate of co-partnership subsequent to the filing of an answer pleading the failure to file the same but prior to the trial of the case would defeat the plea. At page 282 of 184 Cal., at page 778 of 193 P. the court said: "The rule is also settled that it is not necessary that the plaintiffs have complied with the statute at the time of the commencement of the action; that it is sufficient if they have done so at the time at least when issue as to the matter of abatement is made. California [Savings & Loan] Society v. Harris [111 Cal. 133, 43 P. 525], supra; Ward, etc., Co. v. Mapes [147 Cal. 747, 752, 82 P. 426], supra; Roullard v. Gray, 38 Cal.App. 79, 175 P. 479. We have no hesitation in extending this rule so as to make it sufficient if there be a compliance with the statute before trial upon the issue. It is well settled that a plea by way of abatement of another action pending will be avoided by proof that the other action is no longer pending at the time of trial, although it may have been pending when the plea was made. Collins v. Ramish [182 Cal. 360, 188 P. 550], supra, and authorities there cited. The reasoning of the decisions we have cited, beginning with California, etc., Society v. Harris, holding that in such a case as the present a compliance with the statute is sufficient if accomplished before objection is made that it has not been accomplished, proceeds upon the analogy between such a defense and one of another action pending. We see no reason for not following the analogy throughout and holding that in the case of one, as well as in that of the other, the defense fails if it appear at the time of the trial that the matter of abatement no longer exists. In fact, it would seem difficult to reconcile First Nat. Bank v. Henderson, 101 Cal. 307, 35 P. 899, with any other view. In that case a judgment in favor of a banking corporation, as plaintiff, had been given, and an appeal was taken on the ground that the defendant had pleaded and proved that the plaintiff had not filed with the county recorder certain statements which it was required by statute to file as a condition of its right to maintain an action. Pending the appeal, the statute imposing the condition was repealed, and this being made to appear to the Supreme Court, it was held that the ground of defense was removed, and the judgment for the plaintiff was affirmed, although the fact that the plaintiff had not complied with the statute plainly appeared. If the removal of the ground of such a defense after judgment is sufficient to justify a disregarding of the defense upon appeal, we can see no reason for not disregarding a very similar defense in the present action, if at the time of trial it appears that the ground for it no longer exists." The failure to publish articles of co-partnership and the suspension of corporate powers, insofar as the maintenance of an action is concerned, are attended by the same penalties or disabilities and no reason suggests itself why any different rule should be applied to one than to the other, and we therefore conclude that the revival of the corporate powers before the trial of the case was sufficient to permit respondent Farm Builders to maintain the action.

[2] Respondents argue that, irrespective of the validity of the deed, there having been a total failure of consideration for the prior deed from the Halls to Farm Builders, the latter held the property as a constructive trustee; that the Halls are therefore the real parties in interest and proper parties plaintiff. Appellants argue that there was no constructive trust because a failure of consideration is not proper grounds for rescission of a conveyance of real property, and rely upon Schott v. Schott, 168 Cal. 342, 143 P. 595, and Williams v. Reich. 123 Cal.App. 128, 10 P.2d 1030. The first of these cases involved a conveyance in consideration of a promise of future support, and the latter a conveyance in consideration of a promise to marry in the future; in neither was fulfillment of the promise expressly made a condition subsequent. These cases, as well as the many decisions in other jurisdictions to the same effect, are quite patently distinguishable from the situation here presented. In this case the conveyance by the Halls to Farm Builders was intended to be concurrent with the issuance to them of the corporate stock; the failure to deliver the stock did not therefore involve a breach of a promise to be performed in the future but, to the contrary, a failure of an implied condition to the validity of the conveyance. This distinction is recognized in Lawrence v. Gayetty, 78 Cal. 126, at page 133, 20 P. 382, 385, 12 Am. St.Rep. 29, where the court says: "It must be borne in mind that the plaintiff did not contract to convey upon the performance of the contract on the part of the defendants; therefore his promise was not dependent upon theirs * * *." Here the Halls did agree to convey upon issuance of the stock. Therefore their conveyance was dependent upon issuance of the stock.

Appellants do not contend that if the Halls had a right to rescind they are not proper parties; however, they do contend that independent of the question of law just discussed there was no evidence of the facts upon which respondents predicate their argument and no finding by the court that such were the facts. With respect to the lack of a finding appellants are in error. The court did so find in the first paragraph of finding numbered I. In their brief respondents have not indicated any evidence which would support this finding nor have we found such. However, in open court, prior to the introduction of evidence, appellants admitted by stipulation the allegations of paragraph I of the complaint wherein respondent had alleged the transfer from the Halls to Farm Builders and the subsequent revocation of the permit to issue stock, except that portion alleging the execution of the deed from Farm Builders to the Halls. As is above pointed out, the Halls rely upon their equitable interest in the property to maintain the action so that even if it be conceded that the portion of the finding referred to, wherein the court finds that Farm Builders had deeded to the Halls, is entirely lacking in evidentiary support nonetheless the remainder of the finding, which is supported by the admission just referred to, is a sufficient factual basis for respondents' argument in this connection. Though it is true that defendant Title Co. in its answer denied those allegations of the complaint, they did join in the stipulation referred to.

[3, 4] On this phase of the case there remains only the question whether Farm Builders is a proper party plaintiff. Regardless of the effect of the conveyance from Farm Builders to the Halls, if the former were asserting any actual interest there can be no doubt that it would be a proper party defendant. So long as the corporation does not object it can as well be brought before the court as a party plaintiff. California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 744, 91 P. 593. However, the first finding is that the Halls are the owners of the property while the judgment is in favor of the plaintiffs and each of them. The error in awarding plaintiff Farm Builders injunctive relief might be harmless insofar as it would not impose any different or further restrictions on the defendants than the identical judgment in favor of the Halls alone, but the judgment here goes further. The judgment provides that each of the plaintiffs is entitled to have defendant Citizens National Bank perform the duties imposed upon it by the declaration of trust; this provision with respect to Farm Builders is clearly not supported by, and is contrary to the findings of fact, and is therefore error.

As already stated the holding that Pacific States was not the owner of the promissory note involved or of the beneficial interests in the deeds of trust securing the same, is based upon three grounds: (1) that the superintendent of banks had no authority under the Banking Act to execute the transfer; (2) that the notice of hearing of the petition for authority to make the transfer was insufficient; and (3) that the description of the declaration of trust in the order authorizing the transfer was insufficient.

[5, 6] Respondents seek to sustain the first point upon the theory that the authority of the superintendent of banks is limited to those powers contained in the Banking Act, St.1909, p. 87, and that under the Act the superintendent's authority to dispose of assets is limited to a sale thereof. Numerous authorities are cited and lengthy argument is addressed to the contention that this transaction was not a sale. But the appellants do not attempt to sustain the transaction upon the ground that it was a sale. However, we cannot agree with the contention that the authority of the superintendent of banks is so limited. Such a construction of the Act would threaten if not defeat the objectives sought to be accomplished by the provisions for the liquidation of insolvent banks. It may be conceded that in liquidation proceedings the authority of the superintendent of banks emanates entirely from the provisions of the Act but those provisions are to be given a liberal and not a strict construction. Wilson v. Superior Court, 2 Cal.2d 632, 43 P.2d 286; Evans v. Superior Court, 14 Cal.2d 563, 572, 96 P.2d 107. It is true that those cases involved the powers of the commissioner under the Building and Loan Act but no reason is suggested why a different rule of construction should apply here. In fact, in liquidation proceedings the powers conferred by the respective acts are remarkably similar. In applying the same rule of construction to a Banking Act the court in Ex parte Smith, 160 Ky. 83, 169 S.W. 582, 584, said: "The Banking Act confers upon the commissioner extraordinary powers; and it should be given a broad and liberal interpretation."

Section 136 of the Bank Act provides in part as follows: "* * * the superintendent of banks shall have authority to collect all moneys due to such bank and do such other acts as are necessary or expedient to collect, conserve or protect its assets, property and business, and shall proceed to liquidate the affairs thereof as hereinafter provided. * * * The superintendent of banks may sell any real or personal property of such bank on such terms as the court shall direct or approve. * * *

"For the purpose of executing and performing any of the powers and duties hereby conferred upon him, the superintendent of banks may * * * execute, acknowledge and deliver any and all deeds, assignments, releases and other instruments necessary and proper to effectuate any sale of real or personal property or other transaction in connection with the liquidation of said bank * * *." St.1929, p. 471.

In Re Liquidation of Cashmere State Bank, 169 Wash. 258, 13 P.2d 892, in holding that similar general powers authorized the bank examiner to negotiate a loan from the Reconstruction Finance Corporation to be secured by the bank's assets, in order to obviate the necessity of a forced liquidation of "frozen" assets, the court at page 894 of 13 P.2d, said: "Whatever, therefore, may be reasonably necessary in order to enable the state supervisor of banking to properly function and finally to effect as great and speedy a return as possible, to those entitled thereto, may be said to be included within the preservation and administration of the bank's assets. What is necessary to preserve and administer such assets must necessarily be a matter for the state supervisor to determine in the first instance, subject, however, to the approval of the court." In Lummus Cotton Gin Co. v. Taylor, 188 Ark. 100, 64 S.W.2d 90, it was held, under provisions of a Banking Act almost identical to ours, that the bank commissioner was authorized to exchange notes and other property of an insolvent bank for claims against the bank.

[7] The trial court also found that the notice of the hearing on the petition for authority to execute the assignment to Pacific States was insufficient. Even if it be assumed that notice was required and that the specified notice was not adequate, that fact does not render the order subject to collateral attack. The court by the express terms of the Banking Act had jurisdiction of the liquidation proceedings, so that the language of the court in Zilmer v. Gerichten, 111 Cal. 73, at page 77, 43 P. 408, at 409, is applicable: "Conceding, however, that the proceeding for confirmation of the sale was irregular, as claimed, and that notice of the sale was not published for the time required by the order of court, yet these irregularities or errors in the exercise of unquestionable jurisdiction would not invalidate the sale nor the administrator's deed to the extent of making them vulnerable to the collateral attack, made upon them in the court below." See, also, Weadon v. Shahen, 50 Cal.App.2d 254, 123 P.2d 88. Moreover, it is doubtful that any notice was required for, as said in Dugger v. Cox, 6 Cir., 110 F.2d 834, 836, where the court was considering similar provisions of the National Bank Act, 12 U.S.C.A. § 192: "The Statute does not contemplate notice to those interested and there are none of the essentials of a controversy, the proceedings lacking judicial characteristics." To the same effect is Fifer v. Williams, 9 Cir., 5 F.2d 286. The last mentioned case is a complete answer to respondents' contention that the proceedings for authority to execute the assignment constituted a trial. The holding of the court was expressly to the contrary.

[8, 9] Nor can the finding of the lower court be sustained upon the ground that the description of the trust instrument was inadequate. The declaration of trust was described by date, the name of the trustee, and the trust number; it may be that a more precise description could have been given but what was in fact given was sufficient to enable the court to identify the property. It should be noted the lower court found that the description in the petition and order was defective. Title did not pass by virtue of the order but by the assignment authorized. In the petition it was sufficient if the description contained reasonable means for identification of the property. For these reasons the lower court was in error in holding that the Pacific States had no interest in the trust instrument, and, since the Pan Am. Bank had parted with its entire interest in the declaration of trust, it is unnecessary to consider appellants' contention that the court erroneously adjudicated its rights thereunder.

[10, 11] The trial court concluded that the Citizens Bank as trustee was without power to declare default under the declaration of trust for failure to pay principal, interest, or taxes, for the reason that any default in respect to those matters could be remedied solely by a sale under the deed of trust. Each of the instruments contains express provisions for a sale in the case of such defaults. No evidence has been alluded to nor has any been found in the transcript concerning the construction of these provisions, nor has authority been cited or found. Having been given to secure the same obligation and as part of the same transaction the two instruments are to be construed together, but all the provisions of each must be given full effect except insofar as they may be completely repugnant. That the two instruments contain cumulative remedies for the same defaults, that is, a sale by either of two different trustees, certainly is not an irreconcilable repugnancy. It may be that the interpretation of the trial court is consistent with the intention of the parties but there being no repugnancy and the provisions for sales being clear and unambiguous there is no room for judicial

construction. The finding of the trial court was error.

[12, 13] In support of the findings that appellants are estopped to assert default for periods of twelve months and eighteen months respondents rely upon the amendments of the declaration of trust and the notice of November 13, 1939, from Pacific States to Citizens Bank not to permit sales without the approval of the former. Respondents refer to other "numerous and varied acts of the parties" but, except for the amendments and notice just referred to, these acts did not amount to more than a mere forbearance. The amendments merely reduced the release prices of the various parcels of the property; it may be that by executing the instruments the parties waived past defaults but they cannot, under the guise of an estoppel, be construed to be an extension of the maturity of the note. As said in Rottman v. Hevener, 54 Cal.App. 474, at page 481, 202 P. 329, at page 332: "In taking leave of this question, it may indeed be said that if the doctrine of estoppel were extended to cover a situation such as we have here, it would subvert the salutary rule that a written contract must prevail over previous verbal arrangements, as well as the rule that a written contract can be altered only by a contract in writing or by an executed oral agreement, and would open wide the door to all the evils which these two rules were intended to prevent." Appellants justify the notice of November 13, 1939, upon the ground that respondents were then in default. Article III, subdivision 4(b) of the declaration of trust provided that the trustee, from moneys received, should pay taxes, and subdivision 4(e) of that article provided for payment of interest. Article IV, subdivision 3 provided: "The Beneficiary (Farm Builders) covenants and agrees to deposit with the Trustee, all sums necessary for the payment of items shown in article III. * * *" Subdivision 4 of the same article reads: "The Beneficiary shall have the privilege of retaining possession of the said Trust property and to have the management and control of the same, so long as there is no default hereunder, * * *." Article V, subdivision 15 contains this condition: "Time is the essence of this Agreement and full performance by the Beneficiary of all its obligations hereunder, is and shall be a condition precedent to its rights to the benefits of this Declaration of Trust." On November 13, 1939, taxes and interest were in default, respondents therefore were not entitled to the benefits of the declaration of trust and the notice of that date did not constitute a breach of the agreement.

[14] Respondents assert that the description of the property in the notice of default and in the notice of sale was defective. The trial court did not so find. Moreover, the reference in each of said instruments to the date and place of record of a deed describing the same property was sufficient. 9 Cal.Jur. 297.

[15] Appellants contend that the judgment against the Title Co. was erroneous because the plaintiffs themselves alleged in their complaint that the Title Co. was not threatening to sell under the deed of trust. It is true that such is the allegation. However, as we have pointed out above, the remedies under the two instruments were cumulative consequently the threat of the beneficiary to require a sale under one was in substance equally a threat to demand a sale under the other. To enjoin a sale under one and not under the other would be an idle act.

For the foregoing reasons we conclude that the lower court erred in ordering judgment in favor of Farm Builders and in holding that Pacific States Corporation had no interest in the trust instruments; it further erred in holding that no sale under the declaration of trust could be made for failure to pay principal or interest. The findings and evidence are insufficient to support either injunction.

The judgment is reversed.

STURTEVANT, J., concurred.

BEALMEAR v. SOUTHERN CALIFORNIA EDISON CO., Limited, et al.

Civ. 12942.

District Court of Appeal, Second District, Division 3, California.

July 31, 1942.

Rehearing Denied Aug. 24, 1942.

Hearing Granted Sept. 28, 1942.

1. Appeal and error 🔑78(4)

An order of dismissal or an order of nonsuit, entered on the minutes of the court, constitutes a "final judgment" from which an appeal may be taken.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

2. Malicious prosecution 🔑24(3)

As respects right to maintain malicious prosecution action, where justice of peace did not instruct jury to acquit defendant, but dismissed the action, justice was acting under statute providing that a court may order an action or indictment to be dismissed, and not under statute providing that if, at any time after evidence on either side is closed, court deems it insufficient to warrant a conviction, court may advise jury to acquit defendant. Pen.Code, §§ 1118, 1385.

3. Criminal law 🔑752½

When a trial judge determines that the circumstances are in fact such that it will be in furtherance of justice for him to order a criminal action dismissed, it is his duty to make such order. Pen.Code, § 1385.

4. Criminal law 🔑752½

The power of a trial judge to dismiss a criminal action is discretionary. Pen.Code, § 1385.

5. Criminal law 🔑752½

The Legislature in enacting the statute providing that a court may order an action or indictment to be dismissed, and requiring that the reasons of the dismissal must be set forth in an order entered on the minutes, did not contemplate that the court in each case should merely enter the words "in furtherance of justice", but contemplated a statement of the reasons for dismissal. Pen. Code, § 1385.

6. Malicious prosecution 🔑24(3)

Where criminal case was dismissed for insufficiency of the evidence to sustain a conviction, the basis of a malicious prosecution action was thereon established as against contention that where termination of a criminal prosecution has been brought about by the procurement of the defendant therein, an action for malicious prosecution cannot be maintained. Pen.Code, § 1385.

7. Indictment and information 🔑125(4)

The statute penalizing the making of electric connections and tampering with electric meters to avoid payment for current, etc., enunciates several distinct offenses, and hence there can be no application of the rule that when a statute enunciates a series of acts, either of which separately or altogether may constitute an offense, all of such acts may be charged in a single count. Pen.Code, § 499a.

8. Appeal and error 🔑927(3)

On appeal by plaintiff from judgment of nonsuit in malicious prosecution action at conclusion of plaintiff's opening statement, District Court of Appeal was required to draw all reasonable inferences permitted by the opening statement in favor of plaintiff.

9. Malicious prosecution 🔑24(2, 4)

Where original complaint charged plaintiff with making a connection with defendant's electric lines with intent to defraud by using current without passing through a meter, and amended complaint charged that plaintiff tampered with the meter of defendant, different offenses were charged and conviction on the first complaint did not establish "reasonable cause" for filing the amended complaint and on termination of proceedings on such complaint in plaintiff's favor, facts were sufficient "prima facie" to form the basis of an action for malicious prosecution. Pen.Code, §§ 499a, 1385.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie" and "Reasonable Cause".

◆

Appeal from Superior Court, Los Angeles County; Pierson M. Hall, Judge.

Action for malicious prosecution by William C. Bealmear, also known as Wm. C. Bealmear, against the Southern California Edison Company, Limited, and G. H. Moore. From a judgment or an order of dismissal granting defendants' motion for a nonsuit, the plaintiff appeals.

Order and judgment reversed.

Elbert E. Hensley and John H. Klenke, both of Los Angeles, for appellant.

Roy V. Reppy, E. W. Cunningham, and R. E. Woodbury, all of Los Angeles, for respondents.

SCHAUER, Presiding Judge.

[1] Plaintiff in this action for malicious prosecution appeals "from the order of court * * * granting defendants' motion for a non-suit, and from the judgment or order of dismissal * * * granting defendants' motion for a non-suit." The order granting the nonsuit, upon which the "judgment or order of dismissal" was based, was made upon motion of defendants at the conclusion of the opening statement of plaintiff's counsel, before the introduction of any evidence, and, according to its recitals, "on grounds it appears there has not been a final legal determination of the criminal proceedings in favor of defendant prior to commencement of this action." Because either an order of dismissal or an order of nonsuit, entered upon the minutes of the court, constitutes a final judgment from which an appeal may be taken, and since for all purposes of this appeal both orders amount to the same thing (2 Cal.Jur. 158–159, and cases there cited), references hereinafter in this opinion will be to the judgment only.

By allegations in the complaint admitted by defendants' answer it is established that defendants on or about May 14, 1938, in the Justice's Court of San Gabriel Township, charged the plaintiff with having violated section 499a of the Penal Code in that said plaintiff "being the person in charge and control of the premises located at 513 La Merced Road in the City of Wilmar, * * * did wilfully and knowingly, with intent to injure and defraud Southern California Edison Company, Ltd., a corporation, make or cause to be made a connection with an electric wire and electric appliance operated by the Southern California Edison Company, Ltd., a corporation, * * *; and * * * [with similar knowledge and intent] use or cause to be used such connection in such manner as to supply electric current for heat or light or power to an electric lamp or apparatus or device, by and at which electric current for heat or light or power is consumed * * * without passing through a meter * * *." It is further alleged and admitted that defendants on those charges and at that time caused the plaintiff to be arrested, imprisoned for 14 hours, and compelled to give bail.

The plaintiff's complaint further avers in substance, and defendants admit, that some five months later, on October 20, 1938, the defendants caused a second or so-called "amended" complaint to be filed in the same justice's court whereby plaintiff was charged with violation of section 499a of the Penal Code and in which the same specific averments contained in the original complaint were repeated and in addition to which it was charged that plaintiff "did knowingly and wilfully and with intent to defraud said Southern California Edison Company, Ltd., a corporation, alter and procure to be injured and altered an electric meter and obstruct its working and procure the same to be tampered with and injured and did use and cause to be used said electric meter and appliance so tampered with and injured." Whether the so-called "amended" complaint technically constitutes an amended complaint or a new action we need not now determine. Plaintiff's complaint continues with allegations that the "amended" criminal complaint was duly transferred to the Justice's Court of Pasadena Township and that "thereafter between the said 3rd day of November and the 7th day of November, 1938, said case was tried upon its merits, and on the 7th day of November, 1938, after the trial of said cause the said amended complaint was dismissed by the court for insufficiency of the evidence and the plaintiff was acquitted of said crime and his bail exonerated; and said prosecution is wholly and finally ended and determined in favor of this plaintiff." Defendants admit the transfer of the case to the Justice's Court of Pasadena Township and that it was on trial during the period alleged, but deny that plaintiff was acquitted or that the prosecution was ended or determined in favor of plaintiff. The defendants also deny that any charge was made maliciously or without probable cause.

At the opening of the trial in this action plaintiff made an offer of proof including the following facts: that from the year 1934 to a date subsequent to the filing of the criminal charges against him he had resided at 513 La Merced Road, Wilmar, California; that during all of said time the defendant Southern California Edison Company, Ltd., had serviced the premises with electrical current; that it was an old four-room house the wiring system of which was old and had not been changed since its original installation; that plaintiff had complained to the defendant Edison Company that the electric lights flickered, that the radio sometimes would not work, and that his bills were sometimes too high and were irregular; that in March, 1938, prior to the filing of the criminal charge, the defendant company admitted to plaintiff that it had overcharged him; that on April 4, 1938, representatives of the defendant company came into plaintiff's home and searched it and examined the wiring and found nothing irregular but told plaintiff "that they would not bring any charges against him if he would buy an electric range from the Edison Company"; that subsequently a representative of the defendant company threatened on several occasions to have plaintiff arrested if plaintiff did not pay a sum of money to him; that during the month of April, 1938, plaintiff had his house rewired in compliance with the request of the defendant company and a new meter was installed by the company; that the defendant company endeavored to coerce plaintiff into buying an electric range. On May 14, 1938, a Saturday, plaintiff was arrested in the evening and confined in jail until the following morning; in June, 1938, plaintiff was tried before a jury on the charges filed and was found guilty; on appeal to the Appellate Department of the Superior Court the judgment of conviction was reversed; thereafter the complaint "was dismissed upon motion of the District Attorney for the purpose of filing an amended complaint." (The substance of such so-called amended complaint is hereinabove set forth.) A change of venue was requested, the case transferred to the Justice's Court of Pasadena Township and after trial on November 3 to 7, 1938, the following proceedings were had:

"Mr. Hensley: If your Honor please, on behalf of the defendant, I want to at this time move to dismiss this complaint and charge on the ground of insufficiency of evidence to establish the charge. (Argument to the Court on motion)

"The Court: Well, I feel that the evidence is insufficient to show that the defendant has committed this crime.

"Mr. Hunt: Well, I never quarrel with the Court when the Court arrives at his decision.

"The Court: Well, the Court feeling in this matter that the evidence is insufficient to show the defendant guilty of this crime, the matter will be dismissed."

A minute order of dismissal was then entered, the defendant was discharged, and his bail was exonerated.

Upon conclusion of the foregoing summarized opening statement defendants moved for a nonsuit on the following grounds: "1. That there was no final and legal termination of the said criminal cause upon the amended complaint in favor of the plaintiff and therefore, an essential element for an action for malicious prosecution was entirely absent. 2. That there was a conviction on the original complaint which is a complete defense as it conclusively shows probable cause for the criminal prosecution under both the original and the amended complaints."

Upon each of the two grounds above stated defendants urge that the judgment of nonsuit was properly entered. We conclude that the nonsuit could have been properly granted upon neither of such grounds and that the judgment appealed from must be reversed.

[2] Defendants' chief argument in support of their first ground for nonsuit is that by the terms of section 1118 of the Penal Code, the justice of the peace of Pasadena Township was without power to dismiss the "amended" criminal complaint against plaintiff herein because of insufficiency of the evidence. Section 1118 of the Penal Code provides that "If, at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice," and it has been several times stated by our courts that this section does not empower the court to arbitrarily direct the jury to acquit the defendant (People v. Stoll (1904), 143 Cal. 689, 691, 77 P. 818; People v. Roberts (1896), 114 Cal. 67, 68, 45 P. 1016; People v. Daniels (1894), 105 Cal. 262, 266, 38 P. 720). The difficulty with defendants' proposition on this point is that the justice of the peace was not acting under section 1118 of the Penal Code. He did not advise or instruct the jury to acquit the defendant; he dismissed the action. It seems apparent to us that in so dismissing the criminal complaint the justice was acting under the terms of section 1385 of the Penal Code which provides that "The court may, either of its own motion or upon the application of the district attorney, and in furtherance of justice, order an action or

indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes."

[3-5] Although the above quoted section 1385 does not specifically contemplate a motion by a defendant on the ground of insufficiency of the evidence, or any other ground, practicality suggests that the court in acting on its own motion "in furtherance of justice" must in some way have its attention brought to the facts which impel its action. Whether the trial judge on his own initiative engages in inquiry which brings the facts to his attention and then of his own volition orders a dismissal, or whether the district attorney makes the application, or whether a suggestion is made by the defendant, seems relatively inconsequential. If and when a trial judge determines that the circumstances are in fact such that it will be in furtherance of justice in any particular case for him to assume the grave responsibility to the people of his jurisdiction of ordering a criminal action dismissed it is not only his prerogative but his duty to make such order. It is a discretionary power, the use of which entails consideration of all pertinent facts (see Gossman v. Gossman (1942), 52 Cal.App.2d 184, 126 P.2d 178), but within the limits of judicial discretion the legislature has left it to the trial judge to determine what particular facts constitute reasons warranting the dismissal (People v. Disperati (1909), 11 Cal. App. 469, 476, 105 P. 617; People v. Superior Court (1921), 53 Cal.App. 185, 199 P. 840; People v. Martin (1924), 70 Cal.App. 271, 276, 233 P. 85; Wilson v. Troy (1937), 19 Cal.App.2d 156, 158, 64 P.2d 1141). The legislature in enacting section 1385 and requiring that "The reasons of the dismissal must be set forth in an order entered upon the minutes" certainly did not contemplate that the court in each such case should merely enter the words "in furtherance of justice." A statement of the reasons, in the opinion of the court, why a dismissal in a particular case would be in furtherance of justice, is rather what was contemplated. It is difficult to conceive of any more appropriate or compelling reason than that the evidence is legally insufficient to warrant a verdict of guilty.

Defendants advance also the argument that where the termination of a criminal prosecution or civil action has been brought about by the procurement of defendant therein an action for malicious prosecution cannot be maintained and cite, among others, the cases of Holliday v. Holliday (1898), 123 Cal. 26, 35, 55 P. 703, and Paskle v. Williams (1931), 214 Cal. 482, 484, 6 P.2d 505.

We are of the opinion, however, that the case of Jaffe v. Stone (1941) 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775, provides a conclusive answer to the above stated contention and also to the defendants' general proposition that there was no final legal termination of the criminal proceedings in favor of plaintiff. In that case the plaintiff (in the malicious prosecution suit) alleged that after being arrested under a complaint charging him with grand theft, a felony, he moved at the preliminary hearing for dismissal of the proceeding on the ground that there was no evidence to prove his guilt, and that the motion was granted and the proceedings dismissed. It was held that such dismissal satisfied the requirement of a final and favorable termination of the proceeding sufficient to support an action for malicious prosecution, the court stating (18 Cal.2d page 150, 114 P.2d page 338, 135 A.L.R. 775):

"If it [the dismissal] is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination. * * * [18 Cal.2d page 151, 114 P.2d page 338] On the other hand, where the prosecuting officials press the charge before the committing magistrate, the accused does not seek improperly to prevent a fair hearing, and the complaint is dismissed for failure to produce a case against the defendant, there is a favorable termination sufficient to form the basis of a tort action. * * *

"[18 Cal.2d page 152, 114 P.2d page 339] In stating the requirement of termination, courts often say that the proceeding must be 'finally' terminated. Such a statement is entirely accurate if the ordinary reasonable meaning of the words is taken. The *proceeding* must be finally terminated; that is, the particular criminal proceeding commencing, for example, by complaint and arrest, must have passed through some such stage as preliminary hearing and dismissal, or trial and acquittal or abandonment by the prosecuting authorities. When this has occurred, *that proceeding is finally terminated*. If the termination was such as not to constitute a bar to a new prosecution, the accused may be charged and tried again for the same offense; but this will be a *new proceeding,* with a new court number, new pleadings, new judge and jury, and a new judgment.

"[18 Cal.2d page 156, 114 P.2d page 341] * * * It is immaterial whether the termination is a bar to any further prosecution for the same offense, or whether the accused may be charged and tried anew. Only if the new proceeding is already instituted can the accused be precluded from suing for malicious prosecution."

[6] In the case now before us the dismissal was for insufficiency of the evidence to justify a conviction, or, as expressed in the Jaffe case, for "failure to produce a case against the defendant," the particular criminal proceeding was finally terminated, and the basis of a malicious prosecution action was thereupon established (see also Miller v. Lee (1942), 52 Cal.App.2d 10, 125 P.2d 627).

Defendants' second ground urged in support of the nonsuit—that the conviction on the first criminal complaint, even though reversed on appeal, established probable cause for the prosecution under the "amended" complaint (see Roos v. Harris (1928), 203 Cal. 201, 202, 263 P. 225; Carpenter v. Sibley (1908), 153 Cal. 215, 217, 94 P. 879, 15 L.R.A.,N.S., 1143, 126 Am.St. Rep. 77, 15 Ann.Cas. 484; Holliday v. Holliday (1898), supra, 123 Cal. 26, 32, 55 P. 703; Norton v. John M. C. Marble Co. (1939), 30 Cal.App.2d 451, 454, 86 P.2d 892) —is answered, as pointed out by plaintiff, by an analysis of section 499a of the Penal Code, violation of which was charged by both the original and the "amended" criminal complaints. Four different crimes are there created (all predicated in part on the guilty knowledge and intent therein specified): (1) to "make or cause to be made any connection * * * with any electric wire or electric appliance * * *"; (2) to "use or cause to be used any such connection * * *"; (3) to "injure, alter or procure to be injured or altered any electric meter * * *"; and (4) to "use or cause to be used any electric meter, or appliance so tampered with or injured * * *." The original criminal complaint charged plaintiff herein with knowingly and with intent to defraud defendant Southern California Edison Company making or causing to be made and using or causing to be used a connection with an electric wire and electric appliance operated by the defendant Southern California Edison Company, Ltd., and on reversing the judgment of conviction under such complaint the Appellate Department of the Superior Court of Los Angeles County rendered the following memorandum opinion: "The defendant is not charged with tampering with or injuring the meter on his premises or with using such meter knowing that the same had been tampered with or injured; he is charged with making, or causing to be made, and using a connection with an electric wire, so that electric current would be consumed 'without passing through a meter'. The evidence is wholly insufficient to establish that any connection was so made on defendant's premises that Electric current was consumed therein without passing through the meter. The evidence tending to show that some current passed through the meter without registering therein is not at all the equivalent of proof that the current was consumed without passing through the meter. The statute does not declare it to be an offense merely to use electric current which has passed through a meter which is not registering. The judgment is reversed and cause remanded * * * for a new trial." The "amended" complaint thereafter filed charged plaintiff herein, in addition to the charges set out in the original complaint, with altering and procuring to be injured and altered an electric meter and obstructing its working and procuring it to be tampered with and injured and using and causing to be used said electric meter so tampered with and injured.

Defendants argue that but a single crime is defined by section 499a of the Penal Code, that both the original and the "amended" criminal complaint charged the same crime, that the "amended" complaint made good a defect in the original complaint, and that "the filing of the amended complaint therefore operated not as the beginning of a new prosecution but only as a continuation of the prosecution instituted by the filing of the original complaint." In support of this view numerous cases are cited to the effect that "when a statute enunciates a series of acts, either of which separately or all together may constitute the offense, all of such acts may be charged in a single count, for the reason that notwithstanding each act may, by itself, constitute the offense, all of them together do no more, and likewise constitute but one and the same offense." (See 14 Cal.Jur. 61; People v. Frank (1865), 28 Cal. 507, 513; People v.

Harrold (1890), 84 Cal. 567, 568, 24 P. 106; People v. Leyshon (1895), 108 Cal. 440, 442, 41 P. 480; People v. Gusti (1896), 113 Cal. 177, 45 P. 263; People v. McClennegen (1925), 195 Cal. 445, 452, 234 P. 91; People v. Horiuchi (1931), 114 Cal.App. 415, 427, 300 P. 457.)

[7] With this general principle of law we are in full accord, but it does not apply where, as here, the statute enunciates several different and distinct offenses, rather than merely a series of acts constituting the offense. The situation here is similar to that in People v. Plath (1913), 166 Cal. 227, 135 P. 954, and to that in Ex parte Roberts (1910), 157 Cal. 472, 108 P. 315, in both of which cases section 337a of the Penal Code, relating to gambling by pool-selling, bookmaking, bets, and wagers, was analyzed by our Supreme Court and found to declare several distinct crimes. It is to be noted that at the time Ex parte Roberts, supra, was decided section 337a comprised but a single sentence, as does section 499a, here in question. Nevertheless, the court there declared, 157 Cal. at page 474, 108 P. at page 315: "Although comprising but a single sentence, section 337a of the Penal Code creates many distinct offenses. It begins by the phrase 'every person,' [as does section 499a], and each subsequent clause is connected therewith by appropriate punctuation. It is written in the disjunctive throughout, and the several offenses therein described are apparently as distinct and independent of each other as if they had been enacted in separate sections." In further clarification of this distinction it should be here pointed out that People v. Frank, supra, People v. Harrold, supra, and People v. Leyshon, supra, all involved construction of the statute defining the crime of forgery (Pen.Code, sec. 470), which statute declares that "Every person who * * * [does any one of a series of acts] is guilty of forgery." Thus it was a statute enunciating a series of acts constituting but one offense which was there analyzed, rather than, as here, a statute defining several distinct offenses. Upon individual scrutiny the other cases advanced by defendants in support of their second ground for nonsuit are found to be equally inapplicable here.

[8] It is to be remembered that this appeal comes to us from a judgment of nonsuit; that in considering it all reasonable inferences permitted by the opening statement must be drawn in favor of plaintiff; and that our ruling herein does not preclude, but rather tends to require, trial on the merits as to whether probable cause did or did not exist for the making of the charges by defendants (Sebastian v. Crowley (1940), 38 Cal.App.2d 194, 203, 101 P.2d 120; Perry v. Washington National Ins. Co. (1936), 14 Cal.App.2d 609, 616, 58 P.2d 701, 59 P.2d 158; Haydel v. Morton (1935), 8 Cal.App.2d 730, 733, 48 P.2d 709).

[9] We conclude that the second (so-called amended) criminal complaint, in addition to reiterating the offense charged in the first complaint after the evidence had been held insufficient to establish it, set forth new and independent charges; that the conviction on the first complaint, under the circumstances shown here, does not alone establish reasonable cause for the filing of the new complaint; that the proceeding on the new complaint was finally terminated in favor of plaintiff, and hence that the facts admitted by the pleadings augmented by those set forth in plaintiff's opening statement, are sufficient prima facie to form the basis of an action for malicious prosecution. The orders and the judgment appealed from are reversed.

SHINN and PARKER WOOD, JJ., concur.

54 Cal.App.2d 34

RINGEL v. SUPERIOR COURT OF ALAMEDA COUNTY et al.

Civ. 12213.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1942.

Hearing Denied Oct. 8, 1942.

1. Courts 🔑209(2)

Where answer to petition for writ of mandate raises no real issue and is submitted without proof, cause will be treated as before District Court of Appeal on the petition, which court will treat as not controverted, as though submitted on demurrer.

2. Divorce 🔑156

In absence of reconciliation or occurrence of facts showing fraud or mistake after entry of interlocutory divorce decree, statutory provisions for entry of final decree after one year are "mandatory". Civ.Code, § 132.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Statute".

3. Divorce ⚿4

The statute providing that when party to divorce action is entitled to final judgment, which, by mistake, negligence, or inadvertence, has not been entered, court may cause entry of final judgment as of date when it could have been given or made, if applied for, is both "curative" and "remedial", and retroactive operation thereof should be given effect, unless it disturbs some vested right or impairs obligation of contract. Civ.Code, § 133.

See Words and Phrases, Permanent Edition, for all other definitions of "Curative Statute" and "Remedial Statute".

4. Divorce ⚿156

In divorce action, where no property rights are involved and no grounds, such as fraud, mistake, or equitable considerations, for denial of application for entry of final judgment nunc pro tunc have arisen during year after entry of interlocutory decree, prevailing party is entitled to entry of such judgment under statute. Civ.Code, § 133.

◆

Original proceeding by Edna M. Ringel for a writ of mandate to compel the Superior Court of Alameda County and T. W. Harris, Judge thereof, to enter a final decree of divorce nunc pro tunc.

Writ granted.

Charles H. Seccombe, of Oakland, for petitioner.

Ralph E. Hoyt, Dist. Atty., J. Frank Coakley, Chief Asst. Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and J. D. Cooper, Deputy Dist. Atty., all of Oakland, for respondents.

NOURSE, Presiding Justice.

[1] Plaintiff seeks a writ of mandate to compel the respondent to enter a final decree of divorce nunc pro tunc as of April 2, 1932. Though an answer was filed to the petition it raised no real issue, and, since it was submitted without proof, the cause will be treated as before us on the petition which we will treat as not controverted, as though submitted upon demurrer.

From the petition and the affidavit of petitioner filed with the application in the superior court it appears that on April 2, 1931, an interlocutory decree of divorce was duly entered in the cause entitled Clyde Ringel v. Edna M. Ringel, and then pending in the respondent court. "By mistake, negligence, and inadvertence" a final decree was not entered at the expiration of one year thereafter, or at all, but in October, 1934, the petitioner herein, believing that a final decree had theretofore been entered, married Ellis A. Jones. In April, 1942, Jones applied for an annulment of this marriage on the grounds that the final decree of divorce had not been entered prior to the second marriage. It also appears that there is no community property of the parties to the second marriage, and that the two minor children under the care and custody of the petitioner herein are the issue of the first marriage.

On May 11, 1942, the petitioner applied to the respondent for the entry of a final decree to be dated and filed nunc pro tunc as of the date she was entitled to have a final decree entered. Her application was denied upon grounds which have not been stated.

[2] Her right to a final decree is statutory. Section 132 of the Civil Code. When there has been no reconciliation, and no facts occurring subsequent to the entry of the interlocutory decree showing fraud or mistake, the provisions of the section are mandatory. 9 Cal.Jur. p. 767; Claudius v. Melvin, 146 Cal. 257, 79 P. 897; Keller v. Keller, 122 Cal.App. 712, 10 P.2d 541.

[3] Petitioner rests her case upon section 133 of the Civil Code as amended in 1935 and which reads in part: "Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed or entered" the court may cause a final judgment to be entered as of the date when the same could have been given or made if applied for. The historical background of this legislation and the reasons for its enactment are considered in Macedo v. Macedo, 29 Cal. App.2d 387, at page 391, 84 P.2d 552, at page 554, where the court said: "The act is both curative and remedial, and the retroactive operation of such statute should be given effect unless it disturbs some vested right or impairs the obligation of some contract. Baird v. Monroe, 150 Cal. 560, 89 P.

352; 1 Kent's Comm. 455." The Macedo case is decisive of all the points raised by respondent relating to the interpretation of the statute.

[4] It is not denied here that there are no property rights involved, and there are no equitable grounds upon which the denial of the application could be founded. Upon the authority of the cases cited the prevailing party is "entitled to a final judgment" under section 133 of the code when the time has expired after entry of the interlocutory decree and no grounds have arisen in the intervening period—such as fraud, mistake, or equitable considerations—which would justify a denial of the application. The authorities uniformly hold that when such conditions arise the court should not enter a final decree, but they are all in accord that the prevailing party is entitled to the decree when none of these conditions does exist.

Let a writ issue as prayed.

STURTEVANT and SPENCE, JJ., concurred.

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53 Cal.App.2d 710

PARATORE v. SCHARETG et al.

Civ. 11925.

District Court of Appeal, First District,
Division 1, California.
July 31, 1942.

Rehearing Denied Aug. 29, 1942.

1. Evidence 🔑441(1)

When the understanding of parties has been reduced to writing, all contemporaneous negotiations are "merged" in the instrument.

See Words and Phrases, Permanent Edition, for all other definitions of "Merge".

2. Evidence 🔑441(1)

The execution of an instrument in writing supersedes all oral negotiations or stipulations concerning its matter preceding or accompanying such execution.

3. Evidence 🔑397(1)

Generally, oral agreements will not be permitted to change the express written provisions of a contract.

4. Evidence 🔑444(2)

If the taking effect of a contract or any of its provisions is contingent on the happening of a future event, parol evidence may be admitted to show the cause of its nonperformance.

5. Evidence 🔑444(3)

Where building contractor and owners of realty agreed that contractor should furnish labor and materials and complete construction of buildings within 120 working days after date of recording of contract, but contract was never recorded, there was no effective date of commencement or completion of the work, and hence owners of realty in action against them by contractor for breach of contract, were entitled to introduce evidence of an oral agreement that unless a certain sum of money could be obtained from the Federal Housing Administration, construction should not proceed and contract should not be operative.

6. Appeal and error 🔑1071(5)

Where erroneous findings of trial court were unnecessary to judgment rendered, the errors were not prejudicial.

Appeal from Superior Court, City and County of San Francisco; I. M. Golden, Judge.

Action by R. Paratore against Robert Scharetg and others for breach of a building contract. From a judgment for defendants, the plaintiff appeals.

Judgment affirmed.

Albert Picard and Francis McCarty, both of San Francisco, for appellant.

William P. Caubu, of San Francisco, for respondents.

WARD, Justice.

This is an appeal by plaintiff from a judgment for defendants in an action for breach of a building contract.

The contract is in the printed form used generally by building contractors in San Francisco; it is dated October 5, 1939, and provides that plaintiff "within the space of *one hundred twenty* working days from and after *the date of recording this contract*" (emphasis ours) furnish labor and materials and complete the construction of three buildings on a certain parcel of land owned by defendants, for which he was to receive the sum of $26,490. The above italicized words were not a part of the printed form, but were typed therein. The contract was never recorded, and no construction work was ever commenced.

The defendants, while admitting the execution of the contract, set up as a special defense and answer to the allegations of the complaint, and also as a separate answer and defense to the whole thereof, a collateral agreement which they stated was entered into between the parties contemporaneously with the contract and was to the effect that it was necessary to finance the building operation, which was to be done through the facilities of the Federal Housing Administration, and that unless a total minimum of $25,200 could be obtained from this source, the construction should not proceed and the contract should not be operative or effective.

It appears that a preliminary application for a loan from the F. H. A. was made through a local bank about September 10th. On October 6th, the day following the date of the contract, formal application was made in an amount of $33,000. The plans and specifications accompanying the application were prepared by an architect proposed by plaintiff and were in accordance with requirements of the F. H. A. The record shows that $99 to accompany the application was advanced by the defendants on that date to cover costs. The building department of the bank thereafter recommended that $30,000 only be applied for, and the application in this amount was finally delivered to the F. H. A. on October 13th.

The special defense also sets forth that being advised by the F. H. A., on October 25th, that it would make a construction loan in an amount not exceeding $21,000, the defendants so informed the plaintiff, who agreed that by reason thereof the contract was at an end.

Around November 1st, the architect for the proposed building operation demanded settlement by defendants of his fees for work done—thus presumably recognizing that his services were at an end—and was subsequently paid.

On January 5, 1940, plaintiff through his attorney made a formal offer and tender to proceed with the construction of the buildings under the terms of the contract, and advised defendants that unless they immediately proceeded with such construction an action would be brought against them for damages for breach of the contract.

The court found that the facts set up in the special defense were true; that the contract did not become effective; that following the decision of the F. H. A. to loan less than the $25,200 the plaintiff agreed with defendants that the contract was at an end.

Plaintiff admits that he understood that financing was to be arranged through the F. H. A., but that it was his understanding the defendants would furnish any additional amount necessary to complete construction. He contends that the court found that facts admitted by the pleadings were not true; that parol evidence of terms and conditions of a contract is not admissible where the contract has been reduced to writing; and that its terms cannot be changed or varied by parol testimony, or by extrinsic evidence.

Defendants contend that the parol testimony did not seek to change or vary the terms of the written instrument but to show a condition precedent to its going into effect, its conditional delivery, and an explanation of what the parties intended by the typed words "the date of recording this contract" in the printed form.

[1-4] It is a fundamental rule of contract law that when the understanding of parties has been reduced to writing, all contemporaneous negotiations and intentions are deemed merged in the instrument, which should ordinarily be deemed the measure of the rights and liabilities of the parties. The execution of the instrument in writing supersedes all oral negotiations or stipulations concerning its matter preceding or accompanying such execution. Alameda County Title Ins. Co. v. Panella, 218 Cal. 510, 24 P.2d 163; San Francisco Milling Co. v. Frye & Co., 2 Cal.App.2d 563, 38 P.2d 165. The general rule is that oral agreements will not be permitted to change the express written provisions of a contract. However, should the taking effect of the contract, or any of its provisions, be contingent upon the happening of a future event, parol evidence may be admitted to show the cause of its non-performance either in whole or in part. This may necessitate the admission in evidence of a preceding or contemporaneous oral agreement.

In Gleeson v. Dunn, 113 Cal.App. 347, 350, 351, 298 P. 119, 121, the court quoted with approval from Burke v. Dulaney, 153 U.S. 228, 14 S.Ct. 816, 38 L.Ed. 698: "'"The error was in applying to the case the familiar and well-established rule that parol evidence is inadmissible to contradict or vary a written contract. A written contract must be in force as a binding obligation to make it subject to this rule. *Such a contract cannot become a binding obligation until it has been delivered. Its delivery may be absolute or conditional. If the latter, then it does not become a binding obligation until the condition upon which its delivery depends has been fulfilled.*"'" P. A. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411; Harper v. French, 29 Cal.App. 2d 214, 84 P.2d 216; Wolters v. King, 119 Cal. 172, 51 P. 35; Cooper v. Cooper, 3 Cal.App.2d 154, 39 P.2d 820; Restatement of the Law, Contracts, sec. 241, p. 340; 3 Williston on Contracts, sec. 634, p. 1822; IX Wigmore on Evidence, 3d Ed., sec. 2410, p. 30.

In Davis etc. Co. v. Advance, etc., Wks., Inc., 38 Cal.App.2d 270, 100 P.2d 1067; Hanrahan-Wilcox Corp. v. Jenison M. Co., 23 Cal.App.2d 642, 73 P.2d 1241, and Big Boy D. Corp., Ltd., v. Etheridge, 44 Cal. App.2d 114, 111 P.2d 953, cases cited by appellant, there is nothing inconsistent with the views herein expressed. In the Davis case, upon a plea for reformation of a contract upon the basis of mutual mistake, evidence of a contemporaneous oral agreement not inconsistent with the terms of the writing was admissible since it covered a matter upon which the writing was silent. In the Hanrahan-Wilcox case the oral agreement was held to be inconsistent and contrary to the provisions of the written contract. In the Etheridge case, the contract was complete in itself without resort to extrinsic evidence.

[5] In the present case, labor, materials, etc., were to be furnished and the construction completed "within the space of one hundred twenty working days from and after the date of recording this contract." Since the contract was never recorded—and obviously for some good reason, particularly considering the manner of the insertion of the typed words—there was no effective date of commencement or completion of the work.

The reason for the non-performance of the contract was a material issue. If the evidence in this respect showed a condition precedent in the form of an oral contract, before the happening of which the contract, even though executed and delivered, was to have no legal life or binding effect, such evidence, under the authorities cited, is admissible. The parol evidence here is not directed toward any interference with the manifest meaning of the contract as evidenced by its wording, but was admitted for the purpose of showing that a condition precedent to the going into effect of the obligations thereof had not arisen. The indefiniteness of the provision relating to the recording of the contract indicates that the parties contemplated its recordation subsequent to that of the mortgage or deed of trust given to secure a loan by the F. H. A., so that any mechanics' liens arising from the contract would be secondary to such indebtedness.

That plaintiff knew that the performance of the contract was contingent upon the obtaining of a F. H. A. loan is demonstrated by his preparation and delivery to the bank of specifications as required by the former. The evidence is sufficient to show that plaintiff knew what financial arrangements were to be completed before the contract became effective. There was testimony by one of the defendants as follows:

"Q. Now, was any discussion had as to the amount of money that would be necessary to be obtained from the F. H. A. before you could proceed with the buildings? A. Yes, sir.

"Q. How much? A. $8,500.00 [for each of three buildings].

"Q. $8,500.00? A. Yes, sir.

"Q. And what did you say to Mr. Paratore about that? A. Well, I said if we could obtain $8,500.00 we were willing to go ahead with the buildings, and if we couldn't obtain that, why, we just couldn't go ahead.

"Q. In other words, you couldn't finance it? A. No, we did not have the money to finance it.

"Q. Now, what was the amount of the commitment? You learned of the commitment from the Federal Housing, didn't you? A. $7,000.00."

The court found against plaintiff as to there being any foundation for his claim that he understood the defendants were willing to furnish any additional cash not procurable from the F. H. A.

[6] It appears from the record that the trial court erred in several of the findings,

in that they were not supported by the evidence, or, as to matters admitted by the answer and stipulated to be true, found by the findings to be untrue. Manifest as that fact is, it is also true that the challenged findings are immaterial. Having determined that there was another agreement which operated to terminate the written contract on the nonhappening of the condition precedent, those findings were unnecessary to the judgment rendered. The error therefore is not prejudicial.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

PERI et al. v. LOS ANGELES RY. CORPORATION et al.

Civ. 13510.

District Court of Appeal, Second District, Division 1, California.

Aug. 14, 1942.

Hearing Granted Oct. 8, 1942.

1. Railroads 🔑307(3)

In action against railroad for injuries to guest in automobile which collided in heavy fog with fourth car of slow freight train at crossing, railroad could not be held liable for failure to give warnings of approach of train to crossing.

2. Railroads 🔑307(4)

In action against railroad for injuries to guest in automobile which collided in heavy fog with fourth car of slow freight train at crossing, railroad could not be held liable for failure to put out lighted lamp or flare on road where regulations established by Railroad Commission contained no such requirement.

3. Railroads 🔑307(7)

A railroad is not chargeable with knowledge that automobile is likely to be driven into side of moving train, and unless signal warning of presence of train on crossing is required by ordinance or otherwise failure to maintain or use signal is not negligence.

4. Railroads 🔑309

The lawful operation of a railway train is not "negligence per se".

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Sam Peri and others against the Los Angeles Railway Corporation and others for injuries sustained in a collision between an automobile and a train. From a judgment for plaintiffs, named defendant appeals.

Reversed with directions.

Lyndol L. Young and Forrest F. Murray, both of Los Angeles, for appellant.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for respondents.

DORAN, Justice.

In this action for damages for personal injuries, the jury returned a verdict for plaintiffs. Defendant appeals from the judgment and from the order denying defendant's motion in the alternative form for judgment notwithstanding the verdict.

Briefly the facts are as follows: Plaintiffs were guests in an automobile which collided with the fourth car of defendant's freight train of thirty-two cars which was crossing the highway. The accident occurred at night during a heavy fog. The train was traveling about four miles per hour; the automobile, according to plaintiffs' witnesses, about fifteen miles. Visibility was poor.

It is appellant's contention, "that the presence of the train, the engine and three and one-half cars of which had already entered and passed over Atlantic Boulevard, was only a remote condition of the accident and not a proximate cause thereof, and that the sole proximate cause of the plaintiffs' injuries was the negligent act of Mr. Guida, the driver of the automobile, in attempting to drive his automobile upon a railroad crossing which at the same time was being occupied by a passing train. * * *" It is argued, therefore, that the evidence fails to show any actionable negligence on the part of defendant, hence the action of the trial court was error.

It is respondents' contention, on the contrary, that there was "ample and sufficient evidence of defendant's negligence to support the verdicts in the following particulars:

"(1) No bell or whistle of the train was sounded as it approached or was crossing the arterial highway.

"(2) Neither the bell nor the light of the wigwag at the crossing was operating as the train approached and crossed said place.

"(3) Visibility being limited to 5 feet to 15 feet for dark objects, but 35 feet to 50 feet for lighted objects, at the time the dark, unlighted, long train of cars was slowly and silently crossing the dark main highway, the failure to put out a lighted lamp or flare on the road was negligent was a question for the jury, especially where there was a crew of five men on the train, four of whom at all times mentioned were, and *remained, on the locomotive,* although only two men were needed there, and the fifth man was on top of the last car with a lamp in his hand; and, moreover, the jury had the right to believe that the wigwag was not working and that the crew on the engine knew and saw it was not operating, as they began and were crossing the highway." (Italics included.)

With regard to the evidence in support of respondents' contention it is pointed out, quoting from their brief, that "Viewing the evidence in the light most favorable to respondents, the record shows:

"Neither the bell nor whistle of the locomotive was sounded as it approached the crossing, or as it was crossing the highway. The wigwag signal was neither ringing nor lighted at any time during the approach of or crossing of the train. The automobile in which plaintiffs were riding approached the crossing at approximately 10 to 15 miles per hour, the driver bending over the wheel, looking out of the window for objects ahead of him. The visibility of dark objects ahead was from 5 to 10 feet, and of lighted objects from 35 to 50 feet. Plaintiffs and the driver of the automobile were familiar with the crossing and knew that a wigwag signal was maintained at the crossing and would begin ringing and become lighted when a train was at least several hundred feet from, and approaching, the highway, and continue to so operate while the train was crossing the highway, and they were looking for this light and listening for the bell as they approached this crossing, but the light was not lit and the bell was not ringing. When the automobile was about 15 feet from the tracks, upon which the box cars were traveling, the driver saw a side of a box car ahead of him and immediately swerved his automobile to his right and applied his brakes, but could not stop his automobile in time to avoid colliding with one of the box cars. * * *"

Respondents rely in particular on Harper v. Northwestern Pac. R. Co., 34 Cal. App.2d 451, 93 P.2d 821, and Mallett v. Southern Pac. Co., 20 Cal.App.2d 500, 68 P.2d 281, and from them, as well as others, argues that, "It follows from the foregoing authorities that if the wigwag signal was not working (and the jury must be presumed to have accepted plaintiffs' testimony to this effect) then it was the duty of the defendant to give some other adequate warning signal of the *approach* of the train, and its failure to perform this duty was the proximate cause of the accident." (Italics added.)

Referring to respondents' recital of the evidence, as quoted, appellant comments as follows: "Under the heading 'Review of the Testimony' respondents set forth their incorrect version of the evidence and cite certain references to the reporter's transcript in support thereof. Both are misleading and incorrect. The statement that neither the bell nor the whistle of the locomotive were sounded as it approached the crossing and the further statement that the wigwag signal was neither lighted nor ringing at any time during the approach of or the crossing of the train, is directly contrary to the substantial and preponderating evidence. * * *"

The fact is that, with regard to the question as to whether the "wigwag" was operating, or the bell and whistle of the locomotive were sounded, the record reveals the evidence to be conflicting.

Notwithstanding repeated reference in the briefs to the asserted omissions of defendant company with regard to its duty as the train *approached* the crossing, a consideration of that subject is of no help in determining the question herein presented. That question, and it is the sole question, may be summed up in a few words, viz: Is there any evidence to sustain the implied finding of the jury that the defendant company was negligent in the operation of the train at the time the accident occurred, and if so, was such negligence the proximate cause of the alleged damage?

[1] Manifestly, since the accident occurred after a part of the train had passed and while the remainder was crossing the highway, what occurred before is beside the issue. The duties and responsibilities of defendant company are entirely different under two such different situations.

The facts in the case at bar are somewhat similar to the facts in Dunlap v. Pacific Electric Ry. Co., 12 Cal.App.2d 473, 476, 55 P.2d 894, 895. There the court declared as follows:

"Appellant earnestly insists that it was a debatable question of fact, upon which reasonable minds might disagree, as to whether or not the defendant railway company was negligent in running its cars across the highway on a dark and foggy night without providing a flagman, red flares, or some other means of warning to travelers at the intersection; but the authorities seem to hold that railway companies, through their agents, in the reasonable management of their trains which are rightfully upon a crossing, are not chargeable with knowledge that an automobile, bearing headlights of sufficient power to enable the driver to avoid an obstruction in the road, was nevertheless likely to crash into a moving train unless a danger signal or flagman with a lighted lantern was stationed in the highway. Gage v. Boston & M. R. Co., 77 N.H. 289, 90 A. 855, L.R.A.1915A, 363.

"In the instant case the defendant's cars were rightfully occupying the crossing, and the trainmen were exercising due care, so far as the management of the train in approaching and passing over the crossing was concerned.

"The accident was not caused by the train running into the automobile in which the deceased was riding, but by the automobile running into defendant's freight train as the latter was slowly passing over the crossing. It was not occasioned by any mismanagement of the train. In the case of Mabray v. Union Pac. R. Co., D.C., 5 F.Supp. 397, 400, it was held that a railroad company has a right to occupy a crossing in the conduct and operation of its business, and that such obstruction is in itself notice of danger, so that the railroad company is not bound to give any further warning; and that, after a train has reached a crossing, the duty of a flagman ends as to that train, since then the train itself is a sufficient warning. This doctrine also finds support in 52 Cor. Jur., p. 189, and Brown v. Southern Ry. Co. (Pennington v. Southern Ry. Co.) [5 Cir.], 61 F.2d 399.

"No question of the giving of a warning of the approaching train is here involved, because at the time of the accident the engine had passed the crossing and was several hundred feet north thereof. 'All crossing signals are intended to protect the traveler against *approaching trains* and have been so regarded by our courts.' Mabray v. Union Pac. R. Co., supra" (Italics included.)

In both the Harper case and the Mallett case, supra, relied on by the respondents as hereinbefore noted, the court specifically distinguishes the Dunlap case.

[2-4] Respondents' contention "That the failure to put out a lighted lamp or flare on the road was negligent was a question for the jury," is without merit. The authority to regulate such matters is vested in the Railroad Commission. The regulations established by the commission contain no such requirement. Obviously, the trial jury was without power to establish such a requirement and then for the failure to have complied therewith, find, in effect, such failure to have been negligence. Moreover, as pointed out in the Dunlap case, supra, railway companies are not chargeable with knowledge that an automobile is likely to be driven into the side of a moving train. Unless required to do so by ordinance or otherwise, the weight of authority sustains the proposition that the failure to maintain or use signals in the circumstances is not negligence. Manifestly, the lawful operation of a railway train is not negligence per se. The evidence reveals no act or omission on the part of the defendant company that constituted negligence under the law, which can be held to have been the proximate cause of the alleged damage.

For the foregoing reasons the judgment and order are reversed with directions to enter judgment for defendant.

YORK, P. J., and WHITE, J., concurred.

54 Cal.App.2d 82

NORGARD v. NORGARD'S ESTATE.

Civ. 6690.

District Court of Appeal, Third District, California.

Aug. 17, 1942.

Rehearing Denied Sept. 16, 1942.

Hearing Denied Oct. 15, 1942.

1. Witnesses 🔑133

The statute providing that parties to an action against an executor or administrator upon a claim against the estate of a deceased person cannot be witnesses as to any matter or fact occurring before the death of deceased applies to one who is administrator of the estate and who in his individual capacity sues the estate upon a claim against decedent, as well as to all claimants against the estate. Code Civ.Proc. § 1880, subd. 3; Probate Code, § 703.

2. Executors and administrators 🔑231

A suit, in individual capacity, by one who was also administrator, against estate to cancel a note, executed by him to decedent, on the ground that it was fully satisfied by services rendered under an oral contract prior to decedent's death, was barred by limitations when not brought within the time prescribed by statute for presenting claims arising upon contract. Probate Code, §§ 703, 707.

3. Witnesses 🔑133

In suit, in individual capacity, by one who was also administrator, against estate to cancel a note, executed by him to decedent, on ground that it was fully satisfied by services rendered under an oral contract prior to decedent's death, where estate filed cross-complaint on the note, claimant was not a competent witness to substantiate the allegations of his answer to the cross-complaint on theory that he was not testifying to a claim against the estate, where cross-complaint had been dismissed and no evidence was introduced thereunder. Code Civ. Proc. § 1880, subd. 3; Probate Code, § 703.

4. Appeal and error 🔑994(3), 1012(1)
Evidence 🔑594

The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so.

5. Executors and administrators 🔑450

In suit, in individual capacity, by one who was also administrator, against estate to cancel note, executed by him to deceased, on ground that note was satisfied by performance of services under oral contract prior to decedent's death, findings and judgment for the estate was justified where testimony of administrator's witnesses was not so clear, positive, uncontradicted, and of such nature that it could not rationally be disbelieved by trial court. Probate Code, § 707.

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Suit by Elmer Norgard against the estate of Chris Norgard, deceased, to cancel a note executed by plaintiff to decedent, on the ground that it was fully satisfied by services rendered under an alleged oral contract. From a judgment for defendant, plaintiff appeals.

Affirmed.

Preston & Gibson and Lilburn Gibson, all of Ukiah, for appellant.

Taft & Spurr, of Ukiah, for respondent.

SCHOTTKY, Justice pro tem.

Appellant was administrator of the estate of his father, Chris Norgard. He filed a claim against the estate which claim set forth in substance that on February 5, 1938, claimant owed said Chris Norgard the sum of $1,866.44 on a promissory note, and that on said date said Chris Norgard stated to, and agreed with claimant that if the latter would take care of the business affairs of said Chris Norgard, under the latter's instructions from that date "until the date of the death of Chris Norgard," the claimant would be paid for such service the full amount due on said note at the date of the death of Chris Norgard, plus the actual and necessary expense incurred by claimant in looking after said business affairs; that it was mutually agreed between claimant and said Chris Norgard that in consideration of the promise of claimant so to do, on the date of the death of Chris Norgard, said promissory note would be considered canceled; that claimant did take care of the business affairs of Chris Norgard until the latter's death which occurred on September 5, 1938, and in so doing, incurred and paid out certain expenses enumerated in the claim. The claim then concludes: "Claimant therefore claims the sum of $1866.44 with interest thereon from February 15th, 1938, plus the sum of $311.10 as aforesaid, all from the estate of Chris Norgard, deceased."

The claim was presented to the judge of the court and rejected by him, and appellant thereupon filed suit against the estate, and the judge of the court appointed attorneys to represent the estate in the litigation, all in accordance with section 703 of the Probate Code.

The foregoing facts are substantially set forth in the complaint. Count 1 of the complaint is based upon that portion of the claim which seeks the amount of the promissory note plus expenses incurred by Elmer Norgard, and count 2 is based upon their agreement that if plaintiff would perform said services for Chris Norgard from the 5th day of February, 1938, to the date of the death of Chris Norgard, that at the date of the death of Chris Norgard said promissory note would be considered canceled and paid in full.

Defendant estate filed an answer admitting the indebtedness from appellant to deceased, and denying the other material allegations of the complaints for lack of information or belief, and a special defense to each count was interposed that the agreement was not in writing, and was therefore invalid and barred by the provisions of subdivision 6 of section 1973 of the Code of Civil Procedure and subdivision 6 of section 1624 of the Civil Code. A cross-complaint was also filed seeking to recover on the promissory note from appellant to deceased. Appellant filed an answer to the cross-complaint in which he claimed that said promissory note had been paid in full, "as more fully appears by the allegations contained in plaintiff's complaint on file herein, which allegations are hereby referred to and incorporated herein," said answer concluding with the following prayer: "Wherefore, said cross defendant prays that cross complainant take nothing herein and that the prayer of plaintiff's complaint on file herein be granted, and for such other and further order and judgment as may be proper in the premises."

Prior to the time of the trial, defendant estate filed a dismissal of the cross-complaint with the clerk of the court.

The action went to trial, and when appellant attempted to testify as to the conversation and agreement with deceased, objection was made upon two grounds: One, that the contract set forth in his claim was within the statute of frauds (subd. 6 of § 1973, Code Civ.Proc.); and two, that under subdivision 3 of section 1880 of the Code of Civil Procedure, appellant could not testify as to any matter or fact occurring before the death of the deceased. These objections were sustained by the court.

Artie Norgard, a daughter of appellant, was called as a witness, and testified that she heard a conversation between Chris Norgard and appellant on the 5th day of February, 1938, wherein Chris Norgard stated to appellant that if the latter would come up when he wanted him to come, and manage his business until he got better, that he would consider the rest of the note paid, and that he would also pay appellant for his expenses in running back and forth, to which appellant agreed.

Isabell Daugherty, a witness called by plaintiff, testified that she saw Chris Norgard in bed at Eureka in the latter part of June, 1938; that he was ill and in bed at that time; and that at that time, in a conversation with Mr. Norgard, the latter stated that appellant was taking care of his business, and that appellant owed him some money and he was going to let him work it out by taking care of his business until he was able to take care of it himself.

Gertrude Tethrow, a witness called by appellant, testified that she was Chris Norgard's nurse for several months prior to his death, and that Chris Norgard told her appellant would take care of his business because appellant had full charge of all of it, and that he and appellant had fixed it up about this note of $1,866.44, and that he and appellant had squared the bill and just called it a square deal for appellant to take care of his business for him.

Appellant was then granted permission to file an amended complaint, and appellant filed an amendment to complaint, in which counts 1 and 2 were amended by making the period of time during which it was agreed that appellant would take care of the business affairs of deceased "from that date during and while he, the said Chris Norgard, was ill," instead of "from that date until the death of said Chris Norgard," as set forth in the claim as filed, and in the original complaint.

After the filing of the amended complaint, the trial was resumed and appellant's counsel again called appellant as a witness and attempted to have him testify as to matters occurring before the death of Chris Norgard. The court sustained objections to such offered testimony, stating: "As to any facts, matters of fact occurring before the death of Chris Norgard, I am satisfied the witness is not a competent witness."

The case was then submitted to the court, and the court rendered judgment in favor of respondent estate, and this appeal is from said judgment.

Appellant's first contention is that subdivision 3 of section 1880, Code of Civil Procedure, does not apply to the case at bar, and that therefore he was a competent witness in substantiation of the allegations of his amended complaint. He asserts that this action is not one against an executor or administrator. Section 1880, so far as applicable here, reads as follows: "The following persons cannot be witnesses: * * * 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

[1] This argument is ingenious, but without substantial merit. The claim is filed against an estate and not against an executor or administrator, and if allowed, is paid out of the estate and not by the executor or administrator. The section is clearly intended to prevent any person having a claim against an estate from testifying as to any fact occurring before the death of such deceased person. The fact that the administrator in this case was himself suing the estate upon a claim filed by him, would not permit him to testify. The meaning and intent of the statute of fraud is clear, and it applies to all claimants against the estate of a deceased person.

[2] Appellant next contends that he "was entitled to testify in substantiation of the allegations contained in count 2 of his amendment to complaint, by reason of the fact that such cause of action was not necessarily based upon any claim filed against the estate." Appellant then quotes said amendment, which reads as follows: "It was furthermore orally agreed by and between this claimant and said Chris Norgard, on the said 5th day of February, 1938, that if this plaintiff would perform the said services hereinabove referred to for said Chris Norgard from the said 5th day of February, 1938, during the illness of said Chris Norgard, that said promissory note would, by said parties, to-wit: said Chris Norgard and said plaintiff herein, be considered canceled and paid in full; that said plaintiff is therefore entitled to have said note canceled and declared to be of no further force nor effect."

It appears from said allegations that appellant relies upon a contract or agreement between himself and deceased, and hence his asserted claim must be held to be based upon a contract. Section 707 of the Probate Code, so far as it is applicable here, reads as follows: "All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses, must be filed or presented within the time limited in the notice or as extended by the provisions of section 702 of this code; and any claim not so filed or presented is barred forever * * *."

Therefore, if count 2 is based upon a claim, appellant would not be permitted to testify, and if said count 2 is not based upon a claim, then it is barred under section 707, supra.

[3] Appellant's third contention is that he was a competent witness to substantiate the allegations of his affirmative answer to respondent's cross-complaint. As hereinbefore stated, respondent filed a dismissal of the cross-complaint prior to the trial, and introduced no evidence in support thereof. Even if it were true that appellant, by incorporating in his answer to the cross-complaint by reference, the allegations of his complaint, and praying that the prayer of his complaint be granted, was entitled to introduce evidence in support of the affirmative allegations of his answer in spite of the dismissal of the cross-complaint, still this would not relieve appellant from the prohibition of subdivision 3 of section 1880 of the Code of Civil Procedure. The cross-complaint having been abandoned by respondent estate, and no evidence having been introduced by respondent in support thereof, appellant was in precisely the same situation with reference to the affirmative allegations of the cross-complaint as he was with reference to his complaint.

In the case of George v. McManus, 27 Cal.App. 414, at page 418, 150 P. 73, at page 75, the court said: "Respondent insists, however that the statute does not apply to a case where the action is brought by the personal representatives of a deceased person to recover upon facts which occurred prior to the death of the testator, and that, inasmuch as defendants filed a counterclaim asking for affirmative action, such fact rendered the testimony of plaintiff competent. In Sedgwick v. Sedgwick, 52 Cal. 336, it is held that, where an action is brought by an executrix upon a demand, not against, but in favor of, the estate, the defendant, though a party to the transaction had with the deceased, is nevertheless a competent witness in his own behalf in defending the action. It is apparent, however, upon an examination of the record presented, that the evidence of plaintiff was offered, received, and considered by the court in support of the allegations of his complaint. Since defendants had offered no evidence in support of their counterclaim when plaintiff was called to testify, it is clear, therefore, that such evidence was not offered in rebuttal of any testimony given by defendants' witnesses. The purpose of the rule is that, where the voice of one party to a transaction is closed by death, the other will not be permitted to testify as to the facts of the transaction in enforcing a money demand against the estate of such deceased person. In our opinion, the case falls within the provisions of section 1880 [of the Code of Civil Procedure], and it was prejudicial error to permit plaintiff to testify, as to the occurrences and facts upon which he based his claim and demand."

Our conclusion is that the trial court did not err in holding that appellant was not entitled to testify as to matters occurring before the death of the deceased. The rule announced in subdivision 3 of section 1880, supra, is a salutary one, and one supported by sound public policy. Where the voice of one party to a transaction is closed by death, the other should not be permitted to testify as to the facts of the transaction in enforcing a money demand against the estate of the deceased person.

[4] The final question which we must consider is whether or not the record supports the judgment of the trial court. No evidence was introduced by respondent, and the only evidence admitted by the court was the testimony of the witnesses Artie Norgard, Isabell Daugherty and Gertrude Tethrow, hereinbefore referred to. The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so. Davis v. Judson, 159 Cal. 121, 113 P. 147. As was said by our Supreme Court in the very recent case of Blank v. Coffin, 20 Cal.2d 457, 126 P.2d 868, 871: "There are many reasons why a jury may refuse to believe a witness. Section 1847 of the Code of Civil Procedure provides: 'A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence; and the jury are the exclusive judges of his credibility.' Section 2061, subd. 3 of the Code of Civil Procedure provides: 'That a witness false in one part of his testimony is to be distrusted in others.' In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case. See cases collected in 27 Cal.Jur. 180, § 154."

It must not be overlooked, however, that the verified claim of appellant, attached as an exhibit to the verified complaint of appellant, stated that it was mutually agreed between appellant and Chris Norgard that if appellant would take care of the business affairs of Chris Norgard "until the date of the death of Chris Norgard," said promissory note would be considered canceled at the date of the death of Chris Norgard. The trial court had a right to consider the statement of appellant in said claim, as to what was agreed between appellant and Chris Norgard, and said statement was certainly contradictory to the testimony of the three witnesses of appellant. The trial court found that it was not true that appellant and Chris Norgard entered into the agreement set forth in the claim, or the agreement set forth in the amended complaint, and also found that it was not true that appellant thereafter took care of the business affairs of Chris Norgard.

[5] Applying the well settled principles of law hereinbefore set forth, to the instant case, we are satisfied that the evidence of appellant's witnesses was not so "clear, positive, uncontradicted, and of such a

nature that it could not rationally be disbelieved," and that the record supports the findings and judgment of the trial court.

In view of the foregoing, the judgment is affirmed.

THOMPSON, Justice (concurring).

I concur. The appellant may not complain of the defendant's dismissal of its cross-complaint before the trial began, for the reason that no affirmative relief was sought by the answer thereto, and because all of the issues involved therein were tried and determined in the suit which was founded on the original complaint.

The appellant, who was administrator of his father's estate, brought suit under section 703 of the Probate Code to cancel a note which he had executed, on the ground that it was fully satisfied by services rendered under an alleged agreement to that effect. An attorney was appointed to represent the estate, as authorized by that section. The estate answered the complaint, admitting the execution of the note but denying the agreement to cancel the instrument and denying the alleged performance of services. It asserted that an unpaid balance of the note, in the sum of $1,866.44, remained due and owing to the estate. At the same time a cross-complaint was filed, alleging the execution of the note and that said balance remained unpaid and due to the estate. The plaintiff answered the cross-complaint, admitting the execution of the note, but alleging that it was fully paid. The answer contained no demand for affirmative relief. In effect, it contained no more than a denial of the essential allegations of the cross-complaint. The prayer asked that the cross-complainant take nothing by that pleading.

The answer to the cross-complaint raised no issues which were not contained in the cause which was founded on the original complaint. Before the trial of the cause, the cross-complaint was voluntarily dismissed under the provisions of section 581 of the Code of Civil Procedure.

I am of the opinion that the cross-complaint was properly dismissed for the reason that affirmative relief was not sought by the answer thereto. But even though it be deemed that the answer did seek affirmative relief, which I do not concede, the dismissal was harmless because all of the issues which were raised by the answer were included in the cause which was founded on the original complaint and determined by the court on the merits of the case. In the case of Hanson v. Goldsmith, 170 Cal. 512, 150 P. 364, which was a suit to quiet title to real property, the cross-complaint of the defendant, which demanded affirmative relief quieting title in him as the alleged owner thereof, was dismissed over his objection. The court held that dismissal was harmless since the same issues were contained in his answer to the original complaint, and determined the merits adversely to him. The same relative situation exists in the present case.

The appellant complains of the dismissal of the cross-complaint because that procedure deprived him of the opportunity of testifying regarding his father's alleged agreement to cancel the note in consideration of services performed, since the cross-complaint was not founded on a claim against the estate, and his evidence would therefore have been competent, while that testimony was excluded in the action based on the original complaint, under the provisions of section 1880 of the Code of Civil Procedure.

There is no merit in that contention. It is not error to dismiss a cross-complaint, to which dismissal a pleader would otherwise be entitled, merely because the cross-defendant may thereby lose his right to testify against a dead man, contrary to the provisions of section 1880. That is particularly true when the answer to the cross-complaint raises no new issues which are not contained in the pleadings upon which the original action is founded. To so hold would result in circumventing the application of the wholesome provisions of section 1880, which were wisely adopted in the interest of justice. Rules of procedure should not be employed as a game of strategy to avoid the effect of sound principles of evidence.

ADAMS, P. J., concurred.

54 Cal.App.2d 78

NAVONE v. YOUNG et al.

Civ. 12093.

District Court of Appeal, First District, Division 1, California.

Aug. 17, 1942.

1. Mines and minerals ⚷58

Evidence of intent to deceive supported finding of plaintiff's fraud in execution of contract with defendant to work defendant's mining land for defendant's agreement to deed plaintiff an interest therein, justifying cancellation of contract.

2. Evidence ⚷450(5)

In action to enjoin waste to realty, plaintiff's answer to defendant's cross-complaint, specifying parties' interest under contract whereby plaintiff was to work the land for defendant's agreement to deed plaintiff an interest, and alleging that a specified interest had been set aside for development, when read with the agreement, justified admission of parol testimony and letters antedating the agreement and not conflicting with the specific provisions thereof to explain the unexpressed terms with regard to the duties to be performed by plaintiff.

◆

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by J. O. Navone against Clarence Young and others to enjoin waste and trespass, and for damages, wherein defendant F. H. Hood filed a cross-complaint. From an adverse decree, plaintiff appeals.

Affirmed.

Clarence E. Rust, of Oakland, for appellant.

C. W. Pearson, of Placerville, for respondents.

WARD, Justice.

This is an appeal from a judgment quieting respondent Hood's title to, and establishing the fraud of appellant in the matter of a contract entered into between the parties to work, a parcel of mining land.

The facts of the case are as follows: F. H. Hood had for many years been the owner of a mining property, in connection with which he had been endeavoring to discover a method by which the minerals contained in the complex ore found thereon could be reduced and recovered. Plaintiff, a mechanic and mine operator, represented to Hood that he had discovered a method of reducing the ore; that he could concentrate it and had done so. After some negotiations the parties entered into a partnership agreement, by the terms of which plaintiff was to furnish specific equipment and erect and operate a mill for the recovery of the minerals, and Hood was to deed him an interest in the land. A plant was partially constructed and some of the specified machinery installed, but the ore concentration was a failure, and plaintiff stated he was through and left the property. Thereafter, upon defendants Young and Morgan attempting to work the property, with Hood's consent, plaintiff claiming an interest in the real property, filed suit to enjoin waste and trespass and for damage, joining Hood as defendant, he having refused to join in the action. Hood answered and filed a cross-complaint in which he sought to quiet title against the plaintiff; the latter filed an answer thereto claiming an interest in the land. The action was tried substantially as a quiet title suit. Title in respondent Hood was proved and admitted; appellant based his claim of interest in the real property upon the contract above mentioned.

The court decreed the contract to be invalid and void; that it be cancelled and annulled, and that F. H. Hood be declared to be the true and lawful owner of the land described in the complaint and his title quieted against all claims of appellant; that appellant be authorized to remove all personal property placed by him on the land, and that he have judgment against defendants Young and Magee for $75, to cover damage to his equipment caused by their mining operations.

Appellant contends that a finding of fraud as such was outside the issues of the case; that there was no evidence to justify such a finding, and that the court erred in admitting evidence of certain letters antedating the written contract of the parties, as the effect of such evidence was to vary the terms of an unambiguous contract. After the submission of the briefs, on oral argument appellant admitted that the first point was without merit.

Relative to the sufficiency of the evidence to support the finding of fraud on the part of appellant, there is evidence that he had considerable experience with mining machinery and mining operations, and that respondent Hood's experience, if any, was quite limited; that he represented that he "might be able to furnish almost everything in the machinery line"; that he had made a success of his method of reducing ore and could concentrate that on the Hood property. There is also evidence that the above contract was entered into as the result of Hood's confidence in appellant. After the work commenced, appellant sought to excuse and explain his failure to concentrate the ore, but finally abandoned the work.

[1] Appellant contends that the evidence does not show an intention to deceive Hood. A mining engineer of some thirty-seven years' experience testified that most of the machinery installed by appellant was over thirty years old and that it had no value except as junk. A witness who worked with appellant testified: "A. We [appellant and the witness] used to talk about the possibility of getting a title to the property there, whether he had fulfilled his agreement with Mr. Hood and whether he was going to be able to get the property or not, and I remember one time in particular we talked about, used to talk about it a good deal, sometimes talked maybe for an hour or so especially before we went to sleep. After it was all over and we were just about through talking about it he said 'Well, I suppose if somebody was fool enough to give me half of the property for a lot of old junk, why not take it?'" There is no error in the trial court's refusal to adopt appellant's theory that the whole matter was an honest mistake. The evidence taken as a whole indicates substantially that there was an intent to deceive.

[2] Independent of the question whether or not the evidence shows such intent, appellant claims the court erred in admitting in evidence certain letters antedating the written contract of the parties; that the effect of such evidence was to vary the terms of an unambiguous written instrument. Appellant, in his answer to Hood's cross-complaint, alleges his interest in the land to be an undivided 9,405/20,000; Hood's interest to be a 5,095/20,000 and that a 5,000/20,000 interest has been set aside by the parties "for the further development of said property." When this answer is read in conjunction with appellant's exhibit "Mining Partnership Agreement," there is legal justification for allowing in evidence, as an explanation of the labor and duties to be performed by appellant, the parol testimony and the letters, which do not conflict with the specific provisions of the partnership agreement, but explain its unexpressed terms and conditions (Kellogg v. Snell, 93 Cal.App. 717, 270 P. 232; Buckner v. A. Leon & Co., 204 Cal. 225, 267 P. 693; McKee v. Lynch, 40 Cal.App.2d 216, 104 P.2d 675; Stockburger v. Dolan, 14 Cal.2d 313, 94 P.2d 33, 128 A.L.R. 83), a vital matter to be considered in the final adjudication of the rights of the parties and their respective interests in the land.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

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54 Cal.App.2d 802

HOME OWNERS' LOAN CORPORATION v. ABRAHAM et al.

Civ. 2876.

District Court of Appeal, Fourth District, California.

Aug. 12, 1942.

Appeal and error 🔑**787**

Where no proceedings for bill of exceptions was ever instituted, no transcript had been prepared, time for preparing a record had expired, and order was made in trial court dismissing proceeding for procuring a transcript on appeal, appeal was dismissed.

◆

Appeal from Superior Court, Imperial County; Vaughn Thompson, Judge.

Action by the Home Owners' Loan Corporation against W. E. Abraham and others. From an adverse decision, the defendants appeal, and the plaintiff moves to dismiss the appeal.

Motion granted, and appeal dismissed.

W. E. Abraham, of Brawley, in pro. per., for appellants.

W. I. Wilson, of Brawley, for respondent.

PER CURIAM.

The respondent has moved to dismiss this appeal on the ground that no transcript or bill of exceptions has been prepared or filed. It appears from the clerk's certificate that notice of appeal was filed on October 16, 1941; that no proceedings for a bill of exceptions was ever instituted; that no transcript has been prepared; that the time for preparing a record has expired; and that an order was made and entered in the trial court on May 25, 1942, terminating and dismissing the proceeding for procuring a transcript on appeal.

The motion is granted and the appeal is dismissed.

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54 Cal.App.2d 113

HUTCHASON v. MARKS et al.

Civ. 13759.

District Court of Appeal, Second District,
Division 3, California.
Aug. 20, 1942.

1. Jury 🔑13(1)

In determining whether a party is entitled to a trial by jury, neither the caption of the pleadings nor the prayer is conclusive in determining whether a legal or equitable cause of action is stated, and a court must look to the whole of the pleadings, and to all facts of the case.

2. Election of remedies 🔑3(1)

An "action for damages" is based on an affirmance of the contract, while an "action for rescission" is based on a disaffirmance thereof. and such remedies are mutually inconsistent, although damages may be prayed for in event rescission cannot be had.

See Words and Phrases, Permanent Edition, for all other definitions of "Action for Damages" and "Action for Rescission".

3. Jury 🔑13(14)

If a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained on the issues raised by the legal cause.

4. Jury 🔑13(14)

Where legal and equitable remedies are sought in the same action, each remedy is governed by the law that would apply to it if the other remedy had not been requested, and hence, even though the action is essentially equitable, if the plaintiff requests legal relief, the parties are entitled to a jury trial on the legal issue.

5. Appeal and error 🔑110
Jury 🔑14(6)

Where plaintiff by complaint sought first to rescind instruments and secondly to state a cause of action at law for damages on ground that she was damaged and defrauded of her property, trial by jury of issues of fact as to fraud and damage was a matter of right, and hence a defendant was entitled to appeal from superior court's order granting plaintiff's motion for new trial, on ground that order was an "appealable order" under statute providing that appeal may be taken from superior court's order granting a new trial in an action or proceeding where a trial by jury is a matter of right. Code Civ.Proc. §§ 936, 963, subd. 2; Civ.Code, § 1709.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Arthur Hutchason, as administrator of the estate of Virginia Hutchason, deceased, substituted party plaintiff for Virginia Hutchason, against Ben W. Marks, also known as B. W. Marks, Roland Cummings, and others for cancellation of certain instruments and for damages because plaintiff was allegedly defrauded of property. From an order granting the plaintiff a new trial, Roland Cummings appeals, and the plaintiff moves to dismiss the appeal.

Motion to dismiss appeal denied.

Joseph Musgrove, of Los Angeles, for appellant.

Clarke & Bowker and Bailey & Poe, all of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

Respondent plaintiff has moved to dismiss this appeal on the ground that the order attempted to be appealed from is not an appealable order. The notice of appeal recites that it is taken "from the order * * * granting plaintiff's motion for a new trial as against defendant Roland Cummings." Plaintiff contends that the action is equitable in character, that in it trial by jury was not a matter of right, and hence that the order granting a new trial is not in the category made appealable by statute.

Section 963 of the Code of Civil Procedure is the statute in question. It provides that "An appeal may be taken from a superior court in the following cases: * * * 2. From an order granting a new trial * * * in an action or proceeding where a trial by jury is a matter of right * * *." Section 936 of the Code of Civil Procedure declares that "A judgment or order, in a civil action, except when expressly made final by this code, may be reviewed as prescribed in this title, and not otherwise, except as otherwise expressly provided." It is not contended that the order attacked is appealable unless it comes within the purview of subdivision 2 of section 963 of the Code of Civil Procedure, above quoted. Determination of this motion depends on the answer to the question: Does it affirmatively appear that there is no issue as to which trial by jury is a matter of right? Upon examination we find that the record requires a negative answer.

[1] The complaint is labeled "First Amended Complaint for Cancellation of Instruments and for Equitable Relief." But neither the caption of the pleading nor the prayer is conclusive (Standard Brands of California v. Bryce, 1934, 1 Cal.2d 718, 721, 37 P.2d 446); we must look to the whole of the pleadings and to all the facts of the case. See Bettencourt v. Bank of Italy, etc., Ass'n, 1932, 216 Cal. 174, 179, 13 P.2d 659. In the complaint before us plaintiff alleges that the defendants, by means of false and fraudulent representations, and without valuable consideration, induced plaintiff to convey to them a certain promissory note for the principal sum of $25,000, secured by a mortgage on real estate in the City of Los Angeles; that the defendant Prouse, over a period of several months, by means of false and fraudulent representations, and without substantial consideration, procured the plaintiff to convey a parcel of real estate and to advance or become obligated for and pay various sums of money. The complaint further alleges that subsequent to all of the previously mentioned transactions defendants "with intent to further deceive and defraud plaintiff * * * falsely represented * * * that they would settle for all advances made by her" and by means of further false and fraudulent representations induced plaintiff to deliver to defendants certain personal property and to execute an agreement, dated January 5, 1937, in the form of a letter addressed to plaintiff, providing in part that "The undersigned hereby agrees that in full consideration for all financial assistance given by you to the undersigned and/or associates, either in cash or in real or personal property * * * and as full repayment to you of all advances by you to F. C. Prouse personally * * * the undersigned will deliver to you Temporary Stock Receipts, calling for the delivery to you of four thousand (4,000) shares, of a par value of five ($5.00) dollars per share, of privately owned stock of the American-Asiatic Life Insurance Company * * * and it is further agreed that the certificates for said stock are to be delivered to you or your nominee as and when said company is qualified to transact an insurance business.

"It is hereby further agreed that if said company is not so qualified within the time limit set forth in said receipts, or within such further extension of time as may be granted * * * all funds advanced by you, together with interest * * * shall be repaid to you by the undersigned within sixty (60) days from and after the expiration of said time * * *." Such letter purports to be signed "Morley Trust By B. W. Marks" and "B. W. Marks," personally. Endorsed thereon is the following: "The above agreement, and all terms and conditions therein set forth, are hereby approved and agreed to by the undersigned. [Signed] Virginia Hutchason."

The complaint also alleges that "Plaintiff hereby offers to return to defendants the said agreement of January 5, 1937 and any and all other property delivered to her by defendants" and "that in all of the transactions * * * defendants * * * acted in connivance with each other and in pursuance of a common purpose and scheme, and that each and all of said defendants had knowledge of the fraud practiced on plaintiff as hereinabove alleged, and acquiesced therein." A second count in the complaint reiterates all the averments of the first count and in addition alleges that the defendants entered into a conspiracy to obtain plaintiff's property "and use the same in furtherance of a plan to finance their business operations for personal profit" and that the plan "was carried out by defendants in all of the aforesaid acts as hereinabove alleged * * *." The prayer of the complaint is "Wherefore, plaintiff prays judgment against defendants as follows:

"1. That said assignment of note and mortgage be ordered cancelled and delivered up; that in the event said note and mortgage have been disposed of, plaintiff have judgment against the defendants for the value thereof as follows: $24,500 with interest thereon at seven per cent per annum from January 5, 1935, to and including date of entry of judgment herein;

"2. $2,458.00 with interest thereon at the rate of seven per cent per annum from June 5, 1935, to and including date of entry of judgment herein;

"3. $1,500.00 with interest thereon at the rate of seven per cent per annum from August 28, 1935, to and including date of entry of judgment herein;

"4. $2,500.00 with interest thereon at the rate of seven per cent per annum from December 1, 1935, to and including date of entry of Judgment herein;

"5. $3,000.00 with interest thereon at the rate of seven per cent per annum from March 31, 1936, to and including date of entry of judgment herein;

"6. For costs of suit; and

"7. For all equitable relief."

Up to this point in our consideration of the facts it appears that the action is primarily, if not exclusively, equitable in character. It seeks and depends on rescission of the agreement of January 5, 1937, as a step preliminary to any monetary recovery based on the several transactions specifically pleaded and as to one of those transactions—the alleged fraudulently induced conveyance of the $25,000 note and mortgage—the complaint primarily seeks recovery, on the theory of a rescission, of the specific property. As an alternative to recovery of the specific property, "in the event said note and mortgage have been disposed of," plaintiff asks judgment for their value. This alternative demand is not predicated on an alternative and legal cause of action, but is simply for alternative relief based on the equitable theory of rescission and presents a case which appears to be similar to that which is clearly and concisely delineated and disposed of by Mr. Presiding Justice Peters, speaking for Division One of the First District Court of Appeal in Crouser v. Boice, 1942, 51 Cal. App.2d 198, 124 P.2d 358.

But in our case there is an additional averment in the complaint as follows: "Plaintiff alleges that as a result of the fraud and deceit of defendants, and the advantage taken of her by said defendants, as herein set out, plaintiff has been damaged and defrauded of her property in the sum of $33,958.00." This averment is alleged in Count I and is incorporated in Count II by reference. Furthermore Count II alleges that the asserted conspiracy "was carried out by the defendants * * * to the damage of plaintiff in the sum of $33,958.00." Such averments suggest that plaintiff in drafting her complaint was endeavoring, first, in equity, to avoid the effect of the contract of January 5, 1937, and, second, to state a cause of action at law for damages, based on the right declared in section 1709 of the Civil Code, "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers." In such an action trial by jury of the issues of fact as to fraud and damage would be a matter of right.

[2-4] We recognize that "An action for damages is based on an affirmance of the contract; an action for rescission on a disaffirmance thereof. [Citations] The two remedies are mutually inconsistent, although damages may be prayed for in the event rescission cannot be had." Davis v. Rite-Lite Sales Co., 1937, 8 Cal.2d 675, 678, 67 P.2d 1039, 1040. As to the item concerning the $25,000 note and mortgage we may assume that plaintiff's theory is purely that of rescission and that damages are sought only in the alternative that the specific property cannot be recovered. (Whether, on such a state of the pleading, upon a showing at the outset of the trial that the specific property was not recoverable, and that plaintiff would seek only the recovery of damages, a jury could be demanded as a matter of right to try the issues as to fraud and damage, we need not determine.) The $25,000 note and mortgage transaction was only one of several pleaded in both counts. Another transaction pleaded in each count

was one in which plaintiff was allegedly induced by defendants' fraudulent representations to endorse a promissory note and hypothecate property in favor of a person (corporation) not a party to this action. The note was defaulted, plaintiff's hypothecated property was sold, and she was damaged thereby in the sum of $3,000, according to averments in her complaint. Her theory of action, insofar as her cause of action is predicated on this item, is obviously an action at law for damages against each person connected with the fraud. See Swasey v. L'Etanche, 1936, 17 Cal.App.2d 713. 718, 62 P.2d 753. As to the issues of fact arising out of that item, a trial by jury would be a matter of right. It has been said to be the law that "There is no right to a trial by jury where the gist of the action as thus determined [by examination of the pleadings and all the facts of the case] is for the enforcement of some right cognizable only in equity, even though legal relief results as an incidental part of the recovery. The fact, therefore, that the prayer contains a demand for damages is not controlling, for where the cause of action is essentially equitable, the prayer for damages is merely incidental to the relief sought, and if the action is properly brought in a court of equity, that court will determine all the issues in the case." Bettencourt v. Bank of Italy, etc., Ass'n, supra, 1932, 216 Cal. 174, 179, 13 P.2d 659, 661. But in the later case of Pacific Western Oil Co. v. Bern Oil Co., 1939, 13 Cal.2d 60, at page 69, 87 P.2d 1045, at page 1049, the Supreme Court after reviewing the cases of Hughes v. Dunlap, 1891, 91 Cal. 385, 27 P. 642; Farrell v. City of Ontario, 1919, 39 Cal.App. 351, 178 P. 740; and Franklin v. Southern Pacific Co., 1919, 40 Cal.App. 31, 180 P. 76, concerning the right to a jury trial on the issue of damages in an action for an injunction to restrain future trespassing and to recover damages for previous trespasses, said "Neither has there been any decision of this court or of the District Court of Appeal to which our attention has been called holding that a party to an action like the instant one is not entitled as a matter of right to a jury when the question of damages is put in issue by the pleadings until the decision of this court in the case of Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 13 P.2d 659. * * * In so far as the case of Bettencourt v. Bank of Italy, etc., Ass'n, supra, is contrary to the rule thus announced, it is overruled." Likewise in Connell v. Bowes, 1942, 19 Cal.2d 870, at page 871, 123 P.2d 456, the Supreme Court speaking through Mr. Chief Justice Gibson says, "It is now established in this state, however, that if a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause. * * * Also, in Farnsworth v. Hunter, 11 Cal.2d 27, 31, 32, 77 P.2d 840, this court said that upon amendment of an equitable action so as to include a cause for damages the right to a jury trial on the latter issue could then have been asserted." In the case from which the foregoing quotation is taken it was held that the parties became entitled to a jury trial on the legal issues of fact raised by a cross-complaint even though the complaint stated a cause cognizable only in equity. In Crouser v. Boice, supra, 1942, 51 Cal.App.2d 198, 124 P.2d 358, 360, the rule is stated "Under our system of code pleading it is permissible to join legal and equitable issues in the same complaint * * *. Where legal and equitable remedies are sought in the same action, each remedy is governed by the law that would apply to it if the other remedy had not been requested. Thus, even though the action is essentially equitable, if the plaintiff requests legal relief, the parties are entitled to a jury trial on the legal issue."

[5] Upon the same principles as those enunciated in the Farrell case, supra, 39 Cal.App. 351, 178 P. 740, and followed in other cases hereinabove discussed, we are impelled to the conclusion that plaintiff's complaint contemplates the trial of legal as well as equitable issues and that upon the record before us we cannot hold that trial by jury of certain of the issues was not a matter of right.

The motion to dismiss the appeal is denied.

PARKER WOOD, J., and BISHOP, J. pro tem., concur.

54 Cal.App.2d 24

DEEVY v. LEWIS et al.

Civ. 11794.

District Court of Appeal, First District,
Division 2, California.

Aug. 13, 1942.

1. Sales ⟹477(6)

In action by buyer of farm machinery under conditional sales contract against seller's assignee for conversion when assignee repossessed machinery, where contract provided that indulgences granted by seller did not waive seller's right, trial of cause on theory that prior indulgences waived portion of contract making time essence thereof was error.

2. Sales ⟹479(6)

Buyer in default under conditional sales contract for farm machinery who did not tender full compensation to seller's assignee was not entitled to benefit of statute providing for relief from forfeiture. Civ.Code, § 3275.

3. Attachment ⟹302, 314

"Third party claim proceedings" are for the purpose of determining whether the debtor has any right, title or interest in the property upon which the levy has been made and the judgment of the court in such proceedings is only made conclusive as to the right of the plaintiff or other person in whose favor the writ runs to have the property taken and to subject it to payment for other satisfaction of his judgment. Code Civ.Proc. § 689.

See Words and Phrases, Permanent Edition, for all other definitions of "Third Party Claim Proceeding".

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Dan Deevy, Jr., against J. G. Lewis and others for conversion of certain farming equipment. From a judgment for plaintiff, defendants appeal.

Reversed.

Freitas, Duffy & Keating, of San Rafael, for appellants.

Vincent W. Hallinan and James A. Himmel, both of San Francisco, for respondent.

SPENCE, Justice.

In this action for the alleged conversion of certain farming equipment, plaintiff recovered judgment for $679.85 as the value of plaintiff's alleged interest in said equipment, $500 for loss of use thereof and $1,000 as exemplary damages. Upon motion for a new trial, plaintiff consented to a reduction of the exemplary damages to $250 and the motion was denied. Defendants appeal from the judgment.

The Deevy family, consisting of plaintiff together with his parents and his sister, lived upon a farm in Marin County. These parties, either jointly or individually or both, carried on activities in farming and cattle raising. Nellie Deevy, the mother of plaintiff, had an overdue account with defendants for cattle feed. In April, 1940, defendants commenced an action against Nellie Deevy and subsequently recovered judgment therein. A writ of attachment and a writ of execution had been issued in said action and levies had been made upon the farming equipment which is the subject of this action.

Prior to the commencement of said action against Nellie Deevy, plaintiff and said Nellie Deevy had entered into a conditional sales contract for the purchase of said farming equipment from the Grandi Company. Said company had discounted said contract by assignment to a bank. After numerous defaults by the purchasers under the terms of said contract, the bank reassigned said contract to the Grandi Company in June, 1940. Shortly thereafter, under instructions from plaintiff herein, the Grandi Company filed a third-party claim in the action brought by defendants against Nellie Deevy. In said third-party claim, the Grandi Company recited the facts concerning the conditional sales contract including the following: "* * * which said contract has been breached by the purchasers above named for failure to pay the sums due upon said contract in accordance with the terms thereof and that the undersigned has elected to declare a breach of said contract and to retake possession of the property transferred thereunder. * * *" It is conceded that the purchasers were in default at the time said third-party claim was filed and that no further payments were thereafter made. At about the time of the filing of the third-party claim by the Grandi Company, plaintiff herein also filed a third-party claim in said action.

In order to protect their interests, defendants herein purchased from the Grandi Company on June 20, 1940, the conditional sales contract paying therefor the sum of $1,020.15 which was the amount of the entire balance due thereon.

The hearing on said third-party claim was held on August 2, 1940. At that hearing, plaintiff herein claimed that Nellie Deevy signed the conditional sales contract merely as an accommodation to him and that she had no interest in the farming equipment on which the levy had been made. The trial court determined that the legal title to said equipment was in defendants herein and that the equitable title was in plaintiff herein. In other words, it was determined that Nellie Deevy had no interest in said equipment and that the levy upon said equipment, made in said action against her, had failed. Defendants herein immediately advised plaintiff that repossession of the equipment would take place immediately.

Four days later, plaintiff and his attorney called on defendants' attorney and offered to pay the sum of $347 which they calculated to be a sum sufficient to pay up the delinquent payments. This offer was refused but defendants' attorney advised them that if they would apply one-half of said amount upon the judgment against Nellie Deevy, a satisfactory refinancing arrangement might be made with respect to said equipment. This counter-proposition was rejected. Two days thereafter, plaintiff and his attorney again called on defendants' attorney and offered to pay $920.15 which they claimed to be the total amount remaining due. This offer was rejected upon the ground that it was made too late and after plaintiff's rights under the contract had been terminated and upon the further ground that the amount offered was insufficient as $1,020.15 was the amount which would have been required. Thereafter defendants sold said equipment and this action followed.

The main contentions of defendants herein are that the evidence is insufficient to sustain the verdict and judgment; that the judgment is against law; and that the trial court erred in its instructions to the jury. These contentions may be considered together as all of said contentions involve the question of the rights of the parties under the conditional sales contract.

The pertinent portions of said conditional sales contract read as follows:

"4. Should purchaser fail to pay said indebtedness or any part thereof when due, or breach this contract, or if any execution or writ be levied on any of purchaser's property * * * seller, at his option, and without notice to purchaser, may declare the whole amount unpaid hereunder immediately due and payable, or seller may, without notice or demand, by process of law or otherwise, take possession of said chattels wherever located. In the event of such repossession, seller may, without notice to purchaser, declare all of purchaser's rights under the contract terminated and retain all monies paid thereon for the reasonable use of said chattels. * * *

"5. Any action to enforce payment shall not waive any of seller's rights hereunder. Any indulgences granted purchaser shall not constitute a waiver of any of seller's rights. Time is of the essence of this contract * * * seller may assign this contract without notice to purchaser."

"8. This contract shall apply to, inure to the benefit of, and be binding upon the * * * assigns of the respective parties * * *".

The jury was instructed and the trial court proceeded upon the theory that there had been a waiver by the seller of the portion of the contract making time of the essence by reason of the indulgences granted to the purchasers by the seller in accepting payments after the times specified in the contracts. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126. We do not believe this theory can be sustained under the contract before us. It will be noted that the contract here differs from the contract in Boone v. Templeman, supra, and similar cases in that it provides that "Any indulgences granted purchaser shall not constitute a waiver of any of seller's rights."

In the recent case of Fageol T. & C. Co., v. Pacific Ind. Co., 18 Cal.2d 748, at page 756, 117 P.2d 669, at page 674, the court said, "The contract provides that time is the essence of every part thereof; that neither acceptance of any overdue payment nor the waiver of any breach of any term or condition shall 'operate as a waiver of any other *prior or subsequent breach*'; and that upon default repossession may be gained without previous demand of performance. Having so provided, the parties were bound by such covenants to the same extent as they were bound by any other article of their agreement. By such provisions they neither violated a statute nor contravened public policy. Where a contract expressly provides that acceptance of installment payments after they become due shall not operate as a waiver of its forfeiture provision, the acceptance of past due payments does not waive strict performance as to any other payments or conditions stipulated in the contract. Pacific Finance, etc., Co. v. Pierce, 48 Cal.App. 600, 191 P. 1115; Lundberg v. Switzer, 146 Wash. 416, 263 P. 178, 59 A.L.R. 131. It having been established that Thomas was in default as to the payment due January 10 and that such default was never waived, plaintiff's repossession of the truck was its absolute right." See also Pacific Finance, etc., Co. v. Pierce, 48 Cal.App. 600, 191 P. 1115; Brown v. Chowchilla Land Co., 59 Cal.App. 164, 210 P. 424; Lundberg v. Switzer, 146 Wash. 416, 263 P. 178, 59 A.L.R. 131.

In Miller v. Modern Motor Co., 107 Cal. App. 38, at page 44, 290 P. 122, at page 125, a case upon which plaintiff strongly relies, the court distinguishes the contract there from the contract involved in Pacific Finance, etc., Co. v. Pierce, supra, by saying that in the latter case, "* * * the contract expressly provided that acceptance by the owner of any payment after the same is due shall not constitute a waiver of the provision that time was of the essence * * *."

[1, 2] We are therefore of the opinion that the theory upon which the instructions were based and upon which the trial court proceeded did violence to the express terms of the contract of the parties, which terms were valid and gave to the seller the right to repossess the property regardless of prior indulgences. We further conclude that plaintiff may not rely upon the provisions of section 3275 of the Civil Code to sustain the judgment as the uncontradicted evidence shows that plaintiff failed to tender "full compensation" as required by that section as a prerequisite to relief from forfeiture. These conclusions make it unnecessary to consider the other points raised by defendants.

[3] In conclusion it may be stated that plaintiff claims that in the action against Nellie Deevy the court "found that respondent was entitled to the return of the tractor and tractor equipment" and he was therefore "entitled to immediate possession of his property." But that issue was not before the court in that case and no finding or conclusion was made thereon. Third-party claim proceedings under section 689 of the Code of Civil Procedure are had for the purpose of determining whether the debtor has any right, title or interest in the property upon which the levy has been made. By the terms of that section, the judgment of the court in such proceedings is only made "conclusive as to the right of the plaintiff, or other person in whose favor the writ runs, to have said property taken, or held, by the officer and to subject said property to payment or other satisfaction of his judgment."

The judgment is reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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54 Cal.App.2d 49

PEOPLE v. HUBBELL.

Cr. 3544.

District Court of Appeal, Second District, Division 3, California.

Aug. 14, 1942.

Rehearing Denied Aug. 24, 1942.

Hearing Denied Sept. 10, 1942.

1. **Infants** 🔑20

Evidence sustained convictions under statute punishing crimes against children. Pen.Code, § 288.

2. **Sodomy** 🔑6

Evidence sustained conviction under statute punishing sex perversions. Pen. Code, § 288a.

3. **Criminal law** 🔑1134(1)

Where evidence that crime was committed consisted of uncertain testimony of young child, given more than three years after date of alleged crime, it was the duty of the District Court of Appeal to give critical attention to all rulings of the trial court and to the manner in which the jury was instructed, to determine whether errors were committed that were prejudicial to defendant's rights.

4. Criminal law ⚷1169(1)
Infants ⚷20

In prosecution under statute punishing crimes against children, testimony of child's mother that she complained to the police some three weeks after alleged offense was not admissible under rule permitting proof of complaints made by minors and others contemporaneously with or within a short time after commission of offenses, and admission of testimony was prejudicial to defendant, where evidence as to his guilt was palpably weak. Pen.Code, § 288.

5. Criminal law ⚷763(1), 771, 1186(4)

An instruction on corpus delicti was subject to the objection that it was confusing and susceptible to construction that prima facie evidence alone was required to establish elements of offense, that court had determined that proof of offense was sufficient to meet requirements of the law, and that jury must abide by that decision, and instruction was prejudicial to defendant where evidence as to defendant's guilt was palpably weak, and inference that prosecuting witness was an accomplice was strong and corroborating evidence was weak. Const. art. 6, § 4½.

6. Criminal law ⚷532

A court has the duty in the first instance to pass on the sufficiency of proof of the corpus delicti before admitting a confession.

7. Criminal law ⚷1186(4)

Where district attorney read at length from testimony by police officer at defendant's preliminary examination, and testimony so read related but briefly to matter inquired about by defendant of officer on cross-examination, and extensively to defendant's alleged statements to officer relating to many other matters and containing statements strongly indicating guilt, and district attorney continued to read such testimony after court sustained motions to strike, and finally offered original transcript of the testimony of the officer, district attorney's conduct was prejudicial to defendant, where evidence of defendant's guilt was palpably weak and inference that prosecuting witness was an accomplice was strong and corroborating evidence was weak. Const. art. 6, § 4½.

8. Criminal law ⚷772(4)

In prosecution in 1941 for violation of statute punishing crimes against children, wherein there was a conflict in evidence whether prosecuting witness had ever been in defendant's home where offense allegedly took place after the summer of 1937, defendant was entitled to specific instruction as to his defense of the three year statute of limitations. Pen.Code, § 288.

9. Criminal law ⚷1186(4)

In prosecution for violation of statute punishing crimes against children, wherein defense of limitations was interposed, but not defense of alibi, giving of instruction on defense of alibi was not reversible error, though instruction was a confusing attempt to state three legal propositions. Pen.Code, § 288; Const. art. 6, § 4½.

10. Infants ⚷20
Sodomy ⚷6

In prosecution for violation of statute punishing crimes against children and statute punishing sex perversions, admission of testimony of mother of prosecuting witness that, about ten months after one offense charged and almost a month after other offense charged, prosecuting witness complained to witness about defendant, was error, as against contention that testimony was admissible under rule that, where such offense has been committed against one under legal age, complaint made while occurrence was recent may be proved by the victim or by person to whom the complaint was made, since complaint was not as to a "recent occurrence". Pen.Code, §§ 288, 288a.

See Words and Phrases, Permanent Edition, for all other definitions of "Recent Occurrence".

11. Criminal law ⚷407(1)

In prosecution under statute punishing sex perversions, testimony relative to prosecuting witness' accusations, made in the presence of the defendant, was admissible. Pen.Code, § 288a.

12. Criminal law ⚷507(7)

In prosecution for violation of statute punishing sex perversions, evidence authorized a finding by jury that prosecuting witness was an accomplice whose testimony was required to be corroborated. Pen.Code, § 288a.

13. Infants ⚷20

In prosecution under statute punishing crimes against children, no corroboration of prosecuting witness was required. Pen. Code, § 288.

14. Criminal law 🔑1186(4)

Errors did not require a reversal of judgment of conviction, unless District Court of Appeal was convinced, from a consideration of all of the evidence and the significance of the errors as affecting the verdict, that there had been a miscarriage of justice. Const. art. 6, § 4½.

15. Criminal law 🔑409

The weight which was to be accorded defendant's admissions depended largely on defendant's motives in making the statements and whether they were voluntarily made.

16. Criminal law 🔑824(1)

A court in criminal cases has the duty to give instructions on the general principles of law applicable to the case on trial, even though they were not proposed or requested by the parties.

17. Criminal law 🔑517(1), 736(2)

If evidence of a confession is admitted, it is for jury to determine whether confession was voluntarily made and therefore entitled to consideration, and it may not be used against a defendant or considered by the jury as evidence unless the jury believes that it was freely and voluntarily made or without previous inducement, duress, threats, or intimidation.

18. Criminal law 🔑781(1)

If the state of the evidence is such that it admits of no rational conclusion other than that the confession was freely and voluntarily made, there is no necessity for instructions as to the governing rules of law with relation to the receipt and consideration of confessions.

19. Criminal law 🔑781(1)

In prosecution for violation of statute punishing crimes against children, evidence of prosecution established, prima facie, a sufficient foundation for the introduction of defendant's confession, and hence court did not err in failing to give, on its own motion, an instruction pertaining to the admission and consideration of evidence of a confession. Pen.Code, § 288.

20. Criminal law 🔑519(1)

Police officer's statement to defendant that he would bring as many as 30 children to bear witness against defendant did not render defendant's confession an "involuntary confession".

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Confession".

21. Criminal law 🔑519(1)

The fact that defendant may have had some secret hope that a confession would be to his advantage would not render the confession inadmissible on ground that the confession was an "involuntary confession".

22. Criminal law 🔑519(1)

A confession dictated by the hopes and motives of an accused and inspired solely by his own mental processes and emotions is a "voluntary confession".

See Words and Phrases, Permanent Edition, for all other definitions of "Voluntary Confession".

23. Criminal law 🔑519(1)

The pressure exerted on an accused by others, tending to influence his actions, in making a confession, and not the pressure of the circumstances surrounding the accused, is to be weighed in determining whether his confession has been a "voluntary confession" or a confession under the compulsion of external influence.

24. Criminal law 🔑781(4)

Requested instruction that admissions of defendant, whenever made, are not sufficient to convict him unless prosecution proves beyond a reasonable doubt by testimony other than admissions of defendant that defendant committed offense with which he is charged, was properly refused as not correctly stating the law.

25. Criminal law 🔑1172(2)

Giving of instruction to effect that defendant should be conclusively presumed to be sane on dates of alleged offenses and at time of trial was not harmful though no defense of insanity was interposed, where testimony of defendant, of a physician, and of a witness who volunteered statement that she did not believe that anyone would have committed acts charged if he had been sane, furnished sufficient reason for instruction.

26. Criminal law 🔑1119(4)

Where defendant failed to comply with rule of District Court of Appeal requiring a defendant to bring up in the transcript anything said by his own counsel which may have prompted district attorney's statement complained of, no misconduct which would call for a reversal was shown. Rules of the District Court of Appeal, Rule 2, § 7.

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

George S. Hubbell was convicted under the first count of a violation of the statute punishing crimes against children, under the second count of a violation of the statute punishing crimes against children, and under the third count of a violation of the statute punishing sex perversions, and he appeals.

Judgments of conviction for violation of the first and third counts reversed and cause remanded for a new trial, and judgment of conviction under the second count affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

SHINN, Justice.

Defendant was convicted by verdict of a jury of two counts of violation of section 288 and one count of violation of section 288a of the Penal Code. The offense involved in count I of the information was alleged to have been committed in July, 1938, upon the person of a female child nine years of age, while she was seated upon defendant's lap in his home and upon an occasion when other young children were present and being entertained by defendant with stories, which form of entertainment frequently brought neighborhood children to defendant's home. The offense involved in count II was alleged to have been committed in the defendant's home upon the person of a thirteen-year-old boy, consisting of a violation of section 288 on March 24, 1940, and the third involving a violation of section 288a on December 12, 1940, with the same boy. The information was filed February 11, 1941, and the trial was commenced September 30, 1941. Defendant appeals from the judgment as to each count and from an order denying his motion for a new trial.

[1, 2] Appellant's first contention is that the evidence was insufficient to support a conviction of any of the offenses charged. The acts testified to in two instances clearly came within the purview of section 288 and in the other instance of section 288a of the Penal Code. Appellant's argument is that the stories of the children were confused, contradictory, and unworthy of belief. While there were conspicuous weaknesses in the testimony, which we shall point out, the contention that the evidence is insufficient to support the judgment is not sustainable as to any of the three counts.

We should preface our discussion of the conviction under the first count by saying that while we think it was not legally insufficient to support the judgment of conviction, we consider the evidence of guilt to be palpably weak. The proof of the crime was so inconclusive as to lead us to believe that the defendant probably would not have been convicted under this count except for certain errors occurring at the trial in the receipt of evidence and instruction of the jury, which call for a reversal.

The trial took place more than three years after the date of the offense as alleged in count I. The prosecutrix, whom we shall designate as Jane Doe, lived in defendant's neighborhood, was acquainted with defendant's young daughter who lived with him part of the time, and she frequently came to defendant's home with other young children. There was a sharp conflict in the evidence as to whether Jane ever was in defendant's home after the summer of 1937. She had no definite recollection as to the year in which the alleged offense occurred, but the evidence of all of the witnesses who testified on the subject was to the effect that she never returned to the defendant's home after either the summer of 1937 or 1938. The testimony of defendant and his witnesses that she had not been in his home after the summer of 1937 was definite and was supported by circumstances strongly tending to establish that fact. The child's mother testified to a complaint made by the child to her concerning the defendant in July of 1938 and which she said was about a week after the date of the alleged incident, as the time of the occurrence was related to her by her daughter. We shall assume that this evidence, which stands alone, was sufficient to support the finding of the jury that the offense charged in count I was not committed more than three years prior to the filing of the information.

[3] The testimony of the prosecutrix was to the effect that she was in defendant's home with five or six other children one afternoon during the summer school vacation; that she was seated on defendant's lap while he was telling a story, which he was "acting out with his hands"; that

during the telling of the story he touched her private parts once but did not rub them, the plain import of her testimony, in which the circumstance was related several times, being to the effect that the contact of defendant's hand with her body was at most but momentary. While it was a procedure not unusual in such cases, the child's story was elicited by leading questions. Practically all of the facts relating to the occurrence had completely left the mind of the prosecutrix. She could not recall how she was seated in defendant's lap, whether she was moved from one knee to the other, the names of any of the children who were present, where or how they were seated, and in response to the court's questions could not recall whether the panties she had on were tight or loose fitting, nor how much of her legs they covered, or anything else about them. She could not recall at what point in the story being told by defendant the incident occurred, although she testified that she remained on his lap until the story was finished. She recalled going to her home afterward but could not recall whether her mother was present when she arrived. In similar respects her testimony made it clear that she had but an indistinct recollection of what had taken place at the time, the sole specific fact that she was able to recall being that the defendant in some manner had placed his hand upon her private parts beneath her clothing. She was not injured in any manner and there was no evidence that she had been startled or frightened by the experience, nor was there anything in her testimony to suggest that the alleged conduct of defendant had made a firm impression upon her mind. It is not surprising that the child was unable to testify with greater certainty as to the identity of the children who were present and as to the other attendant circumstances. It would have been unusual if such matters had not passed from her mind after the elapse of more than three years, but it is nevertheless true that her recollection was uncertain as to the manner in which the alleged offense was committed and as to details bearing directly upon the question of criminal intent. Under these circumstances, where the evidence that a crime was committed consists of the uncertain testimony of a young child, given more than three years after the date of the alleged offense, it is our duty to give critical attention to all of the rulings of the court during the trial and to the manner in which the jury was instructed, in order to satisfy our minds whether errors were committed that were prejudicial to the rights of the defendant.

[4] The mother of the prosecutrix testified, over objection of defendant, that a week or two after her daughter had made complaint to her she made a report to the police at the police station. No testimony was given as to any conversation she had upon that occasion, although she did testify that she did not, following that report, appear in court as a witness against defendant. The clear inference from the testimony was that a report had been made as to an alleged act of misconduct of defendant but that it had not been made the subject of a criminal charge. Evidence that the mother complained to the police some three weeks after the alleged commission of the offense was not admissible for any purpose. Its effect upon the minds of the jury, we think, would have been to strengthen the mother's testimony to the effect that the child had complained to her and the evidence carried the implication that the mother, at least, believed that the defendant was guilty of some offense against her daughter. We are aware of no rule of evidence which permits a party to prove the acts of his witness, otherwise inadmissible, for the sole purpose of giving circumstantial support to the truth of the recitals he has given on the stand and to thus bolster his testimony. Certainly the evidence was not admissible under the rule which permits proof of complaints made by minors and others contemporaneously with or within a short time after the commission of offenses of violence against them, and we think it was not admissible upon any tenable theory. The mother was permitted to testify further, over objection, that she had also talked with a police officer, who was a witness in the case, in January, 1941, when he came to her house, the natural inference being that they discussed the occurrence as to which the previous complaint had been made. It is not at all unreasonable to believe that this evidence would have tended strongly to convince the jury that defendant must have been guilty of misconduct of some sort, as otherwise the complaints to the police would not have been made. Unsanctioned by any rule of evidence, the complaints made by the mother, with the implications

naturally flowing therefrom, were hearsay and under the facts of the present case were prejudicial to defendant.

The court instructed the jury as follows: "Proof of the corpus delicti means proof of the essential elements necessary to constitute the crime charged and of the existence of criminal agency or means as the cause of them. It may be proven by circumstances shown in evidence, or by inference drawn from facts proven. The evidence of the corpus delicti need not be of conclusive character, and need not necessarily connect the party informed against with the commission of the crime, in order to justify the consideration of an admission or confession of such party so charged with the crime. It is not necessary that the corpus delicti should be proved beyond a reasonable doubt before proof may be made of an admission or confession. Prima facie evidence of the corpus delicti is sufficient; and it is for the court to say whether there is sufficient evidence of the corpus delicti to go to the jury, precisely as in the case of any other material fact."

[5, 6] It is contended that this instruction was confusing; that it was susceptible of a construction that prima facie evidence alone was required to establish the elements of the offense; that the court had determined that the proof of the crime aside from any confession of the defendant was sufficient to meet the requirements of the law and that the jury must abide by that decision. This criticism is well founded. The rule of law stated in the instruction is exclusively one for the guidance of the court during the trial. It is the duty of the court in the first instance to pass upon the sufficiency of the proof of the corpus delicti before admitting a confession or admission of the defendant, but that is a matter with which the jury is not concerned. There could be no proper occasion for the giving of the quoted instruction and the jury inevitably must have been confused in its endeavor to apply the rule stated to their own duties, since any attempt to do so would have led them astray. We think the instruction as given was susceptible of a construction by the jury that they were obliged to accept the decision of the court as to the sufficiency of such evidence. Necessarily the jury would have believed that the instruction was given for their guidance but we think it would have been impossible for them to have found such guidance in the statement of a rule which has application only to questions of the admissibility of evidence. That the instruction was seriously prejudicial to defendant in view of the unsatisfactory proof of guilt under count I cannot be doubted.

[7] In the cross-examination of a police officer, he was questioned by the defendant concerning testimony he had given at the preliminary examination in which he related a conversation he had had with defendant, and his testimony was read, as follows: "A. Well, I asked him if he knew who made the complaint against him whereby he was brought before the authorities at the University, and he said he had a good idea who it was. I asked him if he knew who it was and he said, 'I suspect it was [John Doe, the prosecuting witness].' I asked him if he had ever fondled [John Doe], and he said, 'Well, not intentionally, but maybe psychologically he had, but he didn't mean to harm the boy intentionally'." Upon redirect examination, over objection of defendant, the District Attorney read at length from the testimony of the witness given at the preliminary, the testimony so read relating but briefly to the matter inquired about on cross-examination, as we have quoted it, but extensively to defendant's alleged statements to the officer relating to many other matters, and containing statements strongly indicating, if not admitting, guilt. These passages from the testimony were read over the repeated objections of defendant and upon the insistence of the District Attorney that he had a right to read them because they were all contained in a single answer of the witness to a question propounded at the preliminary and because he contended that they tended to clarify the testimony of the witness with respect to the single matter which we have already alluded to elicited upon his cross-examination at the trial. It is apparent that the purpose of the District Attorney was not merely to clarify the testimony of the witness in the particular in question, which required only the reading of a single sentence, but to read as much as the court would allow of the other damaging statements of defendant that had been testified to by the witness at the preliminary. The witness had related his recollection of the same conversation in his direct examination at the trial, concluding with the statement, "I think that about covers it," he had been cross-examined as to the same con-

versation and yet the District Attorney, not by questions properly propounded, but by reading from the preliminary transcript, supplemented the testimony of the witness, after he had testified at length, and this, as we shall point out, in defiance of the rulings of the court. At one point the court struck out a portion of the testimony read and instructed the jury to disregard it and soon thereafter stated, "I think perhaps, as it is very lengthy, it has gone far enough." The defense made a motion to strike out additional portions, which motion was granted by the court. The District Attorney continued reading testimony having no relation whatever to the cross-examination and containing further damaging admissions of defendant, whereupon defendant made another motion to strike more of the testimony and the court said: "I think the motion to strike will be granted, and you had better abstain from reading all that balance. * * * It covers a multitude of subjects and it has drifted away from the original purport of that portion defense counsel referred to in their cross examination. * * * That portion is down to the time when the court granted the first motion to strike, and from there on the motion to strike is granted and it is stricken." The District Attorney continued with his reading along the same lines, elicited from the witness that he had so testified at the preliminary, and finally offered the original transcript of the testimony of the witness at the preliminary hearing covering his entire direct and cross-examination. In this manner the District Attorney contumaciously ignored the adverse rulings of the court and placed before the jury former testimony of the witness, which was not admissible under the circumstances. The offer of the entire testimony of the witness given at the preliminary, without reason to believe that it would or should be received in evidence, carried the imputation that there was other testimony of like damaging character. Defendant repeatedly assigned the conduct of the District Attorney as prejudicial misconduct and the court, in denying the assignments, admonished the jury to disregard the import of the offer of proof as thus made. The conduct persisted in by the District Attorney was wholly lacking in fairness to defendant and in respect for the court's rulings.

We are of the opinion that the conduct was prejudicial to defendant. Some of the testimony as thus read had been stated in substance in the direct or cross-examination of the witness upon the trial, but statements in addition to the facts previously testified to were placed before the jury only by the reading of the testimony by the District Attorney. One of these statements was to the effect that defendant had stated that he and a young boy, brother of the male prosecuting witness, had stripped and taken showers together and that he saw nothing wrong in that; another was that John Doe had placed his, defendant's, hand upon his, John Doe's, naked skin and that this had given defendant sex gratification; another statement of defendant related in the testimony at the preliminary was that he had fondled the prosecutrix Jane Doe in his home but did not know when it was; a further statement was that he had had another female child in his lap on a bus and had received sex gratification from placing his hand upon her stomach. Also included in the testimony read was an alleged statement of defendant that he had known for a long time that he was a sex pervert and a statement concerning the soiling of his clothes as a consequence of sex activity when fondling children. Other statements read from the testimony, while corresponding generally with the testimony of the witness at the trial, were yet more specific and damaging.

The several rulings of the court striking out portions of the testimony, and the admonition respecting the prosecution's offer of the entire testimony of the witness at the preliminary could not repair the damage that had been done. Nor is it an answer to the charge of unfair conduct on the part of the District Attorney that some of the testimony read was mere repetition of testimony given by the witness at the trial nor that defendant made a statement in writing, which we shall refer to later, containing damaging admissions of somewhat similar import. Mere rulings striking out testimony or admonitions to pay no attention to it cannot remove the feelings of revulsion and abhorrence that are occasioned by narrations that shock the senses and arouse resentment toward the accused. The harm that comes from the needless and unwarranted repetition of such inculpatory statements, as well as from damaging statements improperly placed before the jury, is, of course, greatly magnified in a case where the evidence of guilt is conspicuously weak, as it was under count I.

In view of the conflict in the evidence whether Jane Doe had ever been in his home after the summer of 1937, it was of extreme importance to defendant that the jury should have had a clear understanding of the statute of limitations as applicable to the offense charged in the first count. An instruction was requested and refused by the court which stated the law concisely and clearly and the following instruction was given at the request of the People:

"An alibi simply means that the defendant was at another place at the time the crime charged is alleged to have been committed. All the evidence should be carefully considered by you, and, if the evidence on the subject, with reference to any particular count in the Information, considered with all the other evidence, is sufficient to raise a reasonable doubt as to the guilt of the defendant on that particular count, you should acquit him. It is sufficient to justify an acquittal if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, if you find that a crime was committed.

"The Court further instructs the jury that although as to each count in the information it is alleged that they were committed 'on or about' a particular date, that it is wholly immaterial on what day or night the offense was committed, provided that you believe from the evidence that it was committed, and that the same was committed within three years prior to the filing of the information in this case, taking into consideration however the first paragraph of this instruction hereinabove set out, and if on any particular count as charged in the information any evidence of alibi is sufficient to raise a reasonable doubt as to the guilt of the defendant on that particular count, you should then give the defendant the benefit of that doubt on that particular count.

"The Court further instructs the jury that the information in this case was filed in the Los Angeles County Clerk's office on February 11, 1941."

[8, 9] The defense of alibi was not involved. The question as to time was whether the prosecutrix ceased coming to defendant's home in 1937 or 1938. It was her absence during the summer of 1938 that was heavily relied upon by defendant, not his own absence, and the question of alibi had nothing to do with the defense of the statute of limitations upon which defendant relied nor with any other issue in the case. The instruction was a confusing attempt to state three legal propositions: First, to define the defense of alibi; second, to state that the proof need not show the commission of the several offenses on or about the several dates charged in the information but that it would be sufficient if it established the commission of the crimes, severally, at any time within three years prior to the filing of the information; and, third, that if the offense charged in count I (the only one as to which the statute could have operated, under the evidence, as a defense) was proven to have been committed, defendant would be entitled to an acquittal if the date of the offense was more than three years prior to the filing of the information. Without simplicity and clarity in the expression of legal principles, jury instructions must inevitably defeat rather than accomplish their purpose. What was the jury to understand from the statement in the instruction reading, "taking into consideration however the first paragraph of this instruction hereinabove set out"? What would the jury know about the paragraphs of the writing which was being read to them? And if they had been able to identify the paragraph referred to, how would they have been able to see any connection between the proof as to the date of an offense and any doubt they might have of defendant's "presence at the time and place of the commission of the crime charged"? A common result of a shot at the flock is to bring down nothing but feathers. A "stock" instruction, unsuited to the case, stating irrelevant principles and confusing those that are relevant cannot be expected to produce any better results. Defendant was entitled to a simple, direct and specific instruction as to his defense of the statute of limitations as applied to the proof under count I. Such an instruction was not given. The instruction as given implied that there was a statute of limitations of three years but did not state that the bar of the statute would constitute a valid defense, and what was said on the subject was qualified by the ambiguous phrase above quoted. We cannot know how this instruction was understood by the several members of the jury nor whether it af-

fected their verdict. There is so much uncertainty about it that we are not inclined to predicate a reversal upon any prejudice we might believe resulted from it. We cannot leave the subject without observing that the District Attorney would do well to discontinue the use of this instruction, which was given at his request.

For the foregoing reasons the judgment of conviction and the order denying a new trial under count I must be reversed.

What has been said as to the erroneous instruction on corpus delicti and of the misconduct of the District Attorney is applicable to counts II and III, although we do not reach the same result as to the disposition that should be made of the case under each of these counts.

A reversal of the conviction under count III is also required for the reason that the instruction on corpus delicti and the misconduct of the District Attorney, with certain additional errors to be discussed, considered in the light of the evidence under that count, resulted in a miscarriage of justice.

As to this count corroboration of the testimony of the prosecuting witness was required if he was found to be an accomplice. The inference that he was such accomplice was so strong and the corroborating evidence under this count so weak that the errors committed in the trial preclude an affirmance of the judgment under section 4½, Article VI, of the Constitution. The boy, John, who was 15 years of age at the time of trial, had frequently visited defendant in his home, as had many other children; he testified that he had visited defendant over a long period of time and as often as twice a week. On January 7, 1941, he was apprehended by police officers in the commission of an act of personal misconduct at a service station and was taken to his home, where he was questioned by his mother. She was called as a witness and testified, over defendant's objection, that John at that time made a complaint to her about defendant, no details of the complaint being given. Count II charged an offense committed March 24, 1940, and count III an offense committed December 12, 1940. The inference would be that the complaint to the mother related to both dates.

[10] It is sought to justify the introduction of this testimony under the rule that where an offense of the nature of those here charged has been committed against one under legal age, the fact that a complaint was made while the occurrence was recent may be proved by the victim or by the person to whom the complaint was made. The point is made by appellant that the complaint as made was not as to a "recent" occurrence within the applicable meaning of the word, and this contention must be upheld.

It is the settled law in this state that evidence of the fact that the victim of rape made complaint of the occurrence is admissible in a criminal prosecution, People v. Mayes, 1885, 66 Cal. 597, 6 P. 691, 56 Am.Rep. 126; and cases collected in 22 Cal.Jur. 383–4. According to Mr. Greenleaf, as quoted in the cited case, such evidence is admissible only as corroborative of the testimony of the prosecutrix. The original reason for the rule was that since it is presumably the natural thing for a female who has been outraged to make outcry or prompt complaint of the crime, the fact that she did promptly complain is provable to meet the inference of consent which might be drawn from her silence. In People v. Wilmot, 1903, 139 Cal. 103, 105, 72 P. 838, 839, the court said in that connection: "The reason for the rule admitting such testimony would appear to be wanting in the case where the act is accomplished with a female who fully understands the nature thereof, and freely and voluntarily submits thereto. Doubtless, however, evidence of the fact of complaint of injury on the part of one under the age of legal consent would in most cases be competent, and this court has in this respect made no distinction between cases where there was actual resistance and those where resistance and nonconsent were conclusively inferred by the law." In People v. O'Bryan, 1933, 132 Cal.App. 496, at page 503, 23 P.2d 94, 97, it was said: "We think it may be fairly stated as the general rule that evidence as to the complaints of an outraged woman may be admitted only as corroborating or sustaining her testimony, and that when she does not appear as a witness, even the fact that she made complaint, however recently after the injury, is not admissible. There is an exception to this rule in the case of a child too young to testify, the courts holding that testimony as to the complaint in such case and under certain circumstances may be given by the person to whom complaint is made. People v. Figueroa, 134 Cal. 159, 162, 66 P. 202;

People v. Bianchino, 5 Cal.App. 633, 636, 91 P. 112. We know of no other exception."

This type of evidence escapes exclusion under the hearsay rule only because it portrays a verbal act manifested while the victim is influenced by the shock of mistreatment and because the fact of complaint expresses a spontaneous reaction to an unusual and disturbing experience. A mere casual recital of the facts to acquaintances is not such a complaint as may be proved, People v. Wilmot, supra, nor is an admission obtained from a child as the result of a spanking, People v. Ewing, 1925, 71 Cal.App. 138, 142, 234 P. 917. It is important to bear in mind that the hearsay rule has never been relaxed so as to allow evidence of the substance of the statements constituting the complaint. A conviction in the Mayes case, supra, was reversed because of the improper allowance of evidence of the details of statements made by complainant to her sister concerning the defendant's conduct, and subsequent cases have held strictly to that doctrine. And it must be apparent that a complaint which is a verbal act of the victim when made under the influence of shock resulting from the experience becomes mere hearsay when it is made after the shock has worn off and appears to have been a dispassionate recital of a past event. Therefore the element of time becomes highly important. A review of a great number of reported cases in our state discloses that there has been a general recognition of the rule that complaints cannot be proved unless they have been made promptly. Most of the cases involved such complaints and we find constant repetition of statements that the complaints had been made immediately or shortly after the occurrence. And we also find constant repetition of the rule that complaints to be provable in such cases must have been made "immediately," "as soon as possible," "at the earliest practical moment," "at the earliest opportunity," etc. In fact, the importance of the element of time has never been questioned. In the few cases where it has appeared that there was unexcused delay in making complaint, proof of the complaint has been held to be prejudicial error. In People v. Lambert, 1898, 120 Cal. 170, 52 P. 307, there had been a delay of something less than two months; in People v. Gonzalez, 1907, 6 Cal.App. 255, 91 P. 1013, there had been a delay of a month and a half, and in each case the testimony was held to have been inadmissible under the hearsay rule. In People v. O'Bryan, supra, 132 Cal.App. 496, 23 P.2d 94, a police officer had testified over objection of the defendant that an adult victim of an alleged attempt to commit incest had appeared at the police station some four hours after the commission of the alleged crime and made complaint "concerning a lascivious attack committed upon her by her father, O'Bryan, the defendant in this case." The court said of this testimony (page 503 of 132 Cal.App., page 97 of 23 P.2d): "Whether the alleged victim of the assault in this case would have testified that she made complaint to the police officers we shall never know, because she died before the case first came to trial. Having in mind the fact that testimony of a complaint made as soon as possible after an attack is admissible in the case of an adult victim of rape to demonstrate the fact that the act was committed against her will, and knowing that instead of making an immediate complaint the woman alleged to have been injured in this case did not telephone the police or go to the police station, if at all, until approximately four hours after the time of the offense charged, and then only after defendant had refused to go back to her house at the point of Wilemon's gun there to settle with her husband we seriously doubt whether the admission of her own testimony on these points would have been justified."

In People v. Bianchino, 1907, 5 Cal.App. 633, 91 P. 112, a case involving a 5-year-old girl who had no understanding of the seriousness of the offense (rape), it was held not error to receive evidence of a complaint made several weeks after the assault and at a time when a physical examination by a physician disclosed injuries and a venereal infection. The exceptional circumstances of the case were pointed out in the opinion as bringing it substantially within the rule justifying evidence of complaints.

The admission of evidence of a complaint made by the boy to his mother was unquestionably erroneous. Almost ten months had elapsed since the date of the first charged offense and almost a month since the last one. If it be argued that the case falls within the holding of the Bianchino case, which is the most that could be argued in support of the court's ruling, the dissimilarity of the facts answers the argument. Instead of a 5-year-old girl we have here a boy who was almost 14 years of age at the time of the first alleged offense and 14½ years old at the time of the last one. Not only that, but there was testimony by the same police officer that the boy admitted that he had participated with defendant in committing upon the person of defendant the identical act constituting a violation of section 288a of the Penal Code which he had accused defendant of having committed with him, as charged in count III. To be sure, the boy testified that until he was told so by the officers he did not know that his acts or those of defendant to which he testified were wrong, but this testimony, which would be expected of any prosecuting witness under the same circumstances, was not sufficient to justify the testimony as to complaints made under the circumstances related. Furthermore, the accusations against defendant were made under conditions which would have prompted the boy to seek justification or excuse for his own misdeeds, which had resulted in his apprehension by the police. Needless to say, he had had ample opportunity to make complaint and if his mere statement that he did not appreciate the wrongful nature of the acts would be sufficient foundation for evidence of the complaints, the bars would be down for admission of such evidence in all similar cases where, in the absence of such testimony, evidence of complaints would be pure hearsay. In addition to all of this, it further appeared without contradiction that in the latter part of January, 1941, he was again questioned by his mother and the police officers in the presence of defendant at the police station. There he had first answered that the defendant had done nothing to him. His mother then said to him, "You have got to say what you told me before" and the officer said, "Now you have got to say what you told me before," whereupon the boy made statements to the effect that both he and the defendant had committed the several acts mentioned. Thus it was brought before the jury definitely what would nevertheless have been inferred, namely, that the several complaints theretofore made by the boy had constituted a recital of such acts.

[11] The testimony of the mother with reference to her son's complaint was admitted over defendant's objection. The testimony of the officers as to the bare fact that a complaint was made by the boy on the following day came in without objection. The testimony relative to the boy's accusations made in the presence of the defendant some two weeks later was admissible and, as we have seen, covered the same field as the statements made to the mother and the officers. Neither the fact that the objectionable testimony of the officers as to complaint having been made was not objected to nor the fact that the boy later repeated his charges in the presence of defendant detracts from the error in the admission of the mother's testimony. Even if the officers' testimony had been objected to and excluded, the harm had already been done in receiving the mother's testimony. Defendant's counsel no doubt had reason to believe that any objection they might make to the testimony of the officers would be overruled as previous objections had been. Sufficient has been said upon this subject to show error in the admission of the testimony of the boy's complaints and the prejudicial nature of the evidence.

[12] The jury was instructed that the charges in counts I and II required no corroboration; that corroboration of the testimony of John was required under count III, provided he was found to be an accomplice of defendant in the act charged and, in effect, that whether he was an accomplice depended upon whether he knew that the act committed was a crime in which he was assisting at the time of its commission. We cannot know whether the jury regarded him as an accomplice. He was a school boy who had apparently normal mentality; at least it was not shown that he was a stupid boy. He was 14½ years old at the time of the commission of the act charged in count III and was not shown to have acted involuntarily upon any of the occasions to which his testimony related. It must be conceded that it would have been wholly within the bounds of reason for the jury to have found that he was an accomplice as to the act charged in count III and similar acts which he admitted he himself had committed. People v. Robbins, 1915, 171 Cal. 466, 472, 154 P. 317.

In view of what is considered to be the extreme likelihood that the jury regarded the boy as an accomplice to the crime charged in the third count, it is important to consider in this connection also the instruction as to corpus delicti which we have already discussed. If the boy should be considered as an accomplice, a serious doubt would exist as to whether there was sufficient corroboration to sustain a conviction under count III. The principal corroborative evidence consisted of oral and written admissions to which we shall presently refer. Defendant had consistently denied having committed the act charged in count III. There were reasonable grounds upon which the jury could have found that the boy was an accomplice, that his testimony was without sufficient corroboration and that the admissions of defendant were wholly insufficient to show guilt of this offense, and if they had so believed, it would have been their duty to acquit. They could have construed defendant's admissions as implying guilt of this offense but could have believed that there was no other evidence which they deemed sufficient to prove the elements of the offense, and if they had so believed, it would have been their duty to acquit. But under this instruction they were not free to follow either of these courses. The court, as they were told, had passed upon the weight of the evidence tending to prove the elements of the offense, and they could not know the difference between a determination as to the sufficiency of the evidence to meet a rule of law and its sufficiency to establish guilt. The instruction was especially harmful to the defense to count III because of the close question whether the boy was an accomplice. Bearing in mind the weakness of the evidence relied upon by the prosecution for a conviction under count I and the culpable admissions of the prosecuting witness and the lack of corroboration of his testimony under count III, the language of the Supreme Court in People v. Baldwin, 1897, 117 Cal. 244, 249, 49 P. 186, 187, is particularly appropriate. The court there said: "In this class of prosecutions, the defendant, owing to natural instincts and laudable sentiments on the part of the jury, and the usual circumstances of isolation of the parties involved at the commission of the offense, is, as a rule, so disproportionately at the mercy of the prosecutrix's evidence, that he should be given the full measure of every legal right in an endeavor to maintain his innocence." Because of these errors, the conviction under count III must be reversed.

[13, 14] We have next to consider the effect of the errors already discussed upon the conviction under count II. This charged an offense as to which no corroboration was required. Notwithstanding the errors which require a reversal under counts I and III, the same result will not follow as to the conviction under count II unless we are convinced from a consideration of all of the evidence and the significance of the errors as affecting the verdict that there has been a miscarriage of justice within the meaning of section 4½, Article VI, of the Constitution. It therefore becomes necessary to recite the substance of the evidence tending to establish guilt.

Defendant was called before some of the members of the faculty of the institution where he was employed, was informed of charges brought to their attention respecting his treatment of children, and following a conference, resigned his professorship. He then voluntarily accompanied a police officer employed by the institution to a police station, where he was questioned by officers and made a written statement and certain oral admissions to which we shall refer. Upon the following day he was confronted by John in the presence of the latter's mother and two officers. Upon that occasion John, in the presence of the named persons, made statements accusing defendant of the offenses charged against him. At the conclusion of the interview defendant said to John's mother: "I am sorry that this happened to your boy, Mrs. [Doe]. Please try not to think too badly about me." She answered: "Professor, I don't know what to say. I had such faith in you." And he replied: "I know you had." Upon the preceding day defendant, in the presence of the officers, in his own hand wrote a statement headed "Confession," which read, in part:

"I do not wish to be a menace to children. I feel that I am, and shall probably continue to be while I have my liberty. Therefore I make this confession of essential guilt, in the hope that society will do something to remove the threat of my being at large.

"Accusations: excessive fondling [John Doe] (guilty); feeling of sex parts (if true, unintentional, but in some cases perhaps not without foundation) [here are named the children involved in counts I and III and another female child] (one act, about July, 1940) (Last act with [John Doe], about December 12, 1940.) * * *

"In all, so many children have been involved, and such interpretations have been made, and such psychological foundations exist, that I wish to make my general plea guilty."

Even more damning statements were made in the writing, but we find it unnecessary to quote or discuss the same or defendant's lengthy attempts on the stand to explain away the manifest implications of guilt which they plainly convey. Two police officers testified to oral admissions made by defendant which were so complete and specific as to be in themselves irreconcilable with innocence of violations of section 288 of the Penal Code. In his testimony at the trial defendant admitted having made many of the statements testified to by the officers, and with reference to such statements as well as to the written statements that he had made, gave lengthy explanations to the general effect that he had admitted to the officers that the various acts could have been committed and that certain results of a sexual nature, stated in their raw details, could have been accomplished, but that he had not intended to admit that they had actually happened. It cannot be doubted for a moment that these admissions, if believed by the jury to have been truthfully made, taken in connection with the testimony of the prosecuting witness, if believed, and the evidence of frequent opportunities for commission of such offenses, furnished complete evidence of defendant's guilt under count II of the information. And here we might say, because we have not heretofore discussed the effect of defendant's admissions, that they do not apply with anything like the same force to the charge under count III, which defendant at all times denied, nor were they as potent under the weak independent evidence applying to count I as they were as applied to count II.

[15] The weight which was to be accorded defendant's oral and written admissions depended largely upon defendant's motives in making the statements and whether they were voluntarily made. It is not contended that the statements were induced by threats (except as hereinafter noted), fear or promises of any nature nor that they were the result of any adverse pressure or overpersuasion on the part of the officers. Defendant was asked by the officers to make a statement and did so before he was placed under arrest. He was told by one of the officers that they wanted no statement unless it contained the truth and he composed his written statement with deliberation. The major part of the discussion with the officers followed the writing of the statement and contained further statements which in themselves constituted a confession of sexually-induced practices with children, although they fell short of express admissions of guilt of the specific offenses charged. Defendant's explanation of the circumstances under which the admissions were made and of his motives in making them were given upon the stand at great length. A few excerpts from the record will be sufficient to illustrate the tenor of the testimony in this connection.

"A. He [Officer Lake] told me that I should make a confession or a statement. He didn't promise me that I would escape trial or that the children would not be brought in as witnesses. He didn't promise me anything. But he told me I should make a confession or a statement, and I said that I would like to accomplish that, in spite of the fact that I was innocent of the charges against me, and then we discussed whether I should write such a statement or make it orally. I said that I would write it.

"Q. Now, did Officer Lake say anything with reference to your statement that you would like to accomplish the arrest even though you were innocent of the charge? A. Officer Lake told me that he just couldn't understand a person who wanted to confess to crimes that they had not done, and he gave me several instances of people who had done so. He told me that he thought he would not be able to sleep nights if he were conscious that he had sent an innocent man to prison.

"Q. Then what did you do? A. I might—yes, I will tell you, I wrote my statement, but I would like to add to what I was saying before that I had no intention of making a false confession or saying anything that was untrue. I wanted to write a statement which would do just what I have said I wanted to do, which would get me ultimately in prison and would not involve the children in any further harm or make them tell any more lies about me, or about anything else, just leave them out of it, if I possibly could. * * * I valued my own freedom, and my own future life, at just about zero. I didn't care whether I were free or not free. I felt that these charges had forever made it impossible for me to be an acceptable member of society, and especially the society of children. Any child hereafter who was even seen talking to me would be subject to suspicion, and might be brought in for questioning on very personal matters. Parents would have no faith in me, and my life with children was at an end. * * * It says, 'Without any threat of any kind,' Mr. Lake had told me that he would bring the children to witness against me. He said I believe that he might be able to bring as many as thirty children to bear testimony against me. It didn't occur to me at the time, but it is true that that was the very soundest threat that he could have possibly made; nothing would have driven me to write a statement like that sooner than such a statement.

"Q. Why? A. I was filled with absolute horror at the thought of having thirty children, or even two children, dragged out to go through matters of that kind. I felt that would do them incalculable harm. I felt that any harm that might be done to me was simply infinitesimal in comparison to the harm that would be done to those children. Children are in a malleable and plastic state of development, and harm to them at that time is just criminal. I felt that the very thought that they had involved me by mentioning my name, had already involved me terribly in their statements—and I didn't want to involve them one bit further, if I could help it. So that in the view that there was a threat, which though it may not have been meant as a threat, had a very powerful effect upon me."

One of defendant's witnesses was a psychiatrist, who testified at length about defendant's mental condition and characteristics. We find in his testimony such statements as the following:

"I regarded his sexual immaturity to be a pathological situation, he having failed to grow up beyond the infantile or childish level in his sexual interest. * * * It would be an example of a pathological mental state, a mental disorder. * * * I would say that he has remained essentially infantile in his sexual development, although from an adult standpoint he is essentially asexual. * * * No, I mean that psychologically his interests in sex were those of a small child. * * *

"Q. Now, you say in your opinion Dr. Hubbell has an illness? A. Yes, this is a mental illness.

"Q. Would you say he is insane or ever has been? A. No, I said he is not insane."

After reading at length the testimony of the physician, which was to the same general effect as the portions we have quoted, we have been unable to discern what fact or facts pertinent to the defense of not guilty were attempted to be established or that the testimony had any bearing at all upon that defense. The clear impression conveyed by a reading of the testimony of defendant relating to his oral and written admissions, and that of the physician, is that the tragic aberration of which defendant was pictured as the unfortunate victim brought him unwillingly to the borderline of the offenses charged. The testimony, as we read it, is corroborative of the other evidence tending to establish guilt. This conclusion necessarily follows from the fact that the defense was that the acts charged had not been committed and from the further fact that the deficiencies of defendant, however they be classified, would not avail to establish his innocence if the acts were committed with any of the elements of intent entering into the crime as defined by the Penal Code.

[16-19] It is contended that the failure of the court to instruct the jury as to the law pertaining to the admission and consideration of evidence of a confession requires a reversal of the convictions as to all counts. No such instruction was requested by defendant but it is claimed that it was the duty of the court to give one of its own motion. Undoubtedly it is the duty of the court in criminal cases to give instructions on the general principles of law applicable to the case on trial, even though they are not proposed or requested by the parties. People v. Scofield, 1928, 203 Cal. 703, 709, 265 P. 914; People v. Heddens, 1936, 12 Cal.App.2d 245, 55 P.2d 230; People v. Curran, 1938, 24 Cal.App.2d 673, 676, 75 P.2d 1090; People v. Warren, 1940, 16 Cal.2d 103, 116, 104 P.2d 1024. We may assume, although it is not so stated by appellant, that the principles of law he has in mind are those stated in People v. Dye, 1931, 119 Cal.App. 262, 270, 6 P.2d 313, namely, that if evidence of a confession is admitted, it is for the jury to determine whether the confession was freely and voluntarily made and therefore entitled to consideration, and that it may not be used against a defendant or considered by the jury as evidence in the case unless the jury shall believe from the proof as to the circumstances under which it was given that it was in fact freely and voluntarily made

or, in other words, made without previous inducement, duress, threats or intimidation. The court, speaking through Mr. Presiding Justice Conrey, said (page 270 of 119 Cal. App., page 316 of 6 P.2d): "To 'threats and inducements' we think it appropriate to add, any illegal process whereby through external means of pressure the free will of the defendant has been overcome." We may concede for the purposes of this opinion that it is the duty of the court to so instruct the jury of its own motion in every case in which evidence is received of an admission by the defendant which could reasonably be construed or is contended by the prosecution to be a confession, if there is a failure of proof on the part of the prosecution or other evidence in the case which would reasonably lead to a belief that the confession was not freely and voluntarily made. We may also concede what defendant at the trial strenuously denied, that his written and oral statements did amount to a confession. We are nevertheless of the opinion that if the state of the evidence is such that it admits of no rational conclusion other than that the confession was freely and voluntarily made, there is no necessity for instructions as to the governing rules of law with relation to the receipt and consideration of confessions, and that the failure of the court to give such instructions of its own motion does not constitute error. Here the evidence of the prosecution did establish, prima facie, a sufficient foundation for the introduction of the confession. We find nothing in the evidence of defendant which is in conflict with the evidence of the prosecution upon that subject, nor do we find anything in defendant's testimony, given its fullest effect, which tends to show that the confession in a legal sense was not free and voluntary. His testimony is replete with assertions that he was hopeless for his own future, that he was solicitous of the welfare of the children involved, that he felt that they would be harmed if brought to court to testify in the case, that he was more interested in their welfare than in his own, and that it was his motive and desire in making his written and oral admissions to bring about his own incarceration in a manner that would avoid the appearance of the children in court.

[20-23] It will be noticed in the foregoing quotations from defendant's testimony that one of the officers stated to defendant that he would bring as many as thirty children to bear witness against defendant. It is now argued that this statement constituted a threat and that defendant was induced thereby to make the alleged confession in order to save the children the embarrassment and harm that might come from their appearance in court. No authority is cited which supports this proposition and we consider it untenable. A reading of the testimony of defendant with relation to this incident refutes the argument that defendant in making the confession acted upon the statement of the officer and he definitely testified that it would have made no difference to him whether two children or thirty children had been involved. But the statement of the officer was not the sort of threat or intimidation that would have rendered the confession involuntary had it been acted upon. The brief quotation we have made from People v. Dye, supra, 119 Cal.App. 262, 6 P.2d 313, is broad and comprehensive and recognizes that the process which can invalidate a confession must be exercised "through external means of pressure." Regardless of what defendant's motives may have been, there were no "external means of pressure" used. The officers suggested to defendant that he make a statement. They did not insist upon it nor does it appear that the witness was reluctant to make one. In fact, it appears that he wished to make a statement, not on account of any benefit that he hoped to receive, but because, as he testified, he did not wish the children to be brought into court. It affirmatively appears from defendant's testimony that the officer did not promise him that he would escape trial or that the children would not be brought in as witnesses, and that he made no promise whatever, and yet under these circumstances defendant said that he would like to make a statement. Even if he had had some secret hope that a confession would be to his advantage, that would not have rendered the confession inadmissible. People v. Luis, 1910, 158 Cal. 185, 191, 110 P. 580. His desire to save the children from being brought into court did not tend any more strongly to show an involuntary nature of the confession than did the wish of the defendant in People v. Smalling, 1892, 94 Cal. 112, 113, 29 P. 421, to take responsibility for the crime upon himself in order to free his sister, who was also under arrest, which motive was held not to invalidate his confession as material

and competent evidence. It must be apparent that a confession dictated by the hopes and motives of the accused and inspired solely by his own mental processes and emotions is voluntary in a legal sense. It is not the pressure of the circumstances surrounding an accused person, but pressure exerted by others tending to influence his actions, that is to be weighed in determining whether his confession of guilt has been made voluntarily or under the compulsion of external influences. We are satisfied that there is to be found in the record no basis which the jury could reasonably have regarded as a valid ground for disregarding defendant's alleged confession as involuntary or for believing that his willingness to make the confession was to any extent the result of the act or conduct of any other person, and we conclude therefore that there was no error in the failure of the court to give the instruction. People v. Chan Chaun, 1940, 41 Cal. App.2d 586, 592, 107 P.2d 455, and cases there cited.

[24] Defendant tendered an instruction reading in part as follows: "* * * that admissions of the defendant whenever made are not sufficient to convict him unless the prosecution proves beyond a reasonable doubt by testimony other than admissions of the defendant that the defendant committed the offense or offenses with which he is charged in the information on file." The court declined to give the instruction. No other instruction was asked and none was given on the subject of admissions or confessions. The instruction did not correctly state the law, for it is not true, of course, that the proof, independently of any admissions of the defendant, must be sufficient to establish guilt beyond a reasonable doubt before a conviction can be had. The instruction therefore was properly refused.

[25] Defendant complains of an instruction to the effect that he should be conclusively presumed to be sane on the dates of the alleged offenses and at the time of trial. No defense of insanity was interposed but we believe no harm could have resulted from the instruction. The testimony of defendant, of the physician hereinbefore quoted and that of another of defendant's witnesses who had volunteered the statement that she did not believe that anyone would have committed the acts charged if he had been sane furnished a sufficient reason for the instruction. After reading the testimony of defendant in full we entertain no doubt as to his sanity, but we cannot say that it could not have left a contrary impression upon the minds of the jurors. The vice which counsel attributes to the instruction is that it suggested that defendant was relying upon insanity as a defense and that this was highly prejudicial to his case as it was presented. We think the jury could not have received any such impression but would have understood the contrary.

Other instructions complained of were identical with those recently approved in People v. Kearney, 1942, 20 Cal.2d 147, 126 P.2d 612, and they require no specific attention.

[26] In his closing argument the District Attorney stated that he was precluded by rules of law from proving the statements made by the children to their mothers while the defense was not so limited, and he said, in part: "So I can only say they didn't dare to ask the mothers what the children told them—Mrs. T., for instance, or Mrs. B." The statement was assigned as misconduct and the court admonished the jury to consider it "as purely argument of counsel and not as evidence." If, as now suggested by the People, the statement probably was made in reply to some argument by the defense, the better course for the District Attorney would have been to object to statements of defense counsel which might have called forth an improper reply to an improper argument. But as defendant has failed to comply with section 7 of Rule II of this court, under which he was required to bring up in the transcript anything said by his own counsel which may have prompted the statement complained of, we have no way of judging whether the statement was wholly unwarranted or had been invited by statements equally improper. Upon the record before us no misconduct is shown in this incident which would call for a reversal.

It is our opinion that the testimony of the boy John as to the commission of the offense charged in count II, considered with the other evidence which we have noted, presented a case so strong as to preclude a reversal, notwithstanding the errors which we have discussed.

The judgments and the order denying motion for new trial as to counts I and III of the information are reversed and the cause is remanded for a new trial; the judgment and order denying motion for new trial as to count II are affirmed.

SHAW, Justice pro tem., concurred.

SCHAUER, Presiding Justice (concurring).

I concur in the judgment and in everything said in Mr. Justice SHINN's opinion except certain portions of it which deal with defendant's asserted confession and which are inconsistent with the views hereinafter expressed. Defendant's statement, as applied to count II, in my opinion constitutes a confession. While the evidence tending to negative its voluntary character seems to me to be of little weight, I believe that we cannot say that as a matter of law there was no issue of fact as to whether such confession was voluntarily given. Such issue should have been submitted to the jury with appropriate instructions. Upon the entire record, however, I am of the opinion that the failure to so submit such issue did not affect the verdict as to count II.

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53 Cal.App.2d 835

In re MICHAUD'S ESTATE.

SPALDING, Public Administratrix, v. BOUTIN.

Civ. 12176.

District Court of Appeal, First District, Division 2, California.

Aug. 11, 1942.

1. Descent and distribution 🔑24
Escheat 🔑4

At common law, incapacity of heirs first entitled to succeed to property will not effect an "escheat", but property will pass to the persons next entitled to take as though the first heirs had not existed.

See Words and Phrases, Permanent Edition, for all other definitions of "Escheat".

2. Executors and administrators 🔑20(7)

Even if deceased possessed closer relatives residing in that part of France occupied by Germany, public administratrix could not complain of appointment of a first cousin as administrator as one of "next of kin" entitled to share in the estate, in absence of showing that the nearer relatives were not nonresident aliens barred from inheritance by statute. Probate Code, §§ 259, 259.1, 259.2, 422.

See Words and Phrases, Permanent Edition, for all other definitions of "Next of Kin".

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Proceeding in the matter of the estate of Pierre Joseph Michaud, deceased. From an order denying her petition to be appointed administratrix of the deceased and appointing Jules Boutin as administrator, Jessie A. Spalding, public administratrix, etc., appeals.

Affirmed.

Randall O'Neill, Morettini & O'Neill, and Henry A. Gabriel, all of San Jose, for appellant.

Arnold Rumwell, of Palo Alto, for respondent.

DOOLING, Justice pro tem.

This is an appeal by the public administratrix of Santa Clara County from an order denying the petition of appellant to be appointed administratrix of the estate of Pierre Joseph Michaud, deceased, and appointing respondent Jules Boutin administrator. Jules Boutin is a first cousin of the decedent. His testimony on the hearing disclosed that the decedent had a father and two brothers residing in that part of France now occupied by Germany, that he had last seen them when he was in France in 1909, had not heard from them since that time and did not know whether they were living or dead. Appellant takes the position that this evidence is not sufficient to establish that Boutin is in the class of "next of kin entitled to share in the estate" (Prob.Code, § 422), and that in the absence of such showing the public administratrix is entitled to preference of appointment over Boutin. Estate of Eggers, 114 Cal. 464, 46 P. 380.

We need not decide whether the evidence would support a finding that decedent left no closer relatives living than respondent Boutin since in our opinion this appeal is governed in any event by Probate Code sections 259, 259.1 and 259.2, enacted in 1941 and reading (in part) as follows:

"§ 259. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession * * * is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens * * *.

"§ 259.1. The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

"§ 259.2. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property."

[1, 2] Assuming, as claimed by appellant, that the evidence is not sufficient to negative the existence of closer relatives of decedent residing in that part of France now occupied by Germany, no attempt was made to prove that such relatives would be entitled to inherit under Probate Code section 259, a burden clearly cast upon appellant by section 259.1, since appellant's sole claim to the right to administer depends upon a showing that respondent Boutin is not one of "the next of kin entitled to share in the estate."

This follows necessarily from the provisions of section 259.2 which must be construed as giving more remote kindred resident in this country the right to inherit where the nearer relatives resident in a foreign country are barred from inheritance by section 259. It is a settled rule of the common law that "Incapacity of the heirs first entitled to succeed to property will not effect an escheat, but the property will pass to the persons next entitled to take as though the first heirs had not existed." 19 Am.Jur., 388; 30 C.J.S., Escheat, § 2, p. 1166; Orr v. Hodgson, 4 Wheat. 453, 4 L.Ed. 613; Connolly v. Probate Court, 25 Idaho 35, 136 P. 205. The language of section 259.2, "if no heirs other than such aliens are found eligible to take such property," should be construed in view of this rule of law to entitle respondent Boutin, as a first cousin, to inherit, if all nearer relatives are nonresident aliens barred from inheritance by section 259.

The order appealed from is accordingly affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

KRUM et al. v. MALLOY.

Civ. 2856.

District Court of Appeal, Fourth District, California.

Aug. 20, 1942.

Hearing Granted Oct. 19, 1942.

1. Automobiles 🔑192(4, 9)

The statute imposing liability on automobile owner for negligent operation of automobile by another with owner's permission does not make each part owner of automobile liable for the consequences of the negligent operation of the automobile by a co-owner or co-owner's agent or employee but manifest intent that owner should be liable only for the consequences of his own negligent driving and for the negligent driving of those whom he permits to drive. Vehicle Code, § 402(a), St.1937, p. 2353.

2. Statutes 🔑225

Statute providing that common law of England, so far as not repugnant to federal constitution, or state constitution or laws, is the rule of decision in all courts of the state, is to be considered in conjunction with statute providing that common law rule that statutes in derogation thereof are to be strictly construed, has no application to Civil Code, and the provisions of Civil Code are to be liberally construed. Civ.Code, § 4; Pol.Code, § 4468.

3. Automobiles 🔑192(4)

The statute imposing liability on automobile owner for negligent operation of automobile by another with owner's permission, when read in conjunction with section of Civil Code providing that common law rule that statutes in derogation thereof are to be strictly construed, has no application to Civil Code, and that provisions of Civil Code are to be liberally construed, is not repugnant to the rule of strict construction as applied to co-ownership. Vehicle Code, § 402(a), St.1937, p. 2353; Civ.Code, § 4.

4. Automobiles ⚷192(4)

Where automobile, which was owned by father and minor son as co-owners, was negligently operated by the father in his right as co-owner, and not on son's business, and while son was not present, son was not liable under statute imposing liability on automobile owner for negligent operation of automobile by another with owner's permission, for death and injuries resulting from father's negligent operation of the automobile. Vehicle Code, §§ 66, 402(a), St.1937, p. 2353; St.1940, 1st Ex.Sess., p. 9.

◆

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Marie Krum and John Raymond Krum against Clair Malloy and Richard Malloy to recover for the death of John H. Krum, deceased, and for injuries sustained by John Raymond Krum in an automobile accident. The case was dismissed as to Richard Malloy. From an adverse judgment, the plaintiffs appeal.

Judgment affirmed.

Luce, Forward, Lee & Kunzel, of San Diego, for appellants.

Mills & Wood, of Los Angeles, for respondent.

GRIFFIN, Justice.

Plaintiffs appeal from an adverse judgment which comes before us on the judgment roll alone. The following facts were found by the trial court: Claire E. Malloy, aged 19, sued herein as Clair Malloy, was at the time of the automobile accident in question, a co-owner with his father, Paul Malloy, of the automobile involved. The defendant Richard Malloy was also alleged to be a co-owner of the automobile. The case was dismissed as to him. The father, Paul Malloy, was killed in the accident. The plaintiff and appellant Marie Krum is the surviving widow of John H. Krum who, while riding in his car, was killed as a result of the collision. Plaintiff and appellant John Raymond Krum, who suffered injuries, is the son of the decedent John H. Krum and Marie Krum. Also killed as a result of the same accident was Robert Marvin Krum, another son of the plaintiff and appellant Marie Krum and the deceased John H. Krum. The accident occurred on the 1st day of January, 1941, on Highway 101, near San Onofre.

It was alleged in the amended complaint that the automobile was being driven by Paul Malloy "with the permission and consent of the said Clair Malloy and Richard Malloy." This allegation was denied in the answer.

The court found that the accident was caused by the negligence of the decedent Paul Malloy and further found that the negligence of Paul Malloy was a proximate cause of the death of both John H. and Robert Marvin Krum; that at the time of the accident Claire E. Malloy and Paul Malloy were co-owners of the automobile; that Claire resided at the home of his father and was not present in the automobile when the accident herein mentioned occurred; that Paul Malloy, at the time of the accident, was operating the automobile in his own right as a co-owner and not upon the business of Claire E. Malloy; and that plaintiffs take nothing from the defendant Claire E. Malloy, as a co-owner of the automobile.

The question involved is this: Under section 402 of the Vehicle Code, St.1937, p. 2353, where a father and his minor son are co-owners of an automobile, which automobile is operated by the father in his own right as co-owner and not upon the business of the son, the son not being present in the automobile, is the son liable for the negligence of the father?

Section 402 of the Vehicle Code reads: "Liability of Private Owners. (a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

This section was originally section 1714¼ of the Civil Code. It imposed liability upon the owner of a motor vehicle not operated by the owner, but by some other person, with his consent. This liability was a radical departure from the common law. It has been held in California, prior to the enactment of section

1714¼ of the Civil Code, supra, that in the absence of statute, there was no liability upon the owner who loaned his automobile to another or permitted another to drive it. It is argued by respondent that since the statute imposes new and unusual liability which partakes of the nature of a penalty, it should not, at least, receive a construction favoring the imposition of the liability here claimed by appellants.

[1] Appellants first cite section 4 of the Civil Code as declaring that the section here involved should be liberally construed. Each code contains a similar provision in reference to the construction of its provisions. § 4, Code Civ.Proc.; § 4, Pen.Code. No such provision is set forth in the Vehicle Code. Even though section 4 of the Civil Code may be held to be applicable to the provisions of the Vehicle Code, it must nevertheless clearly be shown that it was the object of the Legislature and the act itself, to fix a liability upon a co-owner of an automobile by virtue of his co-ownership regardless of other qualifications and exceptions. It is evident that the Legislature only intended that the owner of a car should be liable for the consequences of his own negligent driving and for the negligent driving of those whom he *permits* to drive it. In the main, the statute declares the rule that the owner of a car may choose his agents and employees, and may control possession of the vehicle. It is not evident that the Legislature intended to make each part-owner of a car liable for the consequences of the negligent operation of it by a co-owner or the other co-owner's agent or employee. In the first place, the foundation for such a rule does not exist, since a part-owner of an automobile may not choose the agents or employees of the other owner nor control possession of the car by the co-owner. In the second place, the language of the law, fairly interpreted, does not evidence a purpose to visit upon a co-owner the consequences of negligence committed by persons whose custody and possession of the car he may not and cannot control. It would therefore appear that it was not the object of the Legislature to attach liability upon a co-owner of an automobile under all conditions.

Section 4468 of the Political Code provides: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state."

[2, 3] This section is to be considered in conjunction with the rule stated in Civil Code, section 4. Burlingame v. Traeger, 101 Cal.App. 365, 281 P. 1051. When read in conjunction with section 4 of the Civil Code, section 402 of the Vehicle Code, as now worded, is not repugnant to the rule of strict construction as applied to co-ownership. The Supreme Court has held in this respect, that section 402 of the Vehicle Code should be strictly construed. McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909; Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407; Whitechat v. Guyette, 19 Cal.2d 438, 122 P.2d 47; Prager v. Isreal, 15 Cal.2d 89, 98 P.2d 729. See, also, Cook v. Superior Court, 12 Cal.App.2d 608, 55 P.2d 1227, and cases cited; Swing v. Lingo, 129 Cal.App. 518, 19 P.2d 56.

In Mittelstadt v. Kelly, 1918, 202 Mich. 524, 168 N.W. 501, 503, where the statute in that state imposing liability on an owner of an automobile was substantially the same as ours, the same question of liability of a co-owner was considered. That statute provided that "The owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle * * *. Provided, that the owner shall not be liable unless said motor vehicle is being driven by the express or implied consent or knowledge of such owner. * * *". In the Mittelstadt case a father and son together purchased a car, each contributing to the purchase price. It was registered in the son's name and it was contended that the father was a part owner. It was sought to fix liability upon the father as part owner. It was there held that the father, the co-owner, was not liable for several reasons, mainly because he could not control possession of the car by the co-owner and that the language of the law, fairly interpreted, did not evidence a purpose to visit upon the owner the consequences of negligence committed by persons whose custody and possession of the car he may not and could not control.

In the case of Leppard v. O'Brien, 225 App.Div. 162, 232 N.Y.S. 454, affirmed in 252 N.Y. 563, 170 N.E. 144, the facts were essentially as they are here. The defendant was the co-owner with his brother of an automobile. Each drove the car whenever he chose so to do. At the time of the accident, the brother not operating was at home and the car was not being used on the defendant's business. The court held the non-operating co-owner not liable under the New York statute which was, in substance, similar to section 1714¼ of the Civil Code of California. It was so held in Weber v. Pinyan, supra. In the case of Leppard v. O'Brien, supra, the court quotes at length (232 N.Y.S. page 458) from the Michigan case of Mittelstadt v. Kelly, supra, and quotes the Michigan statute. The New York court drew no distinction between the New York and Michigan statutes, as to the purpose and intent of the Legislature. It was there stated that "The object was to prevent an owner, who had given permission, express or implied, for the use of his car, from escaping liability by saying that it was not being used in his business. His permission for its use was made the basis of his liability. He was assumed to have the right to grant or withhold such permission. If it was being driven without his permission, or contrary to his express orders, no liability attached to him. * * *" [225 App.Div. 162, 232 N.Y.S. 456.]

The Leppard v. O'Brien case has been recognized and cited with approval in this state. Cook v. Superior Court, supra; Weber v. Pinyan, supra; Bradford v. Sargent, 135 Cal.App. 324, 27 P.2d 93. It has also been cited and approved in the following New York cases: Houlihan v. Selengut, 175 Misc. 854, 25 N.Y.S.2d 371, 374; Wadsworth v. Webster, 237 App.Div. 319, 261 N.Y.S. 670, 673; Glennie v. Falls Equipment Co., 238 App.Div. 7, 263 N.Y.S. 124, 131. It was also cited in Robinson v. Ebert, 180 Wash. 387, 39 P.2d 992, at page 994, where the court said: "* * * it was properly held that one of them [the brothers] was not responsible for injuries inflicted by the other in driving the jointly owned automobile. The brother held not liable was not in the car at the time of the accident, and it was not being used or operated in his business or in any joint enterprise."

Appellants cite Parlov v. Lozina, 49 Ont. L.R. 299, in which case liability was based on a different statute and on the theory of joint ownership, but which did not take into consideration the additional facts found in the instant case that the co-owner was operating the automobile on his own business.

In the case of Buchel v. Williams, 273 Mich. 132, 262 N.W. 759, 761, cited by appellant, the court held that it was error to release the co-owner because the car was "being operated at the time with her knowledge and consent and for the benefit of the joint owners." Such is not the finding here. Moore v. Noorthoek, 280 Mich. 431, 273 N.W. 758, is also cited by appellant which case was decided upon the theory that consent by the co-owner was presumed to have been given under a statute which presumed consent where the car was driven by an immediate member of the family.

We believe the facts and statute involved in the Leppard v. O'Brien case, supra, were so similar to the statute and facts here involved that we need but quote therefrom to dispose of the issue here presented. The opinion refers to the ownership of the car as joint; that the understanding between the owners was that each of them should use it when he wanted it, and, as to this, the court said:

"That was not the permission contemplated by the statute in question. It cannot be assumed that their minds met on the subject-matter of this statute. The fair inference is that they simply expressed their understanding of their respective rights in conformity with the law relating to their status as joint owners. Their common understanding neither added to nor subtracted anything from the rights which the law gave them. Each of them, in the eyes of the law, had title and possession without the permission of the other, and used it in his own right; neither of them could so control possession and operation of the car as to deny permission to the other owner or his agents and employees."

The court then said: "It nowhere appears in the statute that the Legislature intended that the vicarious liability created by its enactment should be visited upon one who could not prevent or control the use or operation of his car by withholding permission. * * * If the Legislature should deem it proper to impose such a penalty on joint ownership of an automobile, such a purpose should be clearly expressed in the statute.

[4] By section 66 of the Vehicle Code of this state, St.1940, 1st Ex.Sess., p. 9, an "owner" is defined to be "a person having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends, rents or pledges such ve-

hicle." Obviously, one of the incidents of ownership is the right of control of the vehicle (Leppard v. O'Brien, supra), and this Claire E. Malloy did not have as against his father Paul Malloy. The findings of the court negative any element of permission on the part of Claire E. Malloy. He was a minor, living at the home of his father, and manifestly could not control the conduct of his father. He was not present in the automobile and as his father was operating the automobile in his own right, and not upon the business of Claire E. Malloy, it must follow that the judgment of the trial court should be and is affirmed.

BARNARD, P. J., concurred.

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53 Cal.App.2d 831

WHITE v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 12173.

District Court of Appeal, First District, Division 2, California.

Aug. 11, 1942.

1. Gifts 🔑17

All that is necessary to completed "gift" of personal property is actual or symbolic delivery thereof to donee or to another for donee's benefit with intent to vest title in donee.

See Words and **Phrases**, Permanent Edition, for all other definitions of "Gift".

2. Gifts 🔑30(3)

Delivery of bank book, with donative intent, to donee or another for donee's benefit, is sufficient to constitute "gift" of savings bank account, whether accompanied by written order or not.

3. Gifts 🔑30(3)

A bank depositor's delivery of bank book and orders for withdrawal from her savings account to bank teller, with intent thereby to transfer joint tenancy interest in such account by way of gift to certain persons, accomplished "gift" at such time.

4. Gifts 🔑4

When donor's clear intention to make gift can be carried out without doing violence to established principles of law, courts should not seek highly technical reasons for defeating gift.

5. Joint tenancy 🔑3

Compliance with terms of provision in bank act for completion in bank of deposit in joint tenancy form in order to create joint tenancy in bank account is not exclusive method of creating such tenancy. Gen. Laws 1937, Act 652, § 15a.

6. Joint tenancy 🔑3

Under statute authorizing creation of joint tenancy by transfer of personal property from sole owner to himself and others, such transfer may be made by any recognized method for transfer of such property. Civ.Code, § 683.

7. Gifts 🔑4

A valid "gift" of personal property may be made, though donor retains an interest therein.

8. Gifts 🔑30(1)

A bank's rules could not operate to prevent depositor's transfer of joint tenancy interest in her savings account to others by way of gift.

9. Gifts 🔑30(1)

The transfer of bank savings account is not subject to rule requiring presentation of check drawn on commercial account before maker's death.

◆

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Maria A. White, as executrix of the will of Adelina Soares, deceased, against the Bank of America National Trust and Savings Association, Maria Isabel Torres and David C. Torres. From a judgment quieting the title of defendants Torres to a savings account in defendant bank, plaintiff appeals.

Affirmed.

Louis B. DeAvila and Frank S. Roderick, both of Oakland, for appellant.

Skinner & Abbott, J. Adrian Palmquist, Adrian Thiel, and H. H. Bechtel, all of Oakland, for respondents.

DOOLING, Justice pro tem.

This appeal by the executrix of the will of Adelina Soares, deceased, is taken from a decree quieting the title of the defendants, Torres, to a savings account in defendant bank.

On July 23, 1940, the decedent was confined to her bed by what proved to be a fatal illness. She summoned M. L. Reece, a teller of defendant bank, to her home and informed him that she wished to convert a savings account which she had in his bank into a joint tenancy account with her sister Maria Isabel Torres and her nephew David C. Torres. Reece prepared a joint account card to be signed by the three intended joint depositors, and the decedent gave this card to a neighbor, Mr. Peterson, and requested him to mail it to the Torres, who were residing in Massachusetts, for their signatures. The signed card was returned to Peterson by the Torres and received by him about July 30. At decedent's request Peterson delivered it to the bank bearing all three signatures. About August 7 or 8, decedent called in Peterson again and asked him to get in touch with Reece and find out why the transfer had not been completed; "she thought she might die before she had her signature put on there." Peterson telephoned Reece and on August 9, Reece again visited decedent. The decedent signed two withdrawal orders (the second because her signature on the first was not distinct) and delivered the orders and her bank book to Reece for the purpose of transferring the money in her separate account into a joint account with the Torres. This was on Friday after banking hours. The bank was not again open for business until Monday morning, August 12. On Sunday, August 11, the decedent died before the bank book and withdrawal order had been taken to the bank by Reece. It was stipulated that Reece was not the agent of the bank.

It is appellant's position that Reece was decedent's agent for the purpose of having the account transferred into joint tenancy and that her death terminated his agency before the transfer was actually made. That decedent intended to transfer a joint tenancy interest in her account to the Torres by way of gift is plain from her entire course of conduct. The court found that prior to August 11, 1940, decedent did create a joint tenancy with the Torres in her account. Certainly before her death she had done everything within her physical power to complete the gift. She had procured and delivered to the bank the joint account card duly signed, and she had delivered to Reece her bank book and a withdrawal order with instructions to have the account transferred on the books of the bank to a joint tenancy account.

[1-4] All that is necessary to a completed gift of personal property is a delivery, actual or symbolic, to the donee or to another for his benefit with the intent to vest title in the donee. Here decedent delivered her bank book, together with a withdrawal order, to Reece. The delivery of a bank book, with donative intent, has consistently been held sufficient to constitute a gift of a savings bank account, whether accompanied by a written order or not (Wilson v. Crocker First Nat. Bank, 12 Cal.App.2d 627, 630, 55 P.2d 1208, and cases there cited; Cahill v. Goecke, 10 Cal.App.2d 279, 51 P.2d 905) and the delivery may be as effectively made to a third person for the benefit of the donee as to the donee himself. Estate of Escolle, 134 Cal.App. 473, 480, 25 P.2d 860, and cases there cited. If the decedent when she delivered the bank book and withdrawal orders to Reece intended thereby to transfer to the Torres a joint tenancy interest in her account by way of gift under the authorities above cited the gift was accomplished at that time. When the clear intention of the donor to make a gift can be carried out without doing violence to the established principles of law the courts should not seek highly technical reasons for defeating the gift.

[5-9] It is suggested that under section 15a of the Bank Act (Deering's Gen.Laws, 1937, Act 652) a deposit in joint tenancy form must be completed in the bank to create a joint tenancy in the account, but there is no language in section 15a purporting to make compliance with its terms the exclusive method of creating a joint tenancy in a bank account. Since the 1935 amendment to Civil Code, section 683, a joint tenancy may be created "by transfer from a sole owner to himself and others," and no good reason appears why the transfer so authorized may not be made by any recognized method for the transfer of personal property. At a time when a joint tenancy could only be created by conveyance from a third person to the joint tenants it was recognized that a joint tenancy in personal property could be created by oral transfer

(Estate of Harris, 169 Cal. 725, 147 P. 967; Young v. Young, 126 Cal.App. 306, 14 P.2d 580) and it is now well settled that a valid gift of personal property may be made, although the donor retains an interest therein. Gordon v. Barr, 13 Cal. 2d 596, and cases cited at page 602, 91 P.2d 101. The rules of the bank could not operate to prevent the transfer by way of gift (Donovan v. Hibernia Sav. & Loan Soc., 90 Cal.App. 489, 265 P. 995; Braun v. Brown, 14 Cal.2d 346, 354, 94 P.2d 348, 127 A.L.R. 773) and the transfer of a savings account is not subject to the rule governing checks drawn on commercial accounts which requires such checks to be presented to the bank before the maker's death. Spellacy v. Dauterman, 122 Cal. App. 416, 419, 420, 10 P.2d 114.

The case of Smith v. Bliss, 44 Cal.App. 2d 171, 112 P.2d 30, is relied on by appellant. In that case the decedent, Mrs. Coffin, had opened a joint tenancy account for herself and plaintiff. On an envelope containing the bank book evidencing this joint account the decedent wrote: "Make it joint tenancy 20,000" and signed her name. It was the plaintiff's claim that this created a trust to the extent of $20,000 in the undistributed estate of Mrs. Coffin's husband. The bare recital of these facts is sufficient to show the inappositeness of that case to the one before us on this appeal.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

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53 Cal.App.2d 814

MADDEN, Chief of Division of Narcotic Enforcement, et al. v. RILEY, State Controller.

Civ. 6855.

District Court of Appeal, Third District, California.

Aug. 7, 1942.

1. States 🔑62

Under statute providing for allowance of traveling expenses of state officers and employees when away from their headquarters on state business, and providing, in next sentence, for allowance of traveling expenses of officers and employees traveling outside the state on approval by the governor and director of finance, journey outside the state must be undertaken in performance of state business for traveling expenses to be allowable. Pol.Code, § 352.

2. States 🔑119

The Legislature has no authority to authorize use of public funds to pay traveling expenses of state officers and employees on journeys outside the state except as respects journeys on state business. Pol.Code, § 352.

3. States 🔑176, 181

The approval by governor and director of finance of claim of state officer or employee for expense of traveling outside the state raises "prima facie" presumption that claim is valid, but presumption may be rebutted, and such approval is not binding on controller so as to require payment of claim without audit by controller. Pol.Code, §§ 352, 433.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie".

4. States 🔑183

The determination of state controller as to validity of claim against the state is subject to judicial review in proper proceeding. Pol.Code, § 433.

5. Officers 🔑94

Fees, expenses, and compensation of public officers must be authorized by statute, and the provisions of such a statute should be strictly construed.

6. States 🔑62

The only traveling expenses to which state officers and employees are entitled are those which are necessarily incurred in performance of, or incidental to, service for which such officers and employees are regularly employed. Pol.Code, § 352.

7. States 🔑62

The purpose for which state officer attends convention must have some direct connection with fulfillment of his own public duties in the department in which he is employed to entitle him to recover traveling expenses on ground that attendance at convention is "state business". Pol.Code, § 352.

See Words and Phrases, Permanent Edition, for all other definitions of "State Business".

8. States ⟹62

The attendance of chief of division of narcotic enforcement at convention, outside the state, of Pacific Coast International Association of Law Enforcement, was "state business" so as to authorize allowance of claim against the state for traveling expenses, where such officers secured co-operation, reciprocity, and aid of peace officers of other states who constantly dealt with offenders against narcotic laws. Pol.Code, § 352.

◆

Mandamus by Paul E. Madden, as Chief of the Division of Narcotic Enforcement, and others, against Harry B. Riley, State Controller. On demurrer to the petition.

Demurrer overruled.

Robert Clifton, of Los Angeles, for petitioners.

Earl Warren, Atty. Gen., Robert W. Harrison, Chief Asst. Atty. Gen., and Chas. W. Johnson, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

By means of a writ of mandamus the petitioners seek to require the state controller to allow a claim and to draw his warrant in payment of necessary traveling expenses incurred by the Chief of the Division of Narcotic Enforcement of California, in attending a convention of the Pacific Coast International Association of Law Enforcement, held at Reno, Nevada, August 27, 28 and 29, 1940. The Governor and the Director of Finance of California approved the allowance as required by section 352 of the Political Code. The controller rejected the claim on the ground that the expense was not incurred in the performance of state business. A demurrer and answer to the petition were filed by the respondent. The answer controverts essential facts alleged in the petition. The demurrer asserts that the petition fails to state facts sufficient to justify the issuance of the writ.

The petition alleges that Paul E. Madden, as chief of the Division of Narcotic Enforcement of California, incurred necessary expenses amounting to $13, in attending the convention of the Pacific Coast International Association of Law Enforcement at Reno, Nevada, on the dates previously mentioned; that the said sum was subsequently paid by the petitioner, Heda M. Goucher, the disbursing officer of said Narcotic Enforcement Division, out of the revolving fund of that department which is maintained for that purpose; that the said expenses of petitioner, Madden, were previously duly authorized and approved by both the Governor and the Director of Finance of the State of California, as required by section 352 of the Political Code, in the following language:

"August 26, 1940.

"Hon. Harry B. Riley
"State Controller
"Sacramento, California

"Dear Mr. Riley:

"Permission is hereby granted to Paul E. Madden, Chief, Narcotic Division, to be absent from the State of California August 27, 28 and 29, 1940, for the purpose of attending a convention of Pacific Coast Law Enforcement officials at Reno, Nevada. It is important that Mr. Madden attend this conference in order that he may confer with narcotic enforcement officials from Washington, D. C., who are going to attend the gathering.

"The expense of this trip is not to exceed $25.00 and is to be paid by the State of California upon presentation of properly certified and itemized bills from the appropriation for the Support of the Division of Narcotic Enforcement.

"Itinerary of trip: San Francisco to Reno, Nevada; and return.

"Sincerely,
"Culbert L. Olson,
"Governor of California

"Approved:
"J. R. Richards,
"Director of Finance."

The petition further alleges that the purpose for which Mr. Madden attended said convention, which consisted of delegates from twelve states and territories of the United States, and from the national capital at Washington, D. C., was to confer with the said representatives and to cooperate with the peace and narcotic enforcement officers of the United States to secure uniform and effective administration and enforcement of the narcotic laws of California, and among the several states of this Union.

It is also stated in the petition that there are ample funds duly appropriated and allotted to the special support of the Division of Narcotic Enforcement in the State of California, from which to pay the demand in question; that the claim was regularly presented in due form to the state controller, with the written approval of the Governor and the Director of Finance of California, for auditing and allowance thereof; that the claim was rejected by the controller as unlawful and invalid, on the ground that the services of said officer in attending the Pacific Coast Law Enforcement convention at Reno, Nevada, for the purposes assigned, do not constitute "State business," and that said expenses may therefore not be allowed.

The chief issue to be determined is whether section 352 of the Political Code authorizes the approval and allowance of claims for necessary expenses of the representatives of state departments, in attending conventions inside or outside of the state, for purposes appertaining to the particular business of the department to which they belong. That section reads: "All heads of departments, chiefs of divisions, assistants, deputies, agents, experts and other employees of a department shall be entitled to receive in addition to their salaries, their actual necessary traveling expenses when away from their headquarters on State business. Actual and necessary traveling expenses shall be allowed such persons when traveling outside of the State, when such traveling and expenses have been approved by the Governor and by the Director of Finance. Except as otherwise expressly provided by any act creating a new department, the members of no State board or commission which is created or continued in force by such act, shall receive any compensation for their services, but they shall be allowed necessary expenses incurred in the performance of duty."

In the present proceeding it is conceded by the respondent that: "If the authority for such expenditure exists, funds are available by virtue of the appropriation 'for the support' of the Division of Narcotic Enforcement contained in Section 2 of the Budget Act of 1939, Stats.1939, ch. 486, item 157, p. 1850. No contention is made by respondent that the funds therein appropriated have been exhausted."

Section 352 of the Political Code clearly authorizes the payment of "actual necessary traveling expenses" of heads of departments, chiefs of divisions, assistants, deputies, etc., "when away from their headquarters on State business." When such expenses are incurred in traveling on state business within the state, the approval of neither the Governor nor the director of finance is required as a prerequisite to the payment thereof; but, under such circumstances, it is the duty of the state controller, incident to his duty to audit and pay such claims, to first determine that the expenses were necessarily incurred by the officer or employee in the performance of "State business." When such necessary expenses are incurred in traveling on state business outside of the state, they may not be allowed or paid except when they "have been approved by the Governor and by the Director of Finance." If it appears that an officer or employee mentioned in section 352 has actually incurred necessary traveling expenses in attending to state business outside of the state, and that a claim for such amount has been approved for that purpose by the Governor and by the director of finance, it is the duty of the state controller to audit the claim and to draw his warrant in payment thereof, as required by law.

[1, 2] The petitioners assert that the second sentence of section 352 authorizes the Governor and director of finance to permit officers or employees to recover necessary expenses incurred in traveling outside of the state, regardless of whether the journey is undertaken in the performance of state business. We do not agree with that construction of the statute. In our opinion the entire section deals with necessary expenses incurred in traveling inside or outside of the state, only when the officers or employees are engaged in state business. It is apparent that if the petitioners' construction of that language is correct, the act would authorize the approval and payment of claims of officers or employees for traveling expenses incurred in going to any place in the world, on their own private expeditions, for personal recreation, pleasure or business. The Legislature has no authority to authorize such illegal misappropriation of public funds. That is not a reasonable construction of the statute. We are convinced that section authorizes the payment of traveling expenses, either inside or outside of the state, only when the officers or employees are engaged in state business. The language of that section appears to clearly indicate that fact. After the first sentence asserts that certain designated officers or employees may recover their traveling expenses "when away from their headquarters on State business," the following sentence declares that "such persons when traveling outside of the State" [on state business] may recover their traveling expenses, pro-

vided their claims are first approved by the Governor and by the director of finance. We think the words "on State business," which we have inserted in brackets in the previous sentence, are necessarily implied as a part of that provision. Any other construction would lead to an absurdity and authorize the payment of illegal claims.

[3] The petitioners then contend that the second sentence of section 352 renders the validity of a claim for expenses incurred in traveling outside of the state, absolutely conclusive upon the state controller, requiring him to draw his warrant in payment thereof, "when such traveling and expenses have been approved by the Governor and by the Director of Finance." It is argued that such approval becomes final and conclusive evidence that the authorized journey was undertaken in pursuance of state business. That conclusion is reached by asserting that it must be presumed the chief executive and the director of finance would not approve an illegal claim, and that an exercise of discretion on the part of those officers in approving and allowing the expenditure of funds may not be interfered with by either the controller or the courts. We assume that neither of those officers would knowingly approve an illegal claim, and that their approval does carry with it a prima facie presumption that the claim is valid. But that presumption may be rebutted.

We do not agree with the last-mentioned construction of the effect of the approval by the Governor and the director of finance of a claim for traveling expenses. Their approval may raise a presumption that the services were to be performed in pursuance of state business and that the claim is valid, but it does not become conclusive of those facts so as to deprive the controller of his duty to audit the claim and to refuse payment thereof if it appears to be illegal. The state controller is constituted by law the ultimate fact-finding tribunal whose duty it is to pass upon such claims and to reject them if he finds them to be illegal. § 433, Pol.Code. This does not mean that the Governor or the director of finance has approved or allowed an illegal claim. It may merely mean that the claim is illegal for the reason that the services for which it was previously approved were not actually performed, or that the convention was held for a purpose entirely different from that which was represented by the claimant. Under such circumstance, it is the duty of the controller to reject the claim.

It will be observed that section 352 requires the approval by the Governor and the director of finance of two different features of the claim, namely, the privilege to travel outside of the state, and the right to incur specified expenses in the course of that journey. That section declares that said traveling expenses, outside of the state, may be paid only when "such traveling and expenses have been approved."

In the present case the approval of the Governor and the director of finance, authorizing Mr. Madden to attend the convention at Reno "in order that he may confer with narcotic enforcement officials," and limiting his expenses, so incurred, to $25, was given in writing on August 26th, before the convention was held or the services were performed. We assume the Governor and director of finance approved that journey and expenditure of costs of the trip for a legitimate purpose and with full understanding that the object of attending the convention was in line with the claimant's official duties as chief of the Division of Narcotic Enforcement, and that the authorized services therefore constituted state business. That does not preclude the controller, in the exercise of his duties, when the claim is actually filed for allowance, from examining the facts to ascertain whether the business of the convention in fact included duties incident to those of Mr. Madden's regular employment, or whether he did actually attend the convention. If for any valid reason the controller finds that the services were not performed, or that they do not constitute state business, or that the expenses were not incurred, it is his duty to reject the claim.

It is the duty of the state controller to audit claims presented against the state and to draw his warrant in payment of such claims only as are authorized by law. Sawyer v. Colgan, 102 Cal. 283, 36 P. 580, 834; § 433, subds. 10, 17 and 19, Pol.Code. Section 433 provides in part:

"It is the duty of the controller: * * *

"10. To audit all claims against the state *in cases where there are sufficient provisions of law for the payment thereof;* * * *

"17. To draw warrants on the treasurer for the payment of *moneys directed by law* to be paid out of the treasury; *but no war-*

rant must be drawn unless authorized by law, and upon an unexhausted specific appropriation provided by law to meet the same. * * *" (Italics ours.)

In rebutting a similar contention that the controller was bound by the approval of a claim by the Engineering Department, and that he was powerless to challenge its validity on that account, the Supreme Court said in California Highway Comm. v. Riley, 192 Cal. 97, at page 112, 218 P. 579, at page 586, that: "The demand here under consideration having been so made, allowed, and audited, it is said to be the plain mandatory duty of the respondent not to question the same, but to draw his warrant therefor. The various provisions of section 433 of the Political Code seem to indicate that the controller's duties and responsibilities are not so narrowly restricted, but it is not necessary to here determine their precise nature and extent. The writ of mandate is, in a measure at least, a discretionary writ, and it will not be granted where its enforcement would work an injustice or accomplish a legal wrong. [Citing authorities.] It will not issue to compel an auditor to draw his warrant for an illegal claim even though it has been audited and allowed by the board which is charged with that duty and responsibility. Walton v. McPhetridge, 120 Cal. 440, 52 P. 731."

[4] We conclude that it was not only the privilege, but it was the duty of the state controller, to audit the claim which is involved in the present proceeding and to determine whether it was valid or invalid, and to draw or withdraw his warrant therefor, dependent upon his conclusion in that regard. His determination concerning the validity of such claims is subject to review of the courts in proper proceedings. California Highway Comm. v. Riley, supra; Irwin v. County of Yuba, 119 Cal. 686, 52 P. 35; Gibson v. County of Sacramento, 37 Cal.App. 523, 174 P. 935; Shanks v. Commonwealth, 219 Ky. 212, 292 S.W. 837.

This brings us to the problem of what constitutes state business, and whether the allegations of the petition sufficiently show that the expenses, for which the claim was presented, were incurred by Mr. Madden incident to his performance of state business.

We shall not attempt to give a comprehensive definition of state business. That might be an arduous undertaking. It would be far easier to determine, by way of illustration, what activities are deemed not to constitute state business.

[5, 6] It is true that fees, expenses and compensation of public officers must be authorized by statute and that the provisions therefor should be strictly construed. Sarter v. Siskiyou County, 42 Cal.App. 530, 534, 183 P. 852. It must be conceded the only traveling expenses to which officers and employees of the state are entitled are those which are necessarily incurred in the performance of, or incidental to, the service for which such officers and employees are regularly employed. The expenses of the chief of the Division of Narcotic Enforcement, in attending a convention of civil engineers, would clearly not be authorized, for the reason that civil engineering is not in his line of employment. Such authorization might be deemed to be illegal and void. It has been frequently held that attendance of officers or employees at conventions for the mere purpose of acquiring general information, instruction or knowledge applicable to the nature of services demanded in their particular department, or the mere fact that the delegates attending the conventions propose to discuss ways and means of attaining greater efficiency in the duties of their respective similar offices, does not constitute state business, unless the statute specifically so declares. Attendance at conventions, under such circumstances, has been held to be merely educational in its nature. Some of the cases declare that public officers are expected to secure their education, qualifying them for efficient service in their particular employment, at their own expense, and not to expect the public to pay for that training. The courts have repeatedly held that claims for services similar to those which have been previously mentioned are illegal and void. Irwin v. County of Yuba, supra; Jefferson County v. Jefferson County Fiscal Court, 269 Ky. 768, 108 S.W.2d 810; Smith v. Holovtchiner, 101 Neb. 248, 162 N.W. 630, L.R.A.1917E, 331; Gibson v. County of Sacramento, supra. In the case last cited it is said at page 525 of the opinion in 37 Cal. App., at page 936 of 174 P., that: "It cannot be doubted that 'one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which finds authority of law.' Irwin v. County of Yuba, 119 Cal. 686, 52 P. 35; Woods v. Potter, 8 Cal.App. 41, 45, 95 P.

1125. Nor may the payment of such a claim be allowed upon the theory that the services performed for which compensation is claimed were beneficial. There must be some statutory or constitutional authority for compensation for services rendered to a county, otherwise it cannot legally be paid, however beneficial the services performed may be to the county or the public generally."

In opposition to the payment of claims for traveling expenses incurred by officers in attending conventions for the mere purpose of acquiring general knowledge or improving their education, it is said in the case of Jefferson County v. Jefferson County Fiscal Court, supra [269 Ky. 768, 108 S.W.2d 811]: "But the Statute does not expressly or by necessary implication authorize the fiscal court to appropriate the county funds to pay the expenses of its officers for educational purposes. The presumption is that such officers were qualified for the performance of their duties before they were employed, and if they desire further education or information relating to their work, they must acquire such at their own expense. It would be no more reasonable for the county to pay such expenses of the officers here in question than it would be to pay tuition and other expenses incurred in sending any other county officials to school in order that they may better qualify themselves for the discharge of their official duties. Shanks v. Com. 219 Ky. 212, 292 S.W. 837."

To the same effect are numerous cases from other jurisdictions, many of which have been cited by the attorney general in opposition to this petition.

On the contrary, the cases of Tousley v. Leach, 180 Minn. 293, 230 N.W. 788, and Lindquist v. Abbett, 196 Minn. 233, 265 N.W. 54, upon which the petitioner relies, do hold that officers or employees may recover traveling expenses incurred in attending conventions of similar officers for the purpose of securing general knowledge and information which would enable them to perform their particular duties more efficiently.

[7] While it is difficult to draw the line between legitimate services which may be deemed to constitute state business, and those which are not included therein, we are satisfied that the purpose for which an officer attends a convention must have some direct connection with the fulfillment of his own public duties in the department in which he is employed, to entitle him to recover traveling expenses incident thereto. We are not in accord with the two previously cited Minnesota cases in that regard. In our judgment they too greatly extend the so-called discretionary right to allow such claims, and they encourage the reckless approval of illegal demands for expenses incurred in so-called "junketing" expeditions.

[8] In the present case, however, the petition clearly states that Mr. Madden incurred necessary traveling expenses in attending the convention of law enforcement officers at Reno, not only for the purpose of securing expert information and knowledge of modern methods of apprehending and convicting violators of the narcotic laws, so as to administer the duties of his own office more efficiently, but also "to secure the cooperation of other law enforcement officials" of the several states of this Union and of the Federal authorities, to enable him to better enforce the narcotic laws of the State of California. The securing of cooperation, reciprocity and aid of the peace officers of other states, who constantly deal with offenders against the narcotic traffic, would clearly enable the claimant to obtain better enforcement of the narcotic laws in California. Certainly this renders the attendance of that convention, by the chief of the Division of Narcotic Enforcement, state business. That aid would help to more efficiently enforce the law in California, and to fulfill the very official duties for which the claimant is employed. There is a clear distinction between the cases previously cited which involve the payment of claims for traveling expenses incurred in attending conventions for purely educational purposes, and the present proceeding. We are therefore of the opinion the petition alleges facts sufficient to justify the issuance of the writ as prayed for.

The demurrer is overruled. The cause may be placed on the calendar for hearing on its merits.

ADAMS, P. J., concurred.

54 Cal.App.2d 92

CLARK v. DULIEN STEEL PRODUCTS, Inc., et al.

Civ. 12051.

District Court of Appeal, First District,
Division 1, California.

Aug. 18, 1942.

1. Pleading ⇨53(2)

A plaintiff, seeking but one recovery for services rendered, may plead in alternative either on express contract or in quantum meruit.

2. Pleading ⇨406(8)

Where causes of action pleaded are antagonistic in statement of facts, it is trial court's duty, on submission of case, to determine which has been sustained.

3. Appeal and error ⇨1071(5)

In action on written contract or in quantum meruit for broker's commissions, finding for plaintiff on count of complaint in quantum meruit was "surplusage" and not injurious to defendant, in absence of evidence as to reasonable value of services performed.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

4. Pleading ⇨53(2)

There is no inconsistency in setting forth causes of action on contract and of indebitatus assumpsit in two counts of complaint when each refers to same subject matter and only amount due need be determined.

5. Brokers ⇨54

Generally, a broker, securing for his principal in good faith a buyer or seller ready, willing, and able to sell to or purchase from principal on agreed terms within time limit, is entitled to commission, unless brokerage contract places additional burdens on broker.

6. Brokers ⇨63(1)

Where broker fulfills all conditions of his employment, his principal's failure to carry out contract secured by broker does not affect broker's right to commission.

7. Brokers ⇨60

The voluntary abandonment of contract for sale of scrap iron by parties thereto did not affect right of broker securing contract for purchaser, to recover commission, in absence of provision in brokerage agreement making payment of commission contingent on performance of terms of sale contract.

8. Brokers ⇨63(1)

The right of broker, securing contract for sale of scrap iron to his principal, to recover commission under brokerage contract, providing for payment to him of agreed sum per ton of material purchased "upon delivery and complete shipment and payment of the purchase price", did not fall with termination of sale contract because of principal's failure to supply vessel for shipment of materials as required by such contract.

9. Brokers ⇨84(1)

In broker's action to recover commissions for procuring sale of scrap iron to defendant, burden was on defendant to prove that amount of scrap iron contracted for was not available at agreed shipping point, so as to render immaterial defendant's failure to furnish vessel for shipment thereof, as required by sale contract.

10. Appeal and error ⇨842(1), 1008(1)

In action to recover broker's commission for procuring sale of scrap iron to defendant, whether amount of tonnage contracted for was unavailable at agreed shipping point, so as to render immaterial defendant's failure to furnish vessel for shipment thereof as required by sale contract, was not question of expert knowledge, but a fact question, with trial court's determination of which, reviewing court may not interfere.

11. Brokers ⇨88(14)

In action to recover broker's commission for procuring sale of scrap iron to defendant, trial court's correct finding that there was no shortage in agreed tonnage available at shipping point rendered immaterial question whether broker's contract was executed under material mutual mistake of fact as to quantity of scrap iron available and hence unenforceable.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by R. E. Clark against the Dulien Steel Products, Incorporated, and another, to recover broker's commissions for procuring a contract for purchase and sale of scrap iron. Judgment for plaintiff, and defendants appeal.

Affirmed.

John T. McCarthy, J. Bruce Fratis, and Cooley, Crowley & Supple, all of San Francisco, for appellants.

Milton D. Sapiro, of San Francisco, for respondent.

WARD, Justice.

This is an appeal by defendants from a judgment against them for broker's commissions arising from negotiations resulting in a contract for the purchase and sale of scrap iron.

In the fall of 1939 plaintiff's assignor, Joseph Rosenberg, interested Louis Dulien, the president of the Dulien Steel Products, Inc. in the purchase of scrap iron located at Guaymas, Mexico. Mr. Dulien was advised by Rosenberg that approximately 5,000 tons of the scrap, owned by Banco Commercial del Pacifico, for whom Thomas de Reuda acted as agent, was available. Following meetings between Rosenberg and the above representatives of the prospective buyer and seller, a contract was entered into whereby the Banco Commercial del Pacific, S. A. agreed "to sell and the buyer [Dulien Steel Products, Inc.] hereby agrees to buy the following quantity of scrap iron, namely, from four thousand five hundred (4,500) to five thousand (5,000) kilos tons located at Guaymas, Mexico, and consisting of ship scrap and/or railroad scrap. * * *" It was agreed that shipment should be made within ninety days of the date of the contract, October 20, 1939, the buyer undertaking to supply a vessel at Guaymas within such period. The contract further provided that the buyer was to establish a letter of credit for the sum of eighty-five thousand dollars in favor of the seller; and that the seller establish a $20,000 guarantee with a San Francisco bank to secure performance on its part.

Several days after the signing of the contract, Rosenberg, who was acting for the buyer, presented to Dulien for signature a contract for broker's commissions, which set forth that whereas Rosenberg "has rendered services, as a broker, in the consummation of the sale of approximately 5,000 tons of iron ship scrap located at the City of Guaymas, * * * Mexico, * * * second party [Dulien Steel Products, Inc.] * * * agrees to pay to first party [Rosenberg] the sum of $1.50 per each gross ton of such scrap purchased by second party, as aforesaid, immediately upon payment of the purchase price of such scrap. * * *" Dulien objected to the latter part of the above quoted portion of the contract and inserted in his handwriting words [which we have italicized] making the commission payable "immediately upon *delivery and complete shipment and* payment of the purchase price of such scrap. * * *" The change was initialed by both Rosenberg and Dulien.

About a week later, defendant Hyman-Michaels Company signed a contract with the Dulien Steel Products, Inc., for a one-half interest in the Banco-Dulien contract of October 20, 1939, to which reference was made, with a right to one-half of any profit, and an obligation for one-half of any loss, arising therefrom.

The contract for the purchase of the scrap was never performed. There is evidence that the buyers were unable to get a vessel to Guaymas within the period provided; there is also some evidence that the sellers were unable to secure permits for the export of the scrap from Mexico. The contract was mutually cancelled, without, however, any participation or knowledge on the part of Rosenberg.

In the meantime, an action had been brought by plaintiff, assignee of Rosenberg, against defendants, for the commission claimed to be due as brokerage. The court made findings in his favor and awarded judgment against defendants and each of them in the sum of $6,700, based upon a purchase of 4,500 tons of scrap iron.

The appellants admit the execution of the contract with Rosenberg, but claim it was conditional; that commissions, in accordance with their contract, were to be paid only if the sale in connection with which it was to be earned was consummated; that the contract was void as the result of a mutual and material mistake of fact, in this, that only 1,875 tons of scrap were on hand for shipment from Guaymas; that there had been a complete misunderstanding among all the parties as to the amount there available. In this regard, appellants claim that in any event if Rosenberg was entitled to any commission, which they strenuously deny, he was entitled to a commission of $2,812.50 only, based upon the 1,875 tons procurable.

Respondent claims to be entitled to the full commissions; that the shipment of the scrap material was prevented solely by the default of the purchaser in not furnishing a vessel for its shipment.

Appellants base their appeal upon alleged errors of law and contend that the findings are not supported by the evidence and that the measure of damages applied is incorrect.

The trial court found that the contract was never executed, not by reason of any fault on the part of the seller, but solely due to the failure of the purchasers [appellants herein] within ninety days to provide a vessel for shipment of the scrap, of which it also found that it was not proven there were only 1,875 tons available at Guaymas. It further found that it was not true that the seller failed to perform by reason of its inability to deliver in excess of that amount or for any other reason, and that it was not true that the contracts were executed under a material mistake of fact, i. e., as to the existence of the amount of scrap sold.

[1-4] Objection is made that there is no legal justification for the court's finding in favor of respondent on his cause of action on the common counts while at the same time finding for him on the express contract; in other words, that "the action upon the written contract precludes an action on quantum meruit." The doctrine in Gabrielson v. Hague Box & Lumber Co., 55 Wash. 342, 104 P. 635, 133 Am.St.Rep. 1032, cited in support of this contention, was repudiated in Staples v. Esary, 130 Wash. 521, 228 P. 514, 515, where the court said: "Text-books and decisions might be cited to the point of exhaustion, confirming the rule that a plaintiff may, where he is seeking but one recovery, plead in the alternative either upon an express contract or in quantum meruit." The rule in the Staples case is the law of California. City of Los Angeles v. Blondeau, 127 Cal.App. 136, 15 P.2d 553; Goldwater v. Oltman, 210 Cal. 408, 292 P. 624, 71 A.L.R. 871. If, in the statement of facts, the causes of action be antagonistic, it is the duty of the court, upon the submission of the case, to determine which has been sustained. Beatty v. Pacific States S. & L. Co., 4 Cal.App. 2d 692, 41 P.2d 378. In the present case, it is claimed that there was no evidence as to reasonable value of the services performed. If so, the finding on such count in that respect is surplusage and does not injure appellants. There is no inconsistency in setting forth a cause of action in two counts, contract and indebitatus assumpsit, when each refers to the same subject matter, and all that is necessary to determine is the amount due.

As to appellants' contention that in any event respondent was not entitled to commissions based upon the sale of 4,500 tons of scrap since 1,875 tons only could have been delivered and that payment to him should be limited to an amount based upon such tonnage, the trial court found that there was no shortage in material, and that appellants could have had the amount contracted for had they supplied the vessel for its shipment. Because of the conclusion we have reached herein on other questions, it is not necessary further to consider appellants' claim that there could be no damages in excess of $2,812.50, based upon the reduced tonnage.

[5, 6] Unless a contract places additional burdens upon a broker, the general rule is that when in good faith he has secured for his principal a buyer or seller, ready, willing and able to sell or purchase, as the case may be, on terms agreed upon, and within a time limit, he is entitled to his commission. If the broker fulfills all of the conditions of his employment, the fact that his principal fails to carry out the contract does not affect the former's rights. Jauman v. McCusick, 166 Cal. 517, 137 P. 254; S. H. West & Co. v. Wagner, 117 Cal.App. 523, 4 P.2d 276. It should be noted in this case that not only did appellants contract with the party procured by the agent, but they further secured a $20,000 guarantee to insure the performance of the contract entered into. While such contract was eventually cancelled, it was only after the sellers of the scrap had brought suit against appellants [the purchasers]. The terms of settlement between the principals, arrived at more than ninety days after the date of their contract, are not shown by the record, neither does it appear, as stated, that the broker took any part therein.

[7] Unless the wording of the agreement with the broker made payment of his commission contingent upon the performance of the terms of the contract between the seller and the buyer or any of them, the voluntary abandonment of it by them could not affect the broker's rights. The readiness, willingness and ability of the seller was demonstrated by the buyer entering into a contract with it. Avis v. Rebhan, 92 Cal.App. 178, 267 P. 898; Johnson v. Krier, 59 Cal.App. 330, 210 P. 966; Mc-

Namara v. Steckman, 202 Cal. 569, 262 P. 297; Grove v. Lewis, 125 Cal.App. 357, 13 P.2d 847.

[8] On the strength of the wording of the broker's contract, which recited that he was to be paid $1.50 per ton of material purchased "upon delivery and complete shipment and payment of the purchase price," appellants contend that the broker's right to recover fell with the termination of the contract for the sale of the scrap iron. If, as the court found, the failure of "delivery and complete shipment" was due to the principals' fault, the broker's right should not be prejudiced. The words added by Mr. Dulien to the broker's contract merely provide a time for the payment of services already rendered, not a limitation of his right thereto. The question naturally arises as to whether there is evidence in the record indicating fault on the part of the principals. Assuming that the inserted words could be interpreted as constituting a condition precedent to the payment of the broker's commission, if the trial court made a correct finding of fault on the part of appellants, this phase of the case is at an end.

[9, 10] The record shows that appellants did not actually furnish a vessel for the shipment of the scrap, although they did endeavor to charter one. They attempt to establish that their failure to do so was immaterial since the amount of tonnage contracted for was not available at Guaymas. The burden of proving these claims was upon appellants. A dealer in scrap and metals engaged in business in Mexico City testified that he was familiar with the quantity of scrap at Guaymas; that there were only 1,875 tons. If it should be assumed that his testimony was correct, still it does not appear that such information was communicated to appellants until after the time fixed for the supplying of the vessel had expired. A reading of the testimony of this witness shows certain weaknesses and personal interest in the matter sufficient to justify the trier of the facts in discounting his testimony. The trial court was of the opinion that appellants had not satisfactorily borne their burden of sustaining the affirmative defense. The issue in this respect is not one requiring expert knowledge but is a question purely of fact, a matter in which a reviewing court may not interfere.

[11] Appellants contend that the broker's contract was executed under a material mistake of fact as to the quantity of scrap iron available, which rendered it unenforceable. The court explicitly found that there was no "material or any mistake" as to the quantity of scrap. This finding is inseparable from the finding that a shortage in tonnage was not proven. Having determined the correctness of the latter finding, the claim as to mutual mistake is immaterial.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

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54 Cal.App.2d 120

PEZOLD v. AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, et al.

Civ. 13587.

District Court of Appeal, Second District, Division 3, California.
Aug. 20, 1942.

1. **Torts** 🔑10

"Picketing" may be lawful, though no labor dispute between employer and his employees exists and object of picketing is to unionize a place of business in which none of pickets are employed.

See Words and Phrases, Permanent Edition, for all other definitions of "Picketing".

2. **Injunction** 🔑101(3)

In action to enjoin picketing of plaintiff's market, facts, alleged in complaint, revealed by evidence, and found by trial court, that picketers warned prospective customers not to enter market because there might be trouble or they would get hurt, that number of pickets varied from two to 37 spaced a foot apart, and that they parked 10 to 12 automobiles with banners occupying almost all of space in front of market and paraded back and forth on sidewalk, established unlawful "picketing" entitling plaintiff to injunctive relief.

3. **Torts** 🔑10

Picketing by organized group is more than exercise of "free speech", since it involves patrol of particular locality and may induce action irrespective of nature of ideas being disseminated, so that it is subject to restrictive regulation.

See Words and Phrases, Permanent Edition, for all other definitions of "Free Speech".

4. Injunction 🔑101(3)

Picketing, wherein persuasion brought to bear contains threat of physical violence, is unlawful, and use of words and aggregation of pickets reasonably inducing fear of physical molestation may properly be enjoined.

5. Injunction 🔑190

In action to enjoin picketing of plaintiff's market, where evidence showed that persons desiring to enter market were not required to force their way through picket chain, that no court order was violated, and that not even technical battery was committed by any picket on any person, and there was no evidence supporting trial court's findings that threats of physical violence were voiced against plaintiff's employees and that one of them was physically interfered with, trial court erred in concluding that defendants forfeited their privilege of peaceful picketing and should be permanently enjoined from picketing market.

6. Injunction 🔑101(1, 3)

Labor union members' use of sidewalk in front of market for purpose of spreading propaganda against operation thereof on Sundays and holidays may not be prohibited by injunction, but limitation may be placed on number of picketers using walk and manner of its use, so as to prevent intimidation of or undue interference with its use by market owner's customers.

7. Injunction 🔑189

An injunction against labor union's maintenance of picket lines interfering with free ingress and egress to and from market and adjoining parking lot *held* too broad as enjoining lawful acts and acts neither done nor threatened by such unions.

8. Injunction 🔑189

A decree in equity, enjoining doing of acts which parties enjoined have neither done nor threatened to do, so far as appears from evidence, is improper.

9. Injunction 🔑128

In action to enjoin picketing of plaintiff's market, evidence that pickets carried banners bearing statements, "Sunday should be a day of rest", "Free the slaves", "All union markets are closed Sunday and Monday", "We ask that all labor be given one holiday per year", "The only market in the county working its help today", etc., did not warrant judgment enjoining defendants from maintaining pickets bearing banners containing false, libelous, and misleading statements or statements calculated to convey threat of physical violence.

10. Injunction 🔑128

A judgment enjoining labor unions from placing pickets in front of plaintiff's place of business for purpose of influencing any person, firm, or corporation to refrain from selling or delivering merchandise to plaintiff or influencing truck drivers or other employees of plaintiff or corporations selling merchandise to plaintiff to refrain from delivering merchandise to such place by any means calculated to intimidate or create fear of physical violence in such persons, *held* improper as enjoining lawful picketing or doing of acts which defendants had neither done nor threatened to do so far as evidence disclosed.

Appeal from Superior Court, Ventura County; Raymond McIntosh, Judge.

Action by George M. Pezold against the Amalgamated Meat Cutters and Butcher Workmen of North America and others to enjoin picketing of plaintiff's market. Judgment for plaintiff, and defendants appeal.

Reversed.

Clarence E. Todd, of San Francisco, and Albert A. Kidder, Jr., of Ventura, for appellants.

Lewis & Taylor, Neville R. Lewis, Milton A. Taylor, and John J. Varni, all of San Fernando, for respondent.

BISHOP, Justice pro tem.

In this action brought to enjoin the defendants from picketing plaintiff's market, the complaint, proof and findings of fact each made out a case entitling the plaintiff to injunctive relief. The judgment which was entered, however, granted relief beyond that authorized.

The complaint states a cause of action. Much of it is taken up with a recital of facts which, summed up, establish that plaintiff's twenty-four employees were entirely satisfied with their hours of labor, wages and working conditions, were united in a union of their own, not affiliated with any other, and that no labor dispute existed between them and the plaintiff. The defendants were labor organizations and officials, it is alleged, who had conspired to compel plaintiff's employees to join their ranks. To accomplish their object the defendants picketed plaintiff's premises, using banners and the spoken word in an endeavor to convince those who were expected to deliver produce to the plaintiff's market that they should not do so; to dissuade would-be purchasers from buying; and to persuade plaintiff's employees that it was to their interest to join the defendants' unions.

[1] These facts, without others, and unaffected by any legislation that "has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest" (Carpenters & Joiners Union v. Ritter's Cafe, 1942, 62 S.Ct. 897, 808, 86 L.Ed. 1143), do not constitute a cause of action. Picketing may be lawful, although no labor dispute between the employer and employee exists (Magill Bros. v. Building Service, etc., Union, 1942, 20 Cal.2d 506, 127 P.2d 542, and cases cited) and though the object of the picketing be to unionize a place of business in which none of the pickets are employed. American Federation of Labor v. Swing, 1941, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; Magill Bros. v. Building Service, etc., Union, supra, 20 Cal.2d 506, 127 P.2d 542.

[2-4] The complaint contains further averments, however. It is there alleged and it was revealed by the evidence and found by the trial court that those engaged in picket duty did not limit their activities to making known their grievances against the plaintiff, nor confine to appeals to reason their endeavors to persuade would-be customers not to deal with plaintiff. Among other things they stated to them: "Don't go in there lady, there might be trouble"; "Better stay out of there or you will get hurt"; "There she goes, we'll get her next"; "Don't go into that parking lot mister, if you do you won't get back out." Concerning the fact that the picketing was so conducted as to block the entrance to plaintiff's market, the complaint only alleges that the pickets varied in number from two to thirty-seven, but from the evidence it appears not only that the number of pickets varied from two to thirty-seven, but that on the first day they parked ten to twelve automobiles, with banners, occupying almost all the space in front of plaintiff's market, and then twenty-five pickets, carrying banners some two by four feet in size, paraded on the sidewalk back and forth across the sixty-foot front of the market. On the occasion when the picket line reached its peak and thirty-seven were involved, they were spaced a foot apart. The picketing continued for a week, when it ceased in deference to a temporary restraining order. After Sunday and Labor Day each day began with only two or three pickets on duty, but the number increased as the day wore on until in the evenings there would be "quite a parade"; one evening there were seventeen to nineteen on hand. Of these numbers, it would seem, two were always on the parking lot reserved for plaintiff's customers, next door to his market.

From these facts it appears that the picketing was beyond that now established as lawful. We recognize the fact that inherent in the labor practice of picketing there usually is, as in the case under review there undoubtedly was, an exercise of the constitutionally protected right freely to communicate ideas. But it would be stubbornly refusing to admit the obvious not to see in the activities of picketing on many occasions more than the mere expression of ideas. As stated by Mr. Justice Douglas, in an opinion concurred in by two of his associates in Bakery & Pastry Drivers, etc., v. Wohl, 1942, 62 S.Ct. 816, 86 L.Ed. 1178, and quoted by our Supreme Court in Magill Bros. v. Building Service, etc., Union, supra, 20 Cal.2d 506, 510, 127 P.2d 542, 544: " 'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive regulation.' " In Magill Bros. v. Building Service, etc., Union, just cited, it was held, accordingly, that "There can be no doubt that untruthful picketing is unlawful picketing" and that an injunction, limited to a correction of the unlawful aspect of the picketing, was proper. Equally without doubt it is that picketing, wherein the persuasion brought to bear contains a threat of physical violence, is unlawful, and that the use of words and an aggregation of pickets which reasonably induce fear of physical molestation may properly be enjoined. Lisse v. Local Union No. 31, 1935, 2 Cal.2d 312, 317, 41 P.2d 314, 316; McKay v. Retail Auto., etc., Union, 1940, 16 Cal.2d 311, 320, 106 P.2d 373, 378; Steiner v. Long Beach Local, etc., Union, 1942, 19 Cal.2d 676, 682, 123 P.2d 20, 24, 25.

The injunction issued in this case, however, was too broad. After its preliminary recitals the judgment that was entered continues:

"Now, therefore, it is hereby ordered, adjudged and decreed that the defendants, and each of them, their agents, servants, representatives and employes be and they are hereby permanently enjoined and restrained from doing or attempting to do any of the following acts:

"(a) Maintaining picket lines which interfere with free ingress and egress to and from that business and the adjoining parking lot at 847 Main Street, Santa Paula, California;

"(b) Maintining pickets bearing banners containing false, libelous, and misleading statements and/or statements calculated to convey a threat of physical violence;

"(c) And enjoining any picket or representative while picketing from making any statements false, libelous and misleading, and/or calculated to convey a threat of physical violence;

"(d) Stationing or placing in front of or in the vicinity of plaintiff's business, pickets or representatives for the purpose of influencing or inducing or attempting to influence or induce any person to refrain from entering plaintiff's business, or for the purpose of influencing or inducing or attempting to influence or induce any person to refrain from purchasing any goods, wares, merchandise or other articles sold by plaintiff, or for the purpose of influencing or inducing or attempting to influence or induce any of plaintiff's employes to refrain from continuing in plaintiff's service, or for the purpose of influencing or inducing or attempting to influence or induce such employes to become members of the defendant unincorporated associations or their locals, or for the purpose of influencing or inducing any person, firm or corporation or attempting to influence or induce any such person, firm or corporation to refrain from selling or delivering merchandise and commodities to plaintiff, or to refrain from having business or contractual dealings with plaintiff, or for the purpose of influencing or inducing or attempting to influence or induce truck drivers or other employes of plaintiff or corporations selling and delivering merchandise and commodities to plaintiff to refrain from delivering to plaintiff's business merchandise and commodities ordered or intended for delivery thereto by any means calculated to intimidate or create fear in said person or persons of physical violence.

"It is further ordered, adjudged and decreed that plaintiff recover the sum of $1,020.55 from the defendants, and each of them, by way of damages to plaintiff's business and the good will thereof."

[5] The facts of this case do not make out an aggravated or persistent case of mass picketing nor of any physical violence. Those who desired to enter plaintiff's market were not required to force their way through a picket chain, save possibly on one occasion. At the worst at all other times they had but to wait the passing of the picket line at a given point and enter the market before it returned to that point. There was no picketing in defiance of a court order. Nor was there even a technical battery committed by any of the pickets upon any person, whether customer, deliveryman or employee. True, in the complaint it was alleged and the trial court found it to be a fact that a threat "to get" plaintiff's meat department manager was made followed by the placing of pickets at his residence, but there is nothing in the evidence to bear this out. It was further found that certain threats of physical violence were voiced against plaintiff's employees, as the complaint alleged, but again the evidence fails to give the finding any support. Nor does the evidence justify a further finding that one of plaintiff's employees, while obtaining merchandise for plaintiff at a place remote from the market, was physically interfered with, although it does appear that he was called a name that should always be accompanied by a smile, that he was termed a scab, and that on the employee's return trip one of those who had been on the picket line drove his car back and forth across the road ahead of the employee's vehicle.

The picture, then, while not that of a peaceful, lawful, picket line, engaging only in practices protected by the state and federal constitutions, is yet not one in which acts of violence have so stamped themselves upon the scene that for a time at least even peaceful picketing will reflect the events of the past and appear to threaten the personal safety of customers or others, with the result that all picketing must be enjoined in order to afford the plaintiff adequate protection; and the trial court did not find this to be so as a fact. That is to say, those facts found by the trial court that are supported by the evidence do not bring this case within the principles applied in Steiner v. Long Beach Local, etc., Union, 1942, 19 Cal.2d 676, 123 P.2d 20, and Milk Wagon Drivers Union v. Meadowmoor Dairies, 1941, 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200. The trial court erred, therefore, in arriving at the conclusion of law "That in this case * * * defendants have forfeited their privilege of peaceful picketing," and in expressing the further conclusion that the defendants should be permanently enjoined from "having pickets in front of or in the vicinity of plaintiff's business * * *."

[6, 7] The judgment is too broad, therefore, in that it enjoins acts which are lawful, and it is also too broad in that it enjoins acts neither done nor threatened to be done. Subdivision (a), quoted above, is couched in somewhat different language but is the same in scope as the provision of the Yuba County ordinance, considered in In re Bell, 1942, 19 Cal.2d 488, 122 P.2d 22, 27, which in terms made it unlawful "for any person to loiter, stand, or sit upon any public highway, * * * sidewalk or crosswalk so as to in any manner hinder or obstruct the free passage * * * of persons or vehicles * * *." This language, the supreme court stated (page 497 of 19 Cal.2d, page 27 of 122 P.2d) "encompasses conduct that is well within the bounds of peaceful picketing sanctioned by the guarantees of due process of law. Thus a picket may be peaceful even though he loiters, stands, or sits upon a public highway, alley, sidewalk, or crosswalk, and thereby constitutes to some extent an obstruction to the free passage of persons and vehicles or an annoyance to persons who do not approve of his presence." A picket line, no matter how small and peaceful, if on the sidewalk in front of plaintiff's market, would to some extent obstruct the free passage of persons, that is to say, interfere with their free ingress and egress to and from plaintiff's market. The foreordained disapproval of the sweeping language of the ordinance, expressed in In re Bell, supra, 19 Cal.2d page 497, 122 P.2d 22, applies with equal force to the sweeping language of the judgment. The defendants have a right to use the public sidewalk in front of plaintiff's market for the purpose of spreading their propaganda. Plaintiff has a right to have his customers use the sidewalk for the purpose of entering and leaving his market. Neither right is exclusive; each may, fortunately, be exercised without a denial of the other, although each may interfere with the other. Defendants' use of the sidewalk may not be prohibited, but there may be a limitation placed upon the number using it and the manner of use, so that there is neither intimidation nor undue interference with its use by plaintiff's customers. Subdivision (a) of the judgment, however, constitutes a greater restriction than the facts found warrant.

[8, 9] The judgment further enjoins the doing of acts which the defendants have neither done nor threatened to do, so far as appears from the evidence, a field in which a decree in equity should not trespass. Cameron v. Feather River Forest Homes, 1934, 139 Cal.App. 373, 378, 33 P.2d 884; Chrisman v. Culinary Workers' Local Union, 1941, 46 Cal.App.2d 129, 134, 115 P.2d 553; Hitchman Coal & C. Co. v. Mitchell, 1917, 245 U.S. 229, 262, 38 S.Ct. 65, 62 L.Ed. 260, 281, L.R.A.1918C, 497, Ann.Cas.1918B, 461; 32 C.J. 379. We have not heretofore had occasion to note the statements appearing on the banners which the pickets carried, in addition to wearing "A. F. of L." arm bands; they were these: "Some merchants take 24 hours to do 8 hours work. How slow are you?" "We have a list of fair merchants. Is your name there?" "Sunday should be a day of rest. Do you enjoy yours?" "I don't work on Sundays and Holidays. Why do you?" "We are carrying on what Lincoln started. Free the slaves." "My baby has milk today. I arranged for it on Saturday." "Are your competitors reasonable. Some of ours are." "All Union Markets are closed Sunday and Monday. Are Yours?" "All fair merchants advertize that they will close Sunday and Monday."

"We ask that all labor be given one holiday per year." "Is that fair?" "S. P. Mkt. the only Mkt. in the County working its help today." "I don't work on Sundays or holidays. Why do you?" "Some employers are men. Others are exploiters. Which are you?" "This is the only Mkt. open today in this County. There is one small grocery store open here in Santa Paula. Please locate same." "We are acquainted with our families. Are you?" "We belong to the Union. Why can't you?" "Some work from 12 to ? We work from 8 a.m. to 6 p.m." Nowhere in the findings is it found as a fact that any one of these statements was false, libelous or misleading, and they do not appear to be as a matter of law. Indeed in the complaint it is not claimed that any of them were, although it is alleged that the pickets were "so stationed * * * so as to cause prospective customers and the general public wrongfully to believe that an actual labor dispute exists" and, further, that plaintiff lost many customers because of the signs causing them to believe that a strike existed. As pointed out in C. S. Smith Met. Market Co. v. Lyons, 1940, 16 Cal.2d 389, 394, 106 P.2d 414, the presence of pickets is not a sound ground for the inference that a strike has been called or that a labor dispute between employer and employee exists, and the making of statements such as those noted should not be characterized as fraudulent because some persons jumped to the wrong conclusion. Nor can it be argued that any of these banners carried a threat of physical violence. There was no basis, therefore, for the provisions of subdivision (b) of the judgment enjoining the defendants from maintaining pickets bearing banners containing false, libelous and misleading statements or banners calculated to convey a threat of physical violence.

[10] We are at a loss just how to interpret subdivision (d) of the judgment, but any of the possible interpretations requires us to disapprove it as a part of the judgment. This portion of the judgment would be entirely in harmony with the conclusion of law that the defendants had "forfeited their privilege of peaceful picketing," but for the words with which it ends: "by any means calculated to intimidate or create fear in said person or persons of physical violence." Insofar as the words of this phrase apply, the injunction is not against all picketing, but only against that which is unlawful because made under threats of physical molestation. If we look only to the punctuation, we conclude that the phrase applies only to stationing pickets to influence "truck drivers, or other employees of plaintiff or corporations," leaving the injunction one against even peaceful picketing as to all others mentioned. This interpretation, however, is unsatisfactory in that "truck drivers" and "other employees" would seem to be unlikely antecedents of "said person or persons." But if the qualifying words at the end of the subdivision apply only to the prior provisions where a "person" or "persons" are mentioned, again we have left provisions which would enjoin perfectly lawful picketing. If we take the only remaining interpretation of this uncertain subdivision of the judgment and determine that the concluding phrase applies to all the provisions immediately preceding it, whether they refer to a "person" or to "employees," "truck drivers," "firms" or "corporation", then again we have the judgment forbidding the defendants from doing that which they have neither done nor threatened to do, so far as the evidence discloses. For example, there is no proof that any picket endeavored, by means calculated to intimidate or create fear of physical violence, to influence any of plaintiff's employees to quit his service.

We have concluded that the judgment should be reversed rather than modified at our hands because of a combination of circumstances. In some particulars, as we have noted, the findings are not supported by the evidence and in an unknown part the damages awarded seem to be dependent upon the facts found but not proved to exist. The evidence, moreover, was acquired in large part as a result of a stipulation that "the statements contained in the affidavits may be deemed to be testified to here as if they were in court testifying." The affidavits referred to were those filed in support of plaintiff's application for a temporary restraining order. Without holding that evidence so obtained may not properly be used, we find worthy of reference the opinion of it expressed by Judge Amidon in Great Northern Ry. Co. v. Brosseau, D.C.1923, 286 F. 414, 416: "The experience both upon the hearings as to whether a preliminary injunction should issue, and upon the contempt proceedings, have convinced me that affidavits are an untrustworthy guide for judicial action.

That is the case in all legal proceedings, but it is peculiarly true of litigation growing out of a strike, where feelings on both sides are necessarily wrought up, and the desire for victory is likely to obscure nice moral questions and poison the minds of men by prejudice. * * * Experience, as I have stated, has caused me to be so incredulous of affidavits that I have required in all important matters the presence of the chief witnesses upon each side at the hearing." Lastly, we note that these affidavits were filed in September, 1937; the trial at which they were adopted as testimony was held April, 1938; the findings of fact and judgment were filed February, 1941. That a judgment may be entered in which the present equities of both parties may be safeguarded, we deem it advisable that the judgment now entered be reversed, without limitation, so that a new trial may be had after the filing of amended or supplemental pleadings, if that be the desire of the parties.

The judgment, therefore, is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concur.

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53 Cal.App.2d 805

JOHNSON v. JOHNSON.

Civ. 13740.

District Court of Appeal, Second District, Division 1, California.

Aug. 7, 1942.

Rehearing Denied Sept. 3, 1942.

See 128 P.2d 919.

1. Executors and administrators 🔑315(4)

Where there was no allegation or evidence that defendant had knowledge that representation that she was wife of decedent, by which defendant obtained decree setting aside decedent's estate to defendant as decedent's widow, was false because no final divorce decree had been entered dissolving wife's former marriage, and evidence established that all parties were laboring under a misapprehension concerning entry of divorce decree, and that defendant first learned that it had not been entered after entry of decree setting aside the estate to her, decedent's mother was not entitled to have decree setting aside estate to defendant annulled on ground that it was obtained by "fraud". Probate Code, § 640.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

2. Judgment 🔑443(1)

In order for fraud to constitute grounds for equitable relief from judgment, the fraud must be extrinsic or collateral to the question determined in the proceeding resulting in the judgment.

3. Judgment 🔑429

Where alleged fraud or coercion relied on as ground for relief from judgment is of such nature that it may reasonably be presented to the court at the trial so as to afford full and fair protection to rights of interested parties, and they neglect to avail themselves of that opportunity, court of equity will not disturb the judgment.

◆

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action to annul a judgment setting aside an estate to a widow. Judgment for plaintiff reversed with directions.

Action by Laura Johnson against Odeal M. Johnson to annul a decree in probate, whereby the estate of Cornelius A. Johnson, deceased, was set aside to Odeal M. Johnson as deceased's widow, on ground of fraud in procurement of the decree. From an adverse judgment, and from an order denying defendant's motion for new trial and denying defendant's motion for order vacating the judgment appealed from and for the entry of new and different conclusions of law, and a new and different judgment in favor of the defendant, the defendant appeals.

Judgment reversed with directions to enter judgment for defendant and appeal from order dismissed.

Harold B. Pool and Robert G. Johnson, both of Los Angeles, for appellant.

Sylvester Isonberg, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a final judgment; from an order denying the motion of the defendant for a new trial and denying the motion of said defendant for an order vacating the judgment appealed from, and for the entry of new and different conclusions of law and a new and different judgment in favor of said defendant, pursuant to the provisions of sections 663 and 663a of the Code of Civil Procedure. The action is one against appellant to annul a decree in probate whereby the estate of one Cornelius A. Johnson, deceased, was set aside to appellant as his widow, pursuant to the provisions of section 640 of the Probate Code. The complaint in the instant action was based upon fraud in the procurement of the decree in question, and the trial court found for the plaintiff, the mother of the deceased, and entered judgment accordingly.

The complaint herein alleges that said Cornelius A. Johnson died intestate in the city of Los Angeles on or about the 11th day of March, 1940, leaving an estate consisting of real and personal property; that said deceased left no surviving spouse or widow, no children, and no father; that the plaintiff is the surviving mother of said deceased and, as such, is entitled to all of the property of decedent. That on the 11th day of June, 1940, by proceedings duly instituted and prosecuted in the Probate Department of the Superior Court of Los Angeles County appellant herein, "by pretending and falsely representing herself to be the surviving spouse or widow of said deceased and thereby deceiving said Court and this plaintiff into such belief, in her petition and showing in Case No. 194137 in the records of said Probate Court, and by her general appearances, to such effect, induced and caused said Probate Court to make and enter its decree setting apart and assigning absolutely unto said defendant (appellant) all of the aforesaid property as the surviving spouse of said deceased under section 640 of the Probate Code." The complaint then alleges that the appellant is not the surviving spouse of said deceased and was not such surviving spouse at the date of making and entering of said decree in probate, nor at any other time; and that appellant practiced deception, imposition and fraud upon the probate court and plaintiff by falsely representing herself to be the surviving spouse of said deceased. The portion of the complaint which sets forth facts relied upon to show the fraud of appellant is as follows:

"(a) That on the 20th day of October, 1930, said defendant, by and under the name of Odeal Talamon, procured and had entered an interlocutory decree of divorce from one James C. Talamon in the case entitled: 'Odeal Talamon, Plaintiff, vs. James C. Talamon, Defendant, No. D-87638,' in the records of the Superior Court of the State of California in and for the County of Los Angeles; and that said defendant never did obtain a final decree of divorce in said action, but the defedant therein, James C. Talamon, did obtain such final decree of divorce on the 23rd day of May, 1941.

"(b) Plaintiff alleges on information and belief that subsequent to the entering of said interlocutory decree of divorce, and the particular date is unknown to this plaintiff, said defendant deliberately devised a scheme to defraud plaintiff of her expected right, title and interest in and to the aforesaid property and that pursuant thereto said defendant gained influence over said deceased and his confidence so as to impress him that she was an unmarried woman; that by and under the name of Odeal Pecot said defendant contracted marriage with said deceased and induced him to accompany her to the City of Santa Ana in the County of Orange in this State and then and there did go through a purported marriage ceremony under a license issued under said name of Odeal Pecot; that said deceased believed that defendant was an unmarried woman capable of contracting and entering into a valid marriage, as also did this plaintiff all time thereafter, except as hereinafter shown.

"(c) That the procurement of said interlocutory decree of divorce by defendant from said James C. Talamon on October 20, 1930, and the great lapse of time subsequent thereto and false representations of defendant as to her marital status, deceived plaintiff into the false belief that said defendant was an unmarried woman when she entered into said marriage with said deceased; that said defendant kept her failure to obtain said final decree of divorce cunningly concealed from the plaintiff and the deceased by her conduct and deportment as an unmarried woman; and that plaintiff only learned of such failure to obtain said final decree of divorce within the past thirty (30) days."

It is then alleged that because of the falsehood and deception on the part of appellant, plaintiff was deceived into the belief that appellant was the legal surviving spouse of said deceased when said decree was entered by the probate court assigning all of said property of the deceased to appellant as such; and that plaintiff was thereby prevented from presenting the proper opposition thereto, all of which deception, falsehood and fraud prevented a presentation of plaintiff's right to all of the said property of said deceased, as his only heir.

A copy of the probate decree in question is attached to the complaint as an exhibit and, with the exception of the itemized list of the property of the estate, reads as follows:

"The verified petition herein of Odeal M. Johnson, by Robert G. Johnson, her attorney, for letters of administration or to assign estate, coming on regularly this 11th day of June, 1940, for hearing by the Court, all notices of said hearing having been given as required by law, and objections having been presented, and the evidence having been heard, the Court hereby overrules the objections, and finds that the net value of the whole estate of said deceased, over and above all liens or encumbrances of record at the date of death of said deceased, does not exceed the sum of $2500.00; that the expenses of the last illness of said deceased, funeral charges and expenses of administration have been paid, and that the personal estate of the surviving spouse of said deceased does not exceed the sum of $5000.00.

"It is therefore Ordered, Adjudged and Decreed by the Court that the petition for letters of administration is hereby denied, and that the whole of the estate of said Cornelius A. Johnson, deceased, be and the same is hereby assigned to, and that the title thereof shall vest absolutely in Odeal M. Johnson, the surviving spouse of said deceased, subject to whatever mortgages, liens or encumbrances there may have been thereon at the time of the death of said deceased."

Appellant's answer denied the allegations of fraud, denied that a final decree of divorce was not obtained in the divorce action referred to in the complaint until the 23rd day of May, 1941, and specifically alleged that the parties to said divorce action were entitled to a final decree of divorce on the 21st day of October, 1930, and that the final decree of divorce in said action had been entered therein as of said date. In a second separate defense appellant claimed that the complaint did not state facts sufficient to constitute a cause of action.

Evidence introduced at the trial reveals that appellant married Cornelius A. Johnson on November 2, 1938, which was eight years after obtaining her interlocutory decree of divorce above mentioned. The record also reveals that the final judgment of divorce in the matter referred to was entered May 23, 1941; but said final judgment was later vacated on motion of appellant and a second final judgment was entered June 17, 1941, nunc pro tunc as of October 21, 1931, on the ground that through inadvertence the first judgment has been entered as of May 23, 1941, instead of October 21, 1931. Thereafter, and on September 29, 1941, another decree was entered vacating the judgments previously entered, except the interlocutory judgment, and granting appellant a final decree of divorce as of October 21, 1931. This last decree recites that it is made because of some doubt as to the validity of the nunc pro tunc final decree entered on June 17, 1941. The record shows that the plaintiff's case rests solely upon the fact that no final decree of divorce was entered until May 23, 1941.

The trial court found that in representing herself as the surviving spouse of the deceased appellant had fraudulently induced the probate court to enter the decree setting aside the deceased's estate to her, that at the date of deceased's death the marriage of appellant with her previous husband was still in existence and undissolved; and the court concluded that appellant was not the lawful wife of deceased at the time of his death and that appellant had perpetrated a constructive fraud upon the court in applying to have deceased's estate set aside to her; and that the decree in probate setting aside the estate to appellant was void.

The complaint contains no allegation, nor was there any evidence offered or finding made to the effect that appellant knew or believed that her representation to be the wife of the deceased was false. At the trial appellant testified that at the time of her second marriage she believed herself to be a single woman; that she was under the impression that her final decree of divorce had been obtained and that it was her understanding and belief that a final decree of divorce was automatically entered one year after the entry of the interlocutory decree. She also testified that she first learned that the final decree had not been entered on June 7, 1941. There is nothing in the record to controvert her testimony in this respect.

The first final judgment appears from the record to have been entered on May 23, 1941, at the request of counsel for appellant's prior husband.

[1-3] The respective contentions of the parties need not be set forth here. The foregoing demonstrates that plaintiff and respondent's action herein to have the decree in probate vacated is unfounded, and that the findings and conclusions of the trial court are not supported by the evidence. Though respondent alleged in her complaint that appellant's fraud prevented respondent from offering proper opposition to appellant's petition to have the estate set aside, there is no evidence that appellant made any representation to respondent or did any act to prevent respondent from fully defending or asserting any right she may have had to the property of the deceased. The only proper conclusion to be drawn from the evidence is that both appellant and respondent, as well as the deceased, were laboring under a misapprehension as to the entry of the decree of divorce. Such circumstances fall far short of establishing a case of extrinsic fraud, even assuming any fraud at all to have been proven. It is well established, upon abundant authority, that to constitute grounds for equitable relief from a judgment, the fraud shown must be extrinsic or collateral to the question examined and determined in the proceedings resulting in the judgment or order. 15 Cal. Jur. 14, § 123, and cases cited.

"When the alleged fraud or coercion is of such nature that it may reasonably be presented to the court at the trial so as to afford full and fair protection to the rights of the interested parties and they fail or neglect to avail themselves of that opportunity, a court of equity will not disturb the judgment rendered under such circumstances, but will leave the parties in the position in which they placed themselves." Godfrey v. Godfrey, 30 Cal.App.2d 370, 379, 86 P.2d 357, 362. Any failure of respondent to have presented any defense or objection to appellant's petition in the probate court was not shown here to have been caused by any act or representation of appellant. It should be noted that the judgment of the trial court was merely based upon a finding of "constructive" fraud. Moreover, it does not appear from the evidence presented that at the hearing in probate, upon appellant's said petition, the court was not fully apprised of the circumstances of which respondent now complains, except for the testimony of appellant in the instant case to the effect that at the time of her petition to the probate court she was not aware that her final decree of divorce had not been entered.

It is not necessary here to pass upon the question of the effect of the entry nunc pro tunc of the final judgment of divorce. It should be noted, however, that section 133 of the Civil Code, as amended, (Stats. 1941, chap. 995, p. 2632, in effect on the ninety-first day after June 14, 1941), reads: "Whenever either of the parties in a divorce action is, under the law, entitled to a final judgment, but by mistake, negligence or inadvertence the same has not been signed, filed or entered, if no appeal has been taken from the interlocutory judgment or motion for a new trial made, the court, on the motion of either party thereto or upon its own motion, may cause a final judgment to be signed, dated, filed and entered therein granting the divorce as of the date when the same could have been given or made by the court if applied for. The court may cause such final judgment to be signed, dated, filed and entered nunc pro tunc as aforesaid, even though a final judgment may have been previously entered where by mistake, negligence or inadvertence the same has not been signed, filed or entered as soon as it could have been entered under the law if applied for. Upon the filing of such final judgment, the parties to such action shall be deemed to have been restored to the status of single persons as of the date affixed to such judgment, and any marriage of either of such parties subsequent to one year after the granting of the interlocutory judgment as shown by the minutes of the court, and after the final judgment could have been entered under the law if applied for, shall be valid for all purposes as of the date affixed to such final judgment, upon the filing thereof."

For the foregoing reasons the judgment is reversed, with directions to the trial court to enter a judgment in favor of defendant and appellant. The appeal from the order denying motion for new trial and denying motion of defendant for an order vacating the judgment appealed from and for the entry of a new and different judgment is dismissed.

YORK, P. J., and WHITE, J., concurred.

54 Cal.App.2d 20

PEASE v. SAN DIEGO UNIFIED SCHOOL DIST. et al.

Civ. 2868.

District Court of Appeal, Fourth District, California.

Aug. 12, 1942.

1. Landlord and tenant 🔑169(8)

In action by invitee against lessee of school premises for injuries sustained in falling over an insulated wire laid across sidewalk by lessee's agent in connection with the use of a public address system, evidence sustained finding that wire was laid in negligent manner.

2. Landlord and tenant 🔑169(8)

In action by invitee against lessee of school premises for injuries sustained in falling over wire laid across walk by member of stage hands' union in installing a public address system rented by defendant for use at a public meeting, evidence that stage hand had been hired by defendant to do the installation work and had directed stage hand as to where wire should run sustained finding that stage hand was an "employee" and "agent" of defendant.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Employee".

3. Landlord and tenant 🔑167(1)

Where school premises were leased by defendant for public meeting at which plaintiff sustained injuries in falling over a wire laid across walk, both plaintiff and defendant were "invitees" of the owner of the premises, and each was under the duty of using ordinary care with respect to matters affecting the safety of the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

4. Trial 🔑328

Where complaint in personal injury action by invitee charged joint negligence of school district, as owner of premises where injury was sustained, of lessee of premises and of another, lessee would not be exonerated because recovery could not be had against school district, where complaint was sufficient to state a separate liability against each defendant.

5. Judgment 🔑199(3)

Where evidence with inferences which might reasonably be drawn therefrom was sufficient to support a verdict in favor of plaintiff, defendant's motion for judgment notwithstanding the verdict was improperly granted.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Action by Harriett E. Pease against the San Diego Unified School District and others to recover for personal injuries. The defendant Salvation Army, a corporation, filed motion for judgment notwithstanding the verdict. From a judgment for defendant Salvation Army so entered, plaintiff appeals.

Reversed.

Hervey & Holt, of San Diego, and Henry F. Walker, of Los Angeles, for appellant.

Fred O. Reed, Henry E. Kappler, and Marvin Wellins, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an action for damages on account of injuries received by the plaintiff on May 7, 1941, as the result of a fall on an arcade walk between the main school building and the school auditorium on the San Diego High School grounds.

On this occasion the Salvation Army had rented the auditorium for an evening meeting. It had also secured from the defendant Stoll certain equipment for a public address system which was installed for use on this evening. As a part thereof a loud speaker was set up in front of the auditorium and connected with the rest of the system by laying an insulated wire on the ground, across this arcade walk, along the side of the building, and thence into the auditorium. The plaintiff, who had gone to the main school building in connection with the night school which was being held there, caught her foot on this wire as she was leaving and while passing over the arcade walk on her way to the street. There is evidence that the lights over this arcade walk near the place in question were not turned on at the time of the accident.

The plaintiff brought this action against the school district, Stoll, and the Salvation

Army. The court directed a verdict in favor of the school district and a judgment in favor of that defendant has become final. The jury returned a verdict in favor of the plaintiff in the sum of $3,000, as against Stoll and the Salvation Army. The Salvation Army moved for a judgment notwithstanding the verdict, which motion was granted, and the plaintiff has appealed from the judgment then entered in favor of that defendant.

[1] While there is some contention that no act of negligence appears, the evidence, while conflicting, is sufficient to sustain the implied finding that this wire was laid across this walk in a negligent manner. The main controversy here is as to whether or not the person who placed the wire in that position was an agent or employee of this respondent. Respondent contends that Stoll was an independent contractor; that he was in charge of the installation of this equipment; and that the respondent had nothing to do therewith.

[2] There is evidence that some days before this meeting was to be held the secretary of respondent's advisory board, which was in charge of the arrangement for the meeting, telephoned to Stoll, who was in the business of supplying sound equipment for temporary use, with reference to having such equipment furnished on this occasion. Stoll testified that he told the person who telephoned that the price would be $15 with an extra charge of $2.50 if an additional loud speaker was desired on the outside of the building, and that he told this person that this price "doesn't cover the cost of the installation, it doesn't cover the installation because that is under the jurisdiction of the local Stage Hands' Union which has to be done by them." He further testified that he told this person that he "rented" the equipment "but the installation was under their jurisdiction"; that he offered to arrange for the man from the union to make the installation if this was desired or to let them talk to the man direct; that he gave the speaker the telephone number of Mr. Callahan, the business representative of the Stage Hands' Union; and that a day or two later the same person called back "to verify the agreement and the arrangements on this date set." Mr. Callahan testified that a man, who identified himself as Major Taylor and stated that he was speaking for the Salvation Army, telephoned to him and asked to have a man sent to the auditorium on the evening in question, and that he sent a stage hand by the name of Noble. Noble is the man who laid the wire in the position where it caused the trouble. There is some evidence that after he arrived on the scene Noble was directed by a representative of the Salvation Army to put a loud speaker in front of the building, and that he was told by a representative of Stoll to run the wire along the side of the building for the purpose of connecting it up, although there is no evidence that he was directed to lay the wire in the exact manner in which this was done. Later, the respondent paid Stoll with a check for $18 and gave another check for $8 to Callahan to pay for the service rendered by Noble. While there is other conflicting evidence, we think the evidence to which we have referred, with the reasonable inferences therefrom, is sufficient to sustain the implied finding of the jury that Noble was acting as an employee and agent of the respondent.

[3] The respondent contends that the school district was in control of the arcade walk where the accident occurred; that the appellant was not the invitee of the respondent; that as to the respondent the appellant was a mere licensee; and that the only duty it owed to the appellant was to refrain from wilful harm or wilful entrapment. Both the appellant and the respondent were invitees of the owner of the premises and as such each was under the duty of using ordinary care with respect to matters which affected the safety of the other. Perry v. D. J. & T. Sullivan, Inc., 219 Cal. 384, 26 P.2d 485; Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; Koppelman v. Ambassador Hotel Co., 35 Cal.App.2d 537, 96 P.2d 196; Yamauchi v. O'Neill, 38 Cal.App.2d 703, 102 P.2d 365.

[4] The respondent contends that a recovery could not be had against it because the defendant school district was exonerated and the complaint in effect charges joint negligence against all of the defendants. This contention is without merit. Shea v. City of San Bernardino, 7 Cal.2d 688, 62 P.2d 365; Gritsch v. Pickwick Stages System, 27 Cal.App.2d 494, 81 P.2d 257.

[5] The evidence with the inferences which may reasonably be drawn therefrom is sufficient to support a verdict in favor of the appellant and under well settled

rules a judgment notwithstanding the verdict may not be granted under such circumstances.

The judgment is reversed.

GRIFFIN, J., concurred.

54 Cal.App.2d 37

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. MOORE & HARRAH et al.

Civ. 13461.

District Court of Appeal, Second District, Division 3, California.

Aug. 13, 1942.

1. Dismissal and nonsuit 🔑60(7)

Postponement of trial after case was on the calendar and plaintiff and his witnesses were ready to proceed, on motion of a defendant on ground that he had filed a petition in bankruptcy in federal court, and should be given time to procure his discharge to interpose it as a defense, did not interrupt the operation of statute requiring actions to be brought to trial within five years after filing. Code Civ.Proc. § 583; Bankr.Act § 11, subs. a, f, 11 U.S.C.A. § 29, subs. a, f.

2. Estoppel 🔑52

The doctrine of "equitable estoppel" is recognized by statute providing that whenever a party has by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true and to act on such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it. Code Civ.Proc. § 1962, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel".

3. Dismissal and nonsuit 🔑60(6)

Defendant's motion to place a case off the calendar on ground that he filed a petition in bankruptcy and should be given time to procure a discharge to interpose it as a defense did not preclude defendant under doctrine of "equitable estoppel" from thereafter seeking dismissal of action under statute for plaintiff's failure to bring it to trial within five years, where there was no showing that plaintiff could not have brought action to trial within five-year period, and more than two years elapsed after rendition of referee's report containing objection to defendant's application for a discharge, before action was brought up for trial. Code Civ. Proc. §§ 583, 1962, subd. 3; Bankr.Act § 11, subs. a, f, 11 U.S.C.A. § 29, subs. a, f.

4. Dismissal and nonsuit 🔑60(1, 6)

The statute requiring action to be brought to trial within five years after filing was intended to expedite trials and no exception can be created thereto on ground of estoppel.

5. Dismissal and nonsuit 🔑60(7)

The statute requiring actions to be brought to trial within five years after filing is not a "statute of limitations" within meaning of provision of the Federal Bankruptcy Act that operation of any statute of limitations affecting the debts of a bankrupt shall be suspended on filing of petition in bankruptcy. Code Civ.Proc. § 583; Bankr.Act § 11, sub. f, 11 U.S.C.A. § 29, sub. f.

See Words and Phrases, Permanent Edition, for all other definitions of "Statute of Limitation".

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by the Bank of America National Trust and Savings Association against Moore & Harrah, a co-partnership consisting of John S. Moore and John Harrah, and John Harrah. From an order and judgment of dismissal, the plaintiff appeals.

Affirmed.

Louis Ferrari, of San Francisco, and Edmund Nelson and John E. Walter, both of Los Angeles, for appellant.

Harold B. Pool, of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

The complaint in this action was filed on September 24, 1935; on September 18, 1941, on motion of defendants the action was dismissed on the ground that it had not been brought to trial within five years as required by section 583 of the Code of

Civil Procedure. Plaintiff appeals from the dismissal order and judgment as to the defendant Harrah and urges three grounds for reversal: (1) That this case is exempted from the operation of section 583 of the Code of Civil Procedure because it was once on the court's trial calendar within the five-year period and was put off calendar on motion of the defendant Harrah; (2) that defendant waived his right to a dismissal by his motion to place the case off calendar; (3) that section 583 of the Code of Civil Procedure is a statute of limitations and its operation was suspended by subdivision f, of section 11 of the United States Bankruptcy Act, sec. 29, sub. f, Title 11, U.S.C.A., upon the filing of a petition in bankruptcy by defendant Harrah. We find none of plaintiff's points tenable but, after a necessary resume of facts, discuss them in the order in which they are presented.

CHRONOLOGY OF MATERIAL FACTS.

Complaint filed	September 24, 1935
Answer filed	October 9, 1935
Memo for Setting for Trial filed by Plaintiff	January 20, 1937
Petition in bankruptcy filed by Defendant Harrah	April 13, 1937
Adjudication of bankruptcy of Defendant Harrah	April 13, 1937
Trial set for May 5, 1937, on	April 26, 1937
Case ordered off calendar by minute order of reading "This case is ordered off calendar." [Note: the record is silent as to any event on May 5, 1937; it is not, however, contended that trial was entered upon.]	May 6, 1937
Notice of trial (set for September 18, 1941) served and filed by Plaintiff	July 24, 1941
Notice of motion to dismiss for lack of prosecution (Code Civ. Proc., § 583), with memorandum of points and authorities, and affidavit, filed by Defendants	September 12, 1941
Affidavit opposing above motion served by Plaintiff	September 18, 1941
Minute order granting motion to dismiss, made	September 18, 1941

The pertinent statutory provisions are as follows:

Section 583 of the Code of Civil Procedure: "* * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended. * * *"

Section 29, Title 11, of the United States Code Annotated: "a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing, or by the bankrupt's filing a waiver of, or having lost, his right to a discharge. * * *

"f. The operation of any statute of limitations of the United States or of any State, affecting the debts of a bankrupt provable under this title, shall be suspended during the period from the date of the filing of the petition in bankruptcy (1) until the expiration of thirty days after the date of the entry of an order denying his discharge; or (2) if he has waived or lost his right to a discharge, then until the expiration of thirty days after the filing of such waiver or loss of such right * * *; or (3) until thirty days after the dismissal of the bankruptcy proceedings, whichever may first occur."

In opposition to defendants' motion to dismiss, one of plaintiff's counsel filed an affidavit in which it is averred that the action had been set for trial on May *6*, 1937 (rather than May *5* as indicated by the copy of the court record) and "That on May 6, 1937, affiant appeared * * * with the necessary witnesses ready for the trial in said action. At that time, John Harrah appeared and moved the court to place said trial off calendar on the ground that he had filed a petition in bankruptcy, * * * in the local United States District Court on April 13, 1937, and that he should be given time within which to procure discharge to enterpose as a defense. That thereupon and by reason of said defendant's motion, the trial of said action was placed off calendar.

"That this affiant is informed and believes that on February 15, 1938, John Harrah filed his application for a discharge in bankruptcy covering the debts listed in his schedule, which included the debt sued on in this action. That thereafter various objections to the discharge of John Harrah were filed and a hearing of said objections was held on May 2, 1938, and for some days thereafter. * * * Thereafter on or about August 11, 1939, said Referee * * * rendered a decision and reported to the District Court that he sustained the objections to the application of John Harrah for a discharge in bankruptcy.

"This affiant * * * is advised that the United States District Court has never made any order either granting or denying the application for discharge of John Harrah. * * *

"That this affiant believes that under the Federal Bankruptcy Act all statutes of limitation, including the right of dismissal under section 583, C.C.P., has been stayed against the claim sued on in this action and that the five year period prescribed by section 583, C.C.P. has not yet expired. * * *"

We note that under the pertinent provisions of the Bankruptcy Act, subdivision a of section 29, Title 11, of the United States Code Annotated, plaintiff's action herein is of a type which could have been stayed until the question of the bankrupt's right to a discharge had been determined, but we also observe that it is not claimed that the action was in fact stayed for any period whatsoever. The automatic or mandatory stay "until an adjudication or the dismissal of the petition" is inconsequential since the adjudication here was approximately simultaneous with the filing of the petition. The action of the trial court, therefore, in putting the case off its trial calendar was purely discretionary and the case could have been reset and placed on trial at any time.

[1] Plaintiff now urges that such action of the trial court in placing the case off its trial calendar brings the matter within the purview of such cases as Christin v. Superior Court (1937), 9 Cal.2d 526, at page 530, 71 P.2d 205, at page 207, 112 A.L.R. 1153, wherein it is stated, that "despite the mandatory language of the statute, *implied exceptions* have been recognized where it was *not possible* to bring the cause to trial." The obvious weakness in plaintiff's position is that the record does not show that plaintiff *could not* have brought the action to trial within the five-year period. Upon the showing made on defendants' motion to dismiss, the trial court must have concluded that this was not a case where plaintiff had been precluded by means beyond its control from bringing the case to trial but rather that plaintiff had deliberately chosen not to make any effort to bring on the hearing as to either defendant pending some development as to the likelihood of defendant Harrah's receiving or being denied a discharge. Furthermore the fact that over two years was allowed to elapse after the rendition of the referee's report (August 11, 1939) sustaining objections to Harrah's application for a discharge, before the case was brought up for trial (September 18, 1941) is not at all consistent with a diligent effort on plaintiff's part to expedite the trial, and, finally, the fact that plaintiff apparently was able to have the case placed on the trial calendar for September 18, 1941, *without any showing whatsoever of any change in its status* from that which existed on May 6, 1937, when it went off calendar, suggests a further basis for conclusion by the trial court that plaintiff was not precluded by means beyond its control from bringing the case to trial at any time during a period of more than five years prior to September 18, 1941. There is no showing that plaintiff resisted defendants' motion to put the case off calendar or that it ever sought to have the trial reset for a date earlier than September 18, 1941. There is no occasion for us to devote space to an analysis of the cases cited by plaintiff in support of its first proposition; none of those cases is at all persuasive when applied to the above recited factual situation. The fact that the case was on the calendar for trial on May 5 or 6, 1937, and that plaintiff appeared on that day by its counsel with witnesses ready to proceed and that the trial was postponed on defendant Harrah's motion did not interrupt the operation of section 583. (Ravn v. Planz (1918), 37 Cal. App. 735, 736, 174 P. 690; Cruse v. Superior Court (1929), 102 Cal.App. 290, 294, 283 P. 73; Miller & Lux, Inc., v. Superior Court (1923), 192 Cal. 333, 341, 219 P. 1006; Holt v. Miller (1932) 214 Cal. 558, 561, 6 P.2d 937, 79 A.L.R. 844). The case of Mazitelli v. Crane (1917), 35 Cal.App. 264, 169 P. 721, in which a contrary rule had been declared, was expressly overruled by the decisions above cited.

[2] As its second proposition plaintiff invokes the doctrine of equitable estoppel to preclude defendant Harrah from seeking dismissal of the action the trial of which was delayed on his own motion. The argument is ingenious but to support it we should have to join plaintiff's able counsel in skipping over the lack of certain factual elements

essential to its foundation, and, further, we should have to judicially write into section 583 of the Code of Civil Procedure provisions which the legislature did not put there. The doctrine of equitable estoppel is recognized by statute in this state by the declaration in subdivision 3 of section 1962 of the Code of Civil Procedure, that "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

[3] It does not appear to us that a mere motion to place a case "off calendar on the ground that he [defendant] had filed a petition in bankruptcy * * * and that he *should* be given time within which to procure a discharge to enterpose as a defense" can be construed as constituting either a factual basis for operation of the equitable principles above quoted or as the equivalent of a *stipulation in writing* (required by section 583 of the Code of Civil Procedure) that the time might be extended.

[4] The statute has the very salutary purpose of expediting trials. Its language is clear and definite and the integrity of its meaning has generally been upheld by the courts in a plenitude of decisions. In the several legislative amendments to which it has been subjected the legislature has not seen fit to temper the rigor of the language or its forthright construction and support by the courts; the tendency, rather, has been to extend and make more certain its operation. With respect to the invoked doctrine of estoppel we observe that the Supreme Court in Miller & Lux, Inc., v. Superior Court (1923), supra, 192 Cal. 333, at page 339, 219 P. 1006, at page 1008, said "While there is language in several of the cases construing section 583 which seems to recognize the possibility of a waiver by estoppel, it is to be noted that without exception these cases hold that a written stipulation is required. * * * The statute provides that the time for trial may be extended by *written stipulation.* It does not provide that it may be extended by a written stipulation 'or its equivalent.'" Regardless of the propriety or impropriety of the alternative holding in the later case of Govea v. Superior Court (1938), 26 Cal.App.2d 27, 78 P.2d 433 (which perhaps could be supported solely on the ground that a stipulation entered in the minutes of the court is a stipulation in writing [see Cox v. Tyrone Power, etc., Inc. (1942), 49 Cal.App.2d 383, 393, 121 P.2d 829]), with respect to a stipulation stated orally in open court and entered in the minutes "that if such a stipulation * * * does not literally comply with the language of section 583, supra, it does estop the petitioner from thereafter making a motion to dismiss the cause for want of prosecution under said section; that a party to an action cannot be allowed in such manner to play fast and loose with the court," [26 Cal. App.2d 27, 78 P.2d 434] we have no such factual situation here and are not disposed to judicially add any new exceptions to the single one stated by the statute. We are in accord with the principle, which we find pertinent here, as it is stated in Christin v. Superior Court (1937), supra, 9 Cal.2d 526, 529, 71 P.2d 205, 207, 112 A.L.R. 1153, that "estoppel resulting from such conduct does not appear to be a proper ground for creating an exception to the terms of the statute." To the same effect see, also, Elmhurst Packers v. Superior Court (1941), 46 Cal. App.2d 648, 650, 116 P.2d 487.

[5] Plaintiff's last contention is that section 583 of the Code of Civil Procedure is a statute of limitations and that its operation was suspended, on filing of the petition in bankruptcy, by the provisions of subdivision "f" of section 29, Title 11, of the United States Code Annotated, hereinabove quoted. In support of its contention as to the character of section 583 plaintiff quotes from Andersen v. Superior court (1921), 187 Cal. 95, at page 101, 200 P. 963, at page 965, in which, apropos of the proposition that "where a cause of action arises in the lifetime of a person entitled to sue, his death does not interrupt the running of the statute of limitations in the absence of some statutory provision to the contrary," the court said, "No reason is suggested, and we can think of none, why this rule should not extend in like manner to this provision of section 583. It is in effect a statute of limitation upon the time for bringing a cause to trial." We are unable to agree with plaintiff in its view that the language of subdivision "f" of section 29, Title 11, of the United States Code Annotated, "The operation of any statute of limitations of the United States or of any State, affecting the debts of a bankrupt provable under this title, shall be suspended," etc., is applicable to the operation of section 583. A limitation upon the time within which an action pending in

a state court must be brought to trial therein, is not in our opinion a statute of limitation "affecting the debts of a bankrupt provable under" Title 11 of the United States Code Annotated. Congress in enacting section 11 of the Bankruptcy Act, sec. 29, Title 11, U.S.C.A., apparently had in mind the preservation of a distinction, to be operative on the filing of any petition in bankruptcy, between *provable debts* as such, which might, but had not yet, become the subject of state court actions, and *pending suits*. The provisions as to provable debts are set forth in subdivision "f." In subdivision "a," we find different provisions expressly applicable to pending actions: "A suit which is founded upon a claim from which a discharge would be a release, *and which is pending* against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined." Certainly if the United States District Court, in which the bankruptcy proceeding was pending, had exercised the power contemplated by subdivision "a" of section 29 by actually staying the trial of the action in the state court, then we should have had a case in which the entire duration of the stay would have been excluded in computing the five-year period fixed by section 583 of the Code of Civil Procedure for the state court trial. During such stay it would not have been possible for plaintiff to have brought the action to trial and the case would be clearly within the doctrine recognized by Christin v. Superior Court (1937), supra, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153, and all other relevant decisions. But there was no such stay and we perceive no tenable reason for applying subdivision f of section 29, Title 11, of the United States Code Annotated to the operation of the state law regulating trials in state courts. If subdivision "f" has any significance here it would seem to us to strengthen rather than weaken our conclusion. Since by it the operation of all statutes of limitation as to the initiation of actions on provable claims is interrupted, there appears no good reason why actions already pending should not be either tried promptly, or dismissed. It should be desirable in the administration of the bankrupt's estate to have pending actions in state courts, which may affect the federal administration, promptly determined, whether by final judgment or dismissal. If the plaintiff therein recovers judgment he certainly is not prejudiced by obtaining it promptly and if he fails to bring his action to trial and suffers a dismissal the detriment thereof is minimized through the fact that the statute limiting the time for filing a new action is being suspended by subdivision "f" above quoted.

Upon the record we find no basis for holding that the trial court erred or abused its discretion. The judgment and order appealed from are affirmed.

SHINN, J., and SHAW, J. pro tem., concur.

AMERICAN-HAWAIIAN S. S. CO. et al. v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Civ. 12068.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1942.

Hearing Granted Oct. 8, 1942.

1. **Statutes** 🔑184

In the interpretation of an act, it is first important to look to the purpose of the legislature.

2. **Master and servant** 🔑78

Under the statute making an individual ineligible for unemployment compensation insurance if he left his work because of a trade dispute or without good cause refused to accept suitable employment when offered, the clear meaning of the statute is that if the applicants for unemployment insurance have refused to accept suitable employment they are not "persons unemployed through no fault of their own", within the statute, the disqualification for benefits under the statute depending upon the fact of voluntary action and not the motives which led to it. Gen.Laws Supp.1939, Act 8780d, § 56.

See Words and Phrases, Permanent Edition, for all other definitions of "Persons Unemployed Through no Fault of Their Own".

3. Master and servant 🔑78

"Dock checkers", who perform intermittent clerical services in connection with the handling of cargoes, were not "persons unemployed through no fault of their own" within meaning of the Unemployment Insurance Act so as to be entitled to unemployment benefits, where the checkers went on strike against companies operating terminal facilities or transporting freight by water, though at beginning of strike they were either not actually at work or were working for an employer not subject to the strike. Gen.Laws Supp.1939, Act 8780d, § 1; Gen. Laws 1937, Act 8780d, § 13(b), and § 56(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Dock Checker".

4. Mandamus 🔑176

Where there was no substantial dispute in the facts in mandamus proceeding against the Employment Commission to compel the commission to vacate its order of payment of unemployment benefits, court could set aside an erroneous conclusion of law on the part of the commission, based on such facts. Gen.Laws 1937, and Supp.1939, 1941, Act 8780d.

5. Mandamus 🔑81

Mandamus is the proper remedy to relieve a party beneficially interested in the acts and decisions of administrative body, where the acts and decisions are shown to have been arbitrary, capricious, or in violation of law.

6. Mandamus 🔑3(8)

Employers who had been ordered to pay unemployment benefits to striking employees were not barred from maintaining a mandamus proceeding against the Employment Commission to compel it to vacate an order of payment of the benefits on the ground that they had failed to exhaust their remedies under the act where it was alleged that the commission had violated the act in ordering payment of benefits. Gen.Laws Supp. 1941, Act 8780d, § 41.1(d); Gen.Laws Supp. 1939, Act 8780d, § 45.10.

◆

Mandamus proceeding by the American-Hawaiian Steamship Company and others, comprising an association known as the Dock Checkers Employers' Association of San Francisco, against the California Employment Commission and others, to require the California Employment Commission to vacate its order of payment of unemployment benefits, and to refrain from charging the petitioners' accounts with such payments.

Peremptory writ issued.

Brobeck, Phleger & Harrison, of San Francisco, for petitioners.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., Maurice P. McCaffrey and Glenn V. Walls, both of Sacramento, and Gladstein, Grossman, Margolis & Sawyer, of San Francisco, for respondents.

NOURSE, Presiding Justice.

The group of petitioners, all engaged in the business of operating terminal facilities or transporting freight by water to and from ports on San Francisco bay, comprise an association known as the Dock Checkers Employers' Association of San Francisco, and as such were parties to a written contract covering terms and conditions of employment with the Ship Clerks' Association, Local 38-90, International Longshoremen's Association. This contract was in full force and operation on November 10, 1939, when the union called a strike against all members of the employers' association. The strike continued until January 3, 1940, and thereafter approximately one hundred and twenty-five of the employees who had been on strike applied for and were granted unemployment benefits by the respondent commission. The petitioners pursued all the statutory remedies before the commission for a proper adjustment of the controversy, but the commission by a vote of three members to two, ordered that these benefits be paid. Each of the petitioners has at all times been an employer under the terms of the Unemployment Insurance Act, Stats.1935, p. 1226; as amended, Deering's Gen.Laws, 1937 and Supps. 1939, 1941 Act No. 8780d, and as such employer has been required to pay to the respondent commission his employer contributions to the unemployment insurance fund administered by the commission. After pleading their beneficial interest in the administration of the fund the petitioners alleged that they have exhausted all their administrative remedies to no avail and that the respondent commission threatens to pay the benefits to the employees named, and to charge petitioners' accounts in the unemployment fund with such deductions. Alleging that all these payments are in violation of the plain terms of the Unemployment Act, and that they have no other remedy, the petitioners seek this writ of mandate to require the respondent commission to vacate its order of payment of such benefits, and to refrain from charging their accounts with such payments.

The respondent commission appeared generally with all other respondents by demurrer and answer, and thereafter, by stipulation of the parties, the individual employees affected by the controversy appeared by demurrer, answer, and other pleas which do not require consideration. The cause was fully argued and briefed and settles down to the simple question of law—whether the order and award of the commission was within the terms of the statute.

There is no substantial or real controversy as to the facts. Whatever denials were made in the answers were submitted without proof. By stipulation the entire record of the proceedings before the commission was received in evidence, with the reservation of the right to try before the court the question whether the trial of this proceeding was to be confined to such record or whether the parties should have the right to try the whole controversy de novo. This issue was not argued, however, and though the right to a trial de novo was sustained in Laisne v. California State Bd. of Optometry, 19 Cal.2d 831, 123 P.2d 457, the parties did not avail themselves of that privilege. However, the record of the proceedings before the commission does not controvert any of the material facts upon which the controversy rests and we may treat the proceedings now as though submitted on the demurrers to the petition.

A brief statement of these facts will suffice to lay the background for the question of law upon which the whole controversy rests. The petitioners employ a number of men known as dock checkers to perform clerical services in connection with the handling of cargoes. The checkers involved here, known as "casual daily checkers" work on an hourly basis for various employers as their services are required. They are all dispatched to work through the joint hiring halls maintained by the union and the employers' association. An employer can obtain checkers only through these halls, and when the men finish a job they report to the hall for the next assignment. Some of the checkers have a preference, but otherwise they are dispatched in turn in an effort to equalize earnings. The volume of work during the periods herein mentioned was normally sufficient to furnish full employment to all checkers available, though there was not sufficient work to require the services of each checker on each day, and on most days there were some checkers who did not perform a full day's work because they had completed the work to which they had been last dispatched and were awaiting a new assignment. On November 10, 1939, at 6 p. m., the checkers involved went on strike against petitioners, and remained on strike until January 3, 1940. When the strike began they were either not actually at work or were working for an employer not subject to the strike. They applied for unemployment insurance benefits for the period from November 10, 1939, to January 3, 1940, and respondent commission affirmed an award of a referee totaling in excess of $13,000.

Petitioners argue that the claimants left their work because of a trade dispute within the meaning of the Unemployment Insurance Act, section 56(a), which provides that an individual is not eligible for unemployment benefits "If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed." They contend that any unemployment of the claimants during the period in question was due to their refusal to work for petitioners after their union had called a strike; and that to hold that a man employed on an hourly or daily basis who is not actually on the job at the moment a strike begins is not covered by the statute would defeat its purpose, that if he has actual employment, under a rotational or some other system of employment, and goes on strike, he is disqualified.

The respondents seek to support the award upon the ground that, because of the casual nature of the employment, there was no legal relation of employer and employee existing at the time the strike became effective at the close of the working day of November 10th, and that a checker was not an employee who "left his work because of a trade dispute" within the terms of section 56(a) of the act.

[1] In the interpretation of an act of this character it is first important to look

to the purpose and intention of the Legislature in enacting the legislation. Here the purpose is expressly declared in section 1 of the act, as amended in 1939, Gen.Laws Supp.1939 Act 8780d, to be the "compulsory setting aside of funds to be used for a system of unemployment insurance providing benefits for persons *unemployed through no fault of their own,* and to reduce *involuntary unemployment* and the suffering caused thereby to a minimum." (Emphasis ours.) This section was enacted as a "Declaration of state policy" opening with the clause reading, "As a guide to the interpretation and application of this act the public policy of this State is declared as follows:"

Section 56 of the act reads: "An individual is not eligible for benefits for unemployment, and no such benefit shall be payable to him under any of the following conditions:

"(a) If he left his work because of a trade dispute and for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed.

"(b) If without good cause he has refused to accept suitable employment when offered to him, or failed to apply for suitable employment when notified by the district public employment office."

[2] The clear meaning of section 56 is that if the applicants have refused to accept suitable employment they are not "persons unemployed through no fault of their own" just as one who has left his work because of a trade dispute is beyond the contemplation of the act. The clear meaning of the first section of the act as applied to conditions arising under section 56(a) is stated in Bodinson Mfg. Co. v. California E. Com., 17 Cal.2d 321, at page 328, 109 P.2d 935, at page 940, where the Supreme Court said: "In brief, disqualification under the act depends upon the fact of voluntary action, and not the motives which led to it. The legislature did not seek to interfere with union principles or practices. The act merely sets up certain conditions as a prerequisite to the right to receive compensation, and declares that in certain situations the worker shall be ineligible to receive compensation. Fairly interpreted, it was intended to disqualify those workers who voluntarily leave their work because of a trade dispute. Co-respondents in this proceeding in fact 'left their work because of a trade dispute' and are consequently ineligible to receive benefit payments. It follows that the Commission's decision was erroneous as a matter of law and should be annulled."

[3] Section 13(b) of the act provides that employment is not "suitable" if the position offered is "vacant due directly to a strike, lockout, or other labor dispute." But this clause is limited by the preceding clause to one "refusing *new* work" under these conditions. Here the undisputed evidence is that the claimants were not offered "new" work after the strike, but that they refused to accept assignments to the same "work" or jobs, in which they had been employed for many years. The whole story is that they voluntarily refused to cross the picket lines.

Upon the conclusion of the hearings before the commission three members gave a decision in favor of the employees, and two members dissented. The majority based their ruling upon the expressed view that "There was no legal relationship of employer and employee existing between the claimant and any employer at the time of the commencement of the trade disputes. * * *" The two dissenting members—Henry F. Grady and Ansley K. Salz—filed a minority opinion in which they called for a fair and impartial adherence to the statute. They pointed out that the basis of the trade dispute was the failure to reach a new contract, as a result of which the checkers' union called a strike and picketed the docks; and that the failure of the employees to secure employment during the period of the strike was of their own choosing. The peculiar nature of the employer-employee relationship in this case, and the speciousness of the grounds upon which the majority based its findings is covered by the portion of the minority opinion from which we quote: "It is pertinent to point out that the employer-employee relationship in this case is more complicated than in ordinary industries, due inherently to the intermittent nature of the work to be performed, and due to the contractual regulation for rotation and equalization of work assignments from many shipping concerns among a limited group of employees. The true situation herein is clear enough for applying the plain intent of the Legislature, and the guide to interpretation of the act set up in section 1 thereof.

"If the decision of the majority in this case stands, then it follows that if the union herein were to declare a strike at a time when practically all job assignments were completed, it could be assured of benefits being paid to all members of the union not on actual job assignments at the moment, thus assuring it of strike benefits to a large proportion of the registered union checkers. This would circumvent the provisions of 56(a) and be contrary to the plain intent of the act, and an injustice to all other individuals having an interest in the California State Unemployment Compensation Trust Fund who would be unable to obtain such benefits.

"A new technique in strikes on the San Francisco waterfront or other harbors where similar working conditions prevail would naturally follow the majority decision; thus,

"1. The waterfront unions are principally industrial unions.

"2. The Supreme Court has ruled that failure to cross a picket line because of union principles is a disqualifying act under Section 56(a).

"3. If one local union in an industrial union establishes a picket line, no other local will cross it; thus, they will be disqualified.

"4. Therefore, if instead of a local union striking, the industrial union comprising all the locals strikes as a body at a moment when longshore work is at a minimum, the disqualification set up in Section 56(a) will apply only to the few employees who happen to be engaged on job assignments. In this manner, large sums of money could be drawn from the California State Unemployment Compensation Insurance Fund during a trade dispute by a group of individuals who, in furtherance of a trade dispute, had voted not to perform their usual work, but who could not under the Act be said to have left their work, because the words 'left their work' were so narrowly construed as to mean only actually leaving job assignments on which they happened to be engaged at the moment.

"Such a narrow interpretation, which follows the decision of the majority in this case, would be ruinous to the Fund and contrary to the basic intent and principle of the Act as set forth by the Legislature of the State of California."

As to respondents' argument that the petitioners are not entitled to relief in these proceedings and that the court is without power to review the proceedings before the commission little need be said. The same point was raised in the Bodinson case, supra, 17 Cal.2d page 330, 109 P.2d 935, page 941, and decided adversely to respondents. There the court said: "Indeed, it seems to us that elemental principles of justice require that parties to the administrative proceeding be permitted to retain their status as such throughout the final judicial review by a court of law, for the fundamental issues in litigation remain essentially the same. * * * Furthermore, it seems apparent that the employer whose reserve account is affected is the only person having sufficient incentive to challenge a decision awarding benefits. Action by this employer provides the only procedural guarantee that the Commission can be held by legal process to comply with the requirements of the statute under which it operates." And in Laisne v. California State Board of Optometry, 19 Cal.2d 831, 844, 123 P.2d 457, 465, where the same question was raised, the court said: "In regard to the numerous cases containing language to the effect that administrative agencies may make findings of fact and the reasons of expediency given therefor, it must again be pointed out that it is *not* the fact-finding power alone that is involved in the present situation. It is the facts found plus the order based thereon depriving a person of a property right which is the full exercise of the judicial power." But a clearer statement of the principle here involved is found in the dissenting opinion in the Laisne case from which we quote, page 868 of 19 Cal.2d, page 477 of 123 P.2d: "A review upon the issues of law would, of course, include such questions as whether the agency has regularly pursued the authority vested in it, whether it has acted arbitrarily and whether there is substantial evidence to support its determinations of fact. Our decisions have recognized that administrative rulings on questions of law cannot be accorded finality. Such questions may be determined conclusively only by a court exercising constitutional judicial power."

[4, 5] Here the real issue is whether, when there is no substantial dispute in the facts, a court may by proceedings in mandamus, set aside an erroneous conclusion

of law based upon such facts. The rule has always been accepted in this state that mandamus is the proper remedy to relieve the party beneficially interested in the acts and decisions of administrative bodies which are shown to have been arbitrary, capricious, or in violation of law. This rule is adhered to in the Bodinson case, supra, and by both the majority and minority in the Laisne case, supra.

[6] Respondents contend that the writ should not issue because petitioners have failed to exhaust the administrative remedies provided in the act and cite Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715, as authority. The petitioners do not quarrel with the rule of the case cited but contend that it is not applicable here because they have exhausted all these remedies. The respondents rest their argument on section 41.1 of the act which was added by Stats. 1941, p. 2535; Deering's Gen.Laws, 1941 Supp., Act 8780d, and which provides that the commission shall furnish each employer with itemized statements showing the charges to his account and his contribution rate for the succeeding rating period, and gives the employer sixty days to protest any of these items. Subdivision (d) provides: "In the event that the determination in any *protest* proceeding is rendered against the employer" (Italics ours.) he may bring an action to recover the amount claimed as an overpayment. Section 45.10, which was added in 1939, and upon which respondents also rely, is similar to section 41.1 in that the right of action therein referred to is expressly limited to the adjustment of contributions paid under protest. Neither section has any relation to a proceeding such as we have here to determine the right of an employee to be paid benefits under the terms of the act and thus deplete the trust fund to which the petitioners have made their statutory contributions. The right of the employer-contributor to test the validity of payment of benefits by mandamus is expressly confirmed in the Bodinson case, supra, where at page 325 of 17 Cal.2d, page 938 of 109 P.2d the supreme court said: "The statute does not provide its own procedure for testing whether a particular decision of the Commission awarding benefits is consistent with the authority delegated to the Commission under the act. The only express provision for court review is made by section 45.10, * * * which permits an employer to contest the legality of the contribution sought to be enforced against him by paying it under protest and then suing to recover the amount so paid. It does not follow from this, however, that the courts are without power to review a decision awarding unemployment benefits when it is alleged that the Commission has violated the plain provisions of the statute under which it functions."

For the reasons given the order or award of the respondent commission should be vacated and annulled and the accounts of the petitioners should be relieved of charges for the benefits included in that award.

Let a peremptory writ issue as prayed.

STURTEVANT and SPENCE, JJ., concurred.

W. R. GRACE & CO. et al. v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Civ. 12110.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1942.

Hearing Granted Oct. 8, 1942.

1. Master and servant 🔑78

A controversy over working conditions under the terms of an employer-employee contract is a "trade dispute" within meaning of that provision of the Unemployment Insurance Act that an individual is not eligible for benefits for unemployment if he left his work because of a trade dispute. Gen.Laws Supp.1939, Act 8780d, § 56(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Trade Dispute".

2. Master and servant 🔑78

Where longshoremen refused to pass picket lines of dock checkers' union, and refused to work in the absence of checkers, except where it had not been customary to use checkers, the longshoremen were engaged in a "trade dispute" within meaning of provision of the Unemployment Insurance Act that an individual is not eligible for benefits for unemployment if he left his work because of a trade dispute. Gen.Laws Supp.1939, Act 8780d, § 56(a).

3. Mandamus ⚷143(2)

Where Employment Commission's decision granting unemployment benefits was dated April 3, 1940, but was not released until May, 1941, and request for rehearing was denied July 19, 1941, mandamus proceedings against the commission in February, 1942, were not barred by "laches".

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

4. Action ⚷63

It is not the lapse of time so much as it is the consequences of the delay which goes to make up the defense of "laches", and unless prejudice results from the delay, the defense is not established, but if prejudice has resulted, the one whose prompt action would have forestalled it can avoid the responsibility only by showing that he sought his remedy promptly.

5. Mandamus ⚷3(8)

Employers who had been ordered by the Employment Commission to make payments of unemployment benefits to striking employees were not barred from seeking mandamus to compel the commission to vacate its order for payment of benefits on the ground that they had not exhausted their statutory remedies, where the commission had resisted the efforts of the employers to pursue their statutory remedies on technical grounds, and the employers had no other remedy to enforce a compliance by the commission with the express terms of the Act. Gen.Laws Supp.1939, Act 8780d, § 45.10.

◆

Mandamus proceeding by W. R. Grace & Company and others, petitioners, against the California Employment Commission and others, respondents, to compel the Employment Commission to vacate its decision awarding unemployment benefits and to correct its records by removing therefrom all charges made against petitioners' accounts by reason of the payment of such benefits.

Peremptory writ issued.

Brobeck, Phleger & Harrison, of San Francisco, for petitioners.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., Maurice P. McCaffrey and Glenn V. Walls, both of Sacramento, and Gladstein, Grossman, Margolis & Sawyer, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Petitioners seek to review by proceedings in mandamus an order, or award, of the respondent commission directing payments of benefits for unemployment.

Petitioners, employer-contributors under the Unemployment Insurance Act (Stats. 1935, p. 1226, Deering's Gen.Laws Supp. 1939, Act No. 8780d), are engaged in unloading and discharging vessels at ports on the San Francisco Bay. They employ longshoremen, members of the International Longshoremen's and Warehousemen's Union, to perform this work and they belong to the Waterfront Employers' Association of San Francisco which represents the employers in their labor relations with the longshoremen. Petitioners are also members of the Dock Checkers Employers' Association of San Francisco which represents the employers in their labor relations with the checkers, who are employed to keep a clerical record of the cargo. On June 14, 1939, the checkers' local union called a strike against the American-Hawaiian Steamship Company, one of the petitioners herein. On June 17, 1939, the Dock Checkers Employers' Association severed relations with the checkers' local union and its members refused to employ any checkers until termination of the strike against the American-Hawaiian Steamship Company. The strike was terminated on June 27, 1939. During the ten-day period between June 17 and June 27, 1939, the longshoremen refused to pass the picket lines of the checkers' union, and refused to work upon any job in the absence of checkers, except where it had not been customary to use checkers. Subsequent to the strike the longshoremen claimed unemployment benefits for the period during which they had not worked; they contended that an agreement between the longshoremen's union and the Waterfront Employers' Association required the use of checkers and that they had stopped work to enforce this right. Petitioners, on the other hand, claimed that the longshoremen stopped work to aid the checkers in their dispute with the employers. Respondent, California Employment Commission, found in accord with the contention of the longshoremen and concluded that section 56(a) of the Unemployment Insurance Act did not apply; the commission, one member dissenting, rendered a decision awarding the longshoremen unemployment benefits. Under this decision respondent commission has paid benefits to the claimants and threatens to continue to make further payments, all of which, the petitioners allege, has been charged or will be charged to the account maintained by the Waterfront Employers' Association and to the accounts maintained by the individual petitioners as required by the Unemployment Insurance Act; and that this will damage the petitioners by decreasing their reserve and thereby increasing the contribution rate required to be paid by them. Petitioners therefore apply for a writ of mandate compelling respondent commission to vacate its decision and to correct its records by removing therefrom all charges made against petitioners' accounts by reason of the payment of such benefits.

Petitioners contend that if the respondent commission had found that the longshoremen had left their work to aid the checkers it would have been forced to conclude that the longshoremen made the dispute their own and hence were disqualified from receiving unemployment benefits under section 56(a) of the act, citing Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 109 P.2d 935. However, accepting the commission's finding that the longshoremen left work to enforce their own agreement the petitioners contend that the unemployment was the result of a trade dispute within the meaning of section 56(a), and the longshoremen are thereby disqualified from receiving benefits.

Petitioners further argue that mandate is the proper remedy to compel respondent to rectify its decision and that petitioners are the proper parties to obtain that remedy, citing Bodinson Mfg. Co. v. California E. Comm., supra.

The longshoremen, as the real parties in interest, have filed points and authorities in opposition to the issuance of the alternative writ of mandate, and have raised special grounds upon which they contend that the alternative writ should not be granted because: (1) the petitioners have failed to establish the necessity for a speedy determination of the issue and hence this court should not accept jurisdiction prior to an application having been made to the superior court; (2) petitioners have failed to exhaust their administrative remedies and have a plain, speedy and adequate remedy at law which they have pursued by actions filed in the superior court under section 45.10 of the act; and (3) the proceeding is barred by the statute of limitations. Some of these arguments are repeated in briefs filed after the alternative writ was issued. All the respondents seek to sustain the action of the commission not so much upon the grounds upon which the commission based its action as upon the grounds that the longshoremen were casual employees working from day to day, and that they did not *leave* their work when they refused employment.

[1, 2] The ground last mentioned is fully covered in American-Hawaiian, etc., Co. v. California E. Comm., Cal.App., 128 P.2d 627, this day decided, and it would serve no purpose to repeat what was said in that case. The ground upon which the commission based its action is equally untenable. The majority of the commission found that the employees did not leave their work because of a trade dispute, but because the existing contract between the employers and the employees called for a continuation of the "present practices" and conditions of employment, that these "present practices" required the presence of checkers in the places where longshoremen were employed, and that the respondents had therefore merely refused to work because the employers had breached these terms of the contract. It is too manifest to require elaboration that a controversy over working conditions under the terms of an employer-employee contract is a "trade dispute" and the ground upon which the commission based its action cannot be sustained. It may be added that the parties themselves deemed this to be a trade dispute, that it was submitted to arbitration under the terms of the contract, and that the arbitrator ruled adversely to the longshoremen's contention.

[3, 4] The special pleas of the individual respondents relating to procedure are not sound. The question whether this court should assume jurisdiction to hear and determine this proceeding instead of relegating the petitioners to the superior court was determined upon the issuance

of the alternative writ. The question whether the petitioners have exhausted their administrative remedies is answered in the American-Hawaiian case and does not require further discussion. The plea of the statute of limitations rests upon the provisions of section 45.10 authorizing a suit to recover contributions paid under protest. No evidence was offered in support of this special plea, but the parties have stipulated that actions pending in the superior court involve contributions assessed to the petitioners in part because of payments inadvertently made prior to the commission's decision. We find nothing in the record of the proceedings before the commission indicating that any of the contributions here involved were paid under protest, or that they are the subject of other proceedings pending. The proceedings here were instituted to seek a legal determination of the single question whether the employees were covered by section 56 of the act. It is alleged and not denied that a large number of the employees have filed claims for benefits under the act and that their claims have been allowed but that some have not been paid. The decision of the commission was dated April 3, 1940, but not released until May, 1941. A request for a rehearing was denied July 19, 1941, and these proceedings were commenced in February, 1942. It is conceded that there is no statute of limitations which directly applies here. It is reasoned that the court should apply its own limitation by analogy to the time fixed for suits to recover overpayments. This is in effect an argument that petitioners are barred by laches. But the essential elements of laches are not present. "It is not the lapse of time so much as it is the consequences of the delay which goes to make up the defense of laches. Unless prejudice results from the delay the defense is not established, but if prejudice has resulted, the one whose prompt action would have forestalled it can avoid the responsibility only by showing that he sought his remedy promptly." Hayman v. City of Los Angeles, 17 Cal.App.2d 674, 680, 62 P.2d 1047, 1050.

[5] The petitioners have shown that they have exhausted all their statutory remedies in an effort to obtain from the commission a fair and impartial ruling in accordance with the express terms of the statute; that the respondents have resisted those efforts upon grounds which are technical and unreasonable; and that petitioners have no other remedy to enforce a compliance by the commission with the express terms of the act.

Let a peremptory writ issue as prayed.

STURTEVANT and SPENCE, JJ., concurred.

MATSON TERMINALS, Inc., et al. v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Civ. 12227.

District Court of Appeal, First District, Division 2, California.

Aug. 13, 1942.

Hearing Granted Oct. 8, 1942.

1. Mandamus 🔑187(9)

Where questions involved in mandamus proceeding to require the Employment Commission to vacate its order awarding unemployment benefits were questions of law relating to the interpretation of the Unemployment Insurance Act, the District Court of Appeal might treat the matter as though submitted on demurrers and deny all pleas and motions which did not go to the merits. Gen.Laws 1937 and Supp.1939, Act 8780d.

2. Master and servant 🔑78

Where longshoremen voluntarily made labor dispute of dock checkers the longshoremen's labor controversy, and longshoremen either voluntarily left their work because of that dispute or they refused suitable employment because of it, and there was no evidence that any of them was forcibly restrained from pursuing his customary calling, longshoremen were not entitled to unemployment benefits under the Unemployment Insurance Act. Gen.Laws Supp.1939, Act 8780d, § 56.

3. Master and servant 🔑78

Under the Unemployment Insurance Act, employees who voluntarily refuse to accept employment in work of their usual occupation are not entitled to unemployment benefits under the Act, but benefits should not be denied to those who refuse to accept employment in a new position which has become vacant because of a strike or labor dispute. Gen.Laws 1937, Act 8780d, § 13, and subd. (b); Gen.Laws Supp.1939, Act 8780d, § 56(b).

4. Mandamus ⚷187(9)

If restraining order which was issued with order to show cause on the alternative writ of mandate was improper, the question became "moot" on issuance of peremptory writ, since all preliminary orders fall with the peremptory writ.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot".

◆

Mandamus proceeding by Matson Terminals, Inc., and others, petitioners, against the California Employment Commission and others, to compel respondents to deny payments of unemployment benefits to certain claimants and to vacate the order of the California Employment Commission awarding such benefits.

Peremptory writ issued.

Brobeck, Phleger & Harrison, of San Francisco, for petitioners.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., Maurice P. McCaffrey, of San Francisco, Leonard M. Friedman, of Sacramento, and Gladstein, Grossman, Margolis & Sawyer, of San Francisco, for respondents.

NOURSE, Presiding Justice.

[1] The petitioners, as employer-contributors under the Unemployment Insurance Act (Stats.1935, p. 1226, Deering's Gen.Laws, 1937 and Supp.1939, Act No. 8780d) have applied for a writ of mandate to compel respondents to deny payments of unemployment benefits to certain claimants and to vacate the order of the respondent commission awarding such benefits. An alternative writ and order to show cause was issued. The respondent commission filed a demurrer and answer by way of return. The employees affected by the decision, as the real parties in interest, filed a demurrer and answer together with a number of special pleas and motions. The order to show cause was submitted upon the demurrers and the record of the proceedings before the commission. No other evidence was offered and nothing in that record creates a conflict which is material to a decision of the controversy. The questions here involved are purely questions of law relating to the interpretation of the act. We may therefore treat the matter as though submitted upon the demurrers and deny all the pleas and motions of the respondents which do not go to the merits of the controversy.

All the petitioners are members of Waterfront Employers' Association of San Francisco, a corporation organized primarily for the purpose of representing petitioners in their labor relations with employees engaged generally in loading and discharging vessels at ports on San Francisco Bay. Many of the petitioners are also members of the Dock Checkers Employers' Association of San Francisco, an organization maintained primarily to represent the employers in their labor relations with dock checkers. These employees are all members of the same labor union—International Longshoremen's & Warehousemen's Union, District No. 1. The longshoremen belong to one local of this union, the dock checkers belong to another.

On November 10, 1939, the dock checkers' local branch of this union called a strike commencing at six p. m. of that day, that being the time when both checkers and longshoremen regularly left their employment for the day. Picket lines were maintained at all the docks affected by the strike; throughout the period of the strike both longshoremen and checkers refused to cross these picket lines; the strike continued from November 10, 1939, to January 3, 1940, during which time all these employees refused to work upon the docks, except to handle United States mail and some perishable goods under the permission of the officials of the union. The strike was the same as that involved in American-Hawaiian Steamship Co. v. California Employment Comm., Cal.App., 128 P.2d 627, hereafter referred to.

The longshoremen who were unemployed during the period of the strike filed claims with the respondent commission and, after hearings before the referee and before the commission, claims were allowed to approximately 4,500 longshoremen awarding benefits amounting to over $400,000.

The issues involved in this proceeding are so much like those involved in American-Hawaiian Steamship Co. v. California Employment Commission, supra, and W. R. Grace & Company v. California Employment Commission, Cal.App., 128 P.2d 632. this day decided, that there is no need for an elaboration of the views therein expressed. The commission based its ruling upon the ground that the claimants did not leave their work because of a "labor dispute," but because they believed their employers had breached their collective bargaining contracts. The respondents do not now rely upon this clear evasion of the act, but rest their case mainly upon the ground that the employees did not *leave* their work because at 6 p. m. there was no work to do—that to refuse to return the following morning was not a leaving of work since there was then no employer-employee relation. It is also argued that the claimants did not refuse "suitable employment" within the meaning of section 56(b) of the act. These arguments were answered in the American-Hawaiian case (supra) and do not require extended discussion here.

In its decision the respondent commission divided the claimants into five groups —those who had not completed their work at 6 p. m., November 10th, and were ordered to report the following morning; (these men, numbering above five hundred, were denied compensation benefits); those who had not been working on the day the strike was called and who had not thereafter been dispatched; those who had been working on a job that was not struck, but who had refused to work on another job; 36 carmen who were unemployed during the period of the strike because, pursuant to a ruling of the longshoremen's union the work which was usually performed by the carmen was performed by registered longshoremen during the period; and claimants who had finished their previous work assignments and were awaiting dispatchment from the hiring hall at 6 p. m., November 10th.

We will not assume the burden of considering separately the status of each of the large number of claimants involved. The principles of law involved are fully considered in the two cases this day filed. Referring to the claimants by the groupings made by the commission—those in the first group left their work because of the labor dispute and are not entitled to benefits; those in the second group "refused to accept suitable employment" within the provisions of section 56(b) of the act and are not entitled to benefits during the period in which they were voluntarily unemployed; those in the third group are covered by the same ruling as that applied to the second; those in the fourth group were unemployed by reason of a ruling of the local longshoremen's union and hence are entitled to the benefits since their unemployment was not of their own choosing; those in the fifth group were found to have been unemployed either because they refused to accept assignments and cross the picket lines or because the local dispatcher, at the instigation of the union which he represented, declined to make any further assignments to "unfair" jobs, that is, places on the waterfront which were covered by the checkers' strike.

[2] In all these cases, except the carmen, as to whom the parties stipulated at the time of the oral argument that no contention is made, the claimants voluntarily made the labor dispute of the checkers their labor controversy and no specious reasoning can alter the conclusion that they either left their work because of that dispute or that they refused suitable employment because of it. In either case the provisions of section 56 of the act apply.

[3] All the parties argue the case upon section 56(a) of the act and overlook the equally important provisions of section 56(b). It is therein declared that an employee is not entitled to benefits "If without good cause he has refused to accept suitable employment when offered to him * * *." Now "suitable employment" is defined in section 13 of the act as "work in the individual's *usual* occupation or for which he is reasonably fitted * * *." (Italics ours.) Subdivision (b) of this section declares that an employee shall not be denied benefits when otherwise eligible "for refusing *new* work * * *. If the position offered is vacant due directly to a strike, lockout, or other labor dispute." (Italics ours.) We have emphasized the words "usual" and "new" and in reading the two sections together we are compelled to conclude that the Legislature intended to deny benefits to those employees who voluntarily refused to accept employment in work of their "usual occupation" where such work is available, but that benefits should not be denied to those who refuse to accept employment in a "new" job which has become vacant because of a strike or labor dispute. The clear purpose of these provisions is to excuse those employees who refuse new employment as "strike breakers" where their union principles, or fear of violence, com-

pels them to refuse to assume a "new" position which is beyond the scope of their "usual occupation."

This situation does not confront us here. No one of the claimants was asked to accept a "new" job, and no one was offered employment outside of his "usual occupation." All voluntarily refused to accept employment in the jobs which they had occupied for many years before the strike was called. There was no shortage of employment. To the contrary, the commission found that when the strike was called on November 10th the hiring hall dispatcher had "an abnormally large number of orders and a consequent shortage of available men." It is undisputed that the refusal of these men to accept assignments, and the failure of the dispatcher to make further assignments, were both due to the deliberate action of members of the longshoremen's union who announced that they would not work on "struck" jobs while the checkers' strike was in progress. All the longshoremen who are claimants in this proceeding voluntarily refused to perform their customary work because their own union branded their places of employment "unfair," and it must be inferred that, as members of the union, they joined in this inhibition. There is no evidence that any of them were forceably restrained from pursuing their customary calling. Their situation is the same as that referred to in Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 327, 328, 109 P.2d 935, 940, where the court said: "They were unemployed solely because, in accordance with their union principles, they did not choose to work in a plant where certain of their fellow employees were on strike. Their own consciences and faith in their union principles dictated their action. This choice is one which members of organized labor are frequently called upon to make, and in the eyes of the law this kind of choice has never been deemed involuntary."

[4] Respondents argue that, because of the provisions of section 67 of the act, that "such benefits shall be paid regardless of any appeal which may thereafter be taken," no proceeding to review the award of the commission should be permitted to stay the payment of these benefits. The argument is that after a "double affirmance" of the award the payments must be made and that the commission is without power to withhold. The question is not before us in this proceeding. A restraining order was issued with the order to show cause on the alternative writ of mandate. If this were improper the question is now moot, because all preliminary orders fall with the peremptory writ. The restraining order was the customary order made in these cases to continue the status quo of the controversy until the matter is determined. Of course, it is inconceivable that the commission would pay from the trust fund any benefits which are known to be prohibited by the act, but, if valid payments were restrained, then the rights of the parties under section 67 of the act would become a subject of controversy. Until a final decision is reached it is to the interest of all parties that nothing be done which would entail a multiplicity of litigation.

Other questions raised by these respondents do not require consideration.

As to all respondents other than the carmen the allowance of their claims was improper and in violation of the act. These claims should be denied and the award should be vacated and annulled.

Let a peremptory writ issue as prayed.

STURTEVANT and SPENCE, JJ., concurred.

20 Cal.2d 751

UNIVERSAL SALES CORPORATION, Ltd., v. CALIFORNIA PRESS MFG. CO. et al.

S. F. 15988.

Supreme Court of California.

Aug. 27, 1942.

Rehearing Denied Sept. 24, 1942.

1. Contracts 🔑147(1)

The fundamental canon of construction applicable to contracts generally is the ascertainment of the intention of the parties. Civ.Code, § 1636.

2. Contracts 🔑147(3)

The language of contract, if clear and not conducive to an absurd result, governs its interpretation, but a portion only of written instrument, although clear, may not be selected as furnishing conclusive evidence of intention of the parties. Civ.Code, §§ 1636, 1638, 1641.

3. Evidence 🔑450(8)

Language of written contract for sale of feed pellet press providing for return of machine if unsatisfactory and limiting seller's liability to accepting return and refunding payments made and providing that in consideration of purchase and demonstration and advertising, buyer should receive 20 per cent. of gross proceeds of future sales and an interest in any patents or improvements thereon, when construed with provision that agreement should remain in effect for 17 years and inure to benefit of successors and assignees of the parties, created an "ambiguity" which must be resolved in accordance with recognized standards of interpretation. Civ.Code, §§ 1636–1638, 1641.

See Words and Phrases, Permanent Edition, for all other definitions of "Ambiguity".

4. Contracts 🔑169

Trial court, as an aid in discovering the intention of the parties to contract, may look to circumstances surrounding making of agreement including subject matter and object matter of writing, preliminary negotiations, and then place itself in the same situation in which the parties found themselves at the time of contracting. Civ.Code, § 1637; Code Civ.Proc. § 1860.

5. Contracts 🔑170(1)

Where a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court.

6. Contracts 🔑147(2)

In construing a contract, it is the duty of a court to give effect to the intention of the parties where such intention is not wholly at variance with the correct legal interpretation of the terms of the contract. Civ. Code, § 1641.

7. Contracts 🔑170(1)

A practical construction placed by the parties to written contract upon instrument is the best evidence of their intention.

8. Joint adventures 🔑1

Written contract for sale of feed pellet press when construed in the light of precontractual negotiations, whereby buyer interested seller in producing a more efficient machine for making pellets to be tested by buyer, and the cooperation of parties in the efforts to perfect machine until seller perfected and placed on the market a different type of machine warranted finding that parties intended to establish a contractual relationship akin to "joint adventure". Civ.Code, §§ 1636–1638, 1641; Code Civ.Proc. § 1860.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

9. Joint adventures 🔑1

In a technical "joint adventure" there is usually a sharing of profits and losses in the prosecution of a common enterprise but the mode of participating in fruits of the undertaking may be left to the agreement of the parties.

10. Joint adventures 🔑1

Whether a particular contract creates between parties thereto the strict relation of joint adventurers or some other relation involving cooperative effort depends upon actual intention of the parties which is determined in accordance with ordinary rules governing interpretation and construction of contracts and such contract need not be expressed but may be implied from the conduct of the parties.

11. Trial 🔑375

In action on written contract for sale of feed pellet machine, in determining whether a machine subsequently devised by seller for the same purpose was based upon the machine made for buyer so as to be treated as an improvement thereon so that buyer would be entitled to percentage of proceeds of sales thereof, knowledge gained by trial court's inspection of the features of the two machines was "evidence" and properly considered in determining the issues.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

12. Appeal and error ⚷994(3)

The relative weight to be given opinion testimony and factual evidence is for the trial court.

13. Joint adventures ⚷2

Where written contract, whereby feed pellet manufacturer and machine manufacturer undertook to develop a more efficient pellet press and machine manufacturer sold to pellet manufacturer a new type press recognized as imperfect, provided that on all future sales of presses based upon the press sold buyer should receive 20 per cent. of gross proceeds and should have an interest in any patent or improvements thereon, technical rules governing patent infringements holding that improvements include only improvements to the particular machine secured by the patent were not applicable in determining intention of the parties as to meaning of phrases "based upon" and "improvements thereon".

14. Joint adventures ⚷2

Where written contract whereby feed pellet manufacturer and machine manufacturer undertook to develop a more efficient pellet press and machine manufacturer sold to feed manufacturer a press utilizing horizontal worm in casing to force mash through die-plate, provided that buyer should receive percentage of gross proceeds of all further sales of presses based upon the press sold and an interest in any patent and "improvements thereon", a new type press subsequently developed and marketed by seller utilizing vertical roller instead of a worm was properly treated as an improvement "based upon" original model sold so as to entitle buyer to royalty interest therein under contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Based Upon" and "Improvements Thereon".

15. Joint adventures ⚷2

Under written contract providing that pellet press manufacturer in consideration of purchase of press and the demonstration and advertising thereof by pellet feed manufacturer would give the latter a percentage of gross proceeds of further sales of presses and that buyer was not required to pay for press unless it operated properly, buyer's obligation to purchase was conditional and its rejection of press and failure to pay price therefor did not constitute "failure of consideration" barring participation under royalty agreement in proceeds of sales of improved press.

See Words and Phrases, Permanent Edition, for all other definitions of "Failure of Consideration".

16. Sales ⚷197

The words "purchase" and "sale" in a contract do not necessarily connote an executed or consummated purchase or sale but are frequently used in the sense of an agreement to buy or sell, the interpretation of the words in any particular case being controlled by the context of the writing necessitating an examination of the entire instrument.

See Words and Phrases, Permanent Edition, for all other definitions of "Purchase" and "Sale".

17. Appeal and error ⚷1008(3)

Trial court's finding that parties in using the word "purchase" in contract for royalty payments meant an agreement to purchase would not be disturbed by Supreme Court where such finding was consistent with the surrounding circumstances and other provisions of the contract evidencing intention of the parties.

18. Contracts ⚷10(1)

Where pellet press manufacturer agreed to give feed pellet manufacturer a percentage of gross proceeds of further sales of presses in consideration of purchase of pellet press and the advantages to be derived from demonstration and advertising by buyer and buyer did its best to promote sales of the press, there was such "mutuality of remedy" as to justify action by buyer to recover its percentage of proceeds of sales, regardless of whether there was mutuality of obligation in the first instance in that buyer was not required to keep and pay for press unless it operated satisfactorily.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality of Remedy".

19. Joint adventures 🔑2

Where machine manufacturer and feed pellet manufacturer undertook to develop a more efficient pellet press under contract providing that feed manufacturer should receive a percentage of gross proceeds, contract provision that buyer should be under no obligation to pay for press unless it operated properly and that liability of seller should be limited to accepting return of press and refunding payments made, limited seller's liability only as respects liability for damages due to failure of press to operate properly and did not provide for a "forfeiture" of buyer's royalty rights upon return of the press for unsatisfactory operation.

See Words and Phrases, Permanent Edition, for all other definitions of "Forfeiture".

20. Contracts 🔑169

"Liability" is frequently construed in the light of the surrounding circumstances to determine if it refers to all obligations accrued and contingent or only to some particular liability which parties to contract had in mind.

See Words and Phrases, Permanent Edition, for all other definitions of "Liability".

21. Contracts 🔑318

Forfeitures are not favored and will not be enforced in the absence of a clear statement to that effect.

22. Contracts 🔑318

It is the duty of the court to interpret an agreement so as to avoid a forfeiture, if such interpretation is reasonable, the burden being upon the party claiming a forfeiture to show that such was the unmistakable intention of the instrument.

23. Contracts 🔑168

In every contract there is an implied covenant that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

24. Joint adventures 🔑4(1)

Where feed pellet manufacturer and machine manufacturer undertook to develop a more efficient pellet press under contract whereby feed manufacturer purchased a press for purposes of testing, demonstration and advertising, and in consideration therefor was to receive a royalty interest in any patent and improvements thereon, seller's conduct in withholding information regarding development of improved press, its sale to the public and application for a patent violated implied covenant of good faith and fair dealing.

25. Joint adventures 🔑4(1)

Parties engaged in a "joint adventure" owe to each other the duty of fair, open, honest disclosure, and one joint adventurer cannot by connivance, deceit or suppression of facts within the right of or to the advantage of the other to know, secure or accept secret gains.

26. Joint adventures 🔑4(1)

Where corporations engaged respectively in the manufacture of feed pellets and machines undertook to develop a more efficient pellet press under contract providing for feed manufacturer a royalty interest in any patent, machine manufacturer could not defeat royalty rights of feed manufacturer by having machine manufacturer's president apply individually for letters patent covering improved press on the ground that corporation could not file for a patent, but such patent would be deemed held in trust for the purposes of the contract. 35 U.S.C.A. § 33.

27. Appeal and error 🔑1008(3)

Where trial court's construction of contract appears to be consistent with the true intent of the parties, appellate court will not substitute another interpretation, even though such interpretation seems equally tenable.

28. Appeal and error 🔑230

The strict rule of pleading requiring that bar of statute of limitations be asserted according to specific section and subdivision of the code is not self-operating but depends for its enforcement on the diligence of the plaintiff in objecting to insufficiency of the plea, either by demurrer to the answer or by timely objection at the trial. Code Civ.Proc. § 458.

29. Appeal and error 🔑230

Defendant's charge of inadequacy of amended complaint to raise issue of performance of plaintiff of contract sued on was of no avail where parties extensively litigated the subject during the main trial, trial court properly made specific findings on the matter and the point of defective pleading was not urged until after trial had been completed as to all questions except the supplemental accounting aspect of the case. Code Civ.Proc. §§ 457, 475.

30. Specific performance 🔑73

A contract for personal services extending over a long period will not be specifically enforced. Civ.Code, § 3390.

31. Action 🔑6

The fact that considerations of personal service were involved in contract sued on did not render the agreement an improper subject for declaratory relief nor establish that such suit was governed by the rules relating to actions for specific performance. Code Civ.Proc. §§ 1060–1062a; Civ.Code, § 3390.

32. Action 🔑6

Where machine manufacturer refused to give feed pellet manufacturer a percentage of proceeds of sales of pellet press in accordance with contract whereby the two manufacturers undertook to develop a more efficient pellet press, feed manufacturer's rights under the contract were a proper subject for declaratory relief under Declaratory Judgment Act, and judgment declaring rights and duties of parties under the contract and limiting money awards in favor of feed manufacturer to sum to which it was entitled as of date of hearing on supplemental complaint did not exceed court's jurisdiction nor amount to a decree of specific performance of contract for personal services extending over a long period. Code Civ.Proc. §§ 1060–1062a; Civ.Code, § 3390.

33. Joint adventures 🔑4(1)

In view of testimony by a machine manufacturer's president that entire machine used in heating and mixing mash and forming pellets therefrom was considered to be the pellet press rather than merely the pellet making mechanism thereof, under contract providing that buyer of press should receive a percentage of gross proceeds of further sales of the presses, buyer was entitled to percentage on sale price of entire machine, notwithstanding some operative part thereof was purchased by manufacturer from an outside source.

34. Contracts 🔑143, 169

Trial court may construe contract from a reading of the whole thereof, and where any word or phrase is subject to different meanings, such meaning should be given as will harmonize with the provisions of the instrument in its entirety, and, in arriving at a true construction of the instrument all of the surrounding circumstances should be considered.

35. Contracts 🔑159

The words "and" and "or" may be construed as interchangeable where necessary to effect the apparent meaning of parties to contract.

See Words and Phrases, Permanent Edition, for all other definitions of "And" and "Or".

36. Joint adventures 🔑5(1)

In action on contract providing that plaintiff should receive percentage of proceeds of gross sales of pellet press and an interest in any patent and improvements thereon, judgment decreeing plaintiff's right to interest in all patents obtained upon the pellet press and improved press subsequently developed by defendant and improvements on either was not excessive.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the Universal Sales Corporation, Limited, against the California Press Manufacturing Company, on a written contract relating to the development and marketing of a machine manufactured by defendant and for accounting of profits on sales of similar machines in which action defendant filed a cross complaint against San Francisco Milling Company, Limited. From certain parts of a judgment for plaintiff, defendant appeals.

Judgment affirmed.

For prior opinion, see 118 P.2d 291.

Molkenbuhr & Molkenbuhr, of San Francisco, Charles O. Bruce, of Berkeley, and Walter H. Linforth and Wm. M. Cannon, both of San Francisco, for appellant.

Carl R. Schulz, of San Francisco, Hugh S. Center and Arthur G. Shoup, both of San Jose, and Harold C. Faulkner and Gregory, Hunt & Melvin, all of San Francisco, for respondents.

CURTIS, Justice.

This is an appeal by the defendant, California Press Manufacturing Company, from certain parts of a judgment in favor of the plaintiff, Universal Sales Corporation, Ltd.

The action is based on a written contract dated March 2, 1931, between the plaintiff, a subsidiary of the San Francisco Milling Co., a producer and distributor of poultry and animal feed, and the defendant, a manufacturer of various types of presses. Since the questions presented upon this appeal concern primarily the scope of this contract and the legal rights and duties of the respective parties thereunder, it is essential in the disposition of this cause that the more important provisions of this writing be recited in some detail.

The contract contains three introductory "Whereas" clauses which state that the defendant has manufactured and has for sale a certain pellet press; that the defendant believes that it has manufactured a machine which will produce the results of a cuber press now operated by the plaintiff, and with a like or greater capacity; and that the defendant desires the plaintiff to purchase and operate the machine so as to be able to demonstrate its advantages. [The cuber press mentioned is an English pellet-making machine which at that time was being used by the plaintiff to produce feed pellets.]

It is then agreed that the defendant shall sell and the plaintiff shall purchase the machine for $2,000, payable $500 "upon delivery and test" and the balance in installments of $500 per month. This language is followed by the proviso that if the machine does not operate properly or with sufficient capacity, the plaintiff shall be under no obligation to pay for it, but the defendant shall not be liable for consequential damages, and the liability of the defendant shall be exclusively limited to accepting from the plaintiff the return of the machine and refunding the payments made. In this connection it is stated that before rejection of the machine the defendant shall have the privilege, should it so desire, of making such adjustments as will enable it to make the machine operate satisfactorily.

The contract further provides that in consideration of the purchase of the machine and the advantages of demonstration and advertising that the defendant will derive from the use of the machine by the plaintiff, the defendant agrees that as to all further sales of presses made by it, based upon the press sold to the plaintiff, and whether such sales be negotiated by the plaintiff or otherwise, twenty per cent of the gross selling price shall belong to the plaintiff and be paid by the defendant to the plaintiff when and as the said selling price is received by the defendant. In this part of the contract the plaintiff agrees to foster the sale of the manufactured machines. Then follows a stipulation that the agreement shall remain in effect for seventeen years from its date. It is further stated that the defendant agrees "to endeavor to patent said machine, or the improvements thereon"; and in the event of success in that regard, the defendant agrees that the plaintiff shall have "a twenty per cent interest in such patent or patents and in any improvements thereon that may be thereafter made by either party; the expense in prosecuting said patents to be borne twenty per cent by" the plaintiff "and eighty per cent by" the defendant.

The record discloses that the plaintiff operated the machine intermittently until December, 1931, and that it never did function with steady efficiency and sufficient capacity to satisfy the plaintiff. During this period of operation a great deal of effort was exerted by the officers and employees of each of the companies both in repair work and in attempts to increase the productive capacity of the machine, but apparently with only ephemeral success. Without endeavoring to describe in detail the mechanism of the press delivered to the plaintiff, it is sufficient to state that the meal, after being mixed and heated, is fed to a die-plate, through the holes of which the material is extruded in solid form by pressure. The prepared mash is fed to and pressed through the perforated die-plate by means of a worm laid horizontally and enclosed in casing. The principal difficulty encountered by the parties in the operation of this press was the tendency of the mash to solidify into a hard cake, which would not pass properly or uniformly through the holes of the die, so that the frequent clogging of the machine necessitated the removal of the die and its cleaning numerous times daily.

Sometime in the fall of 1931 and without the knowledge of the plaintiff, the defendant began to develop a variant form of press, featuring a roller mechanism, standing vertically and without casing, in place of the horizontal, encased worm or screw. Coincident with its progress with this change of construction, the defendant lost interest in making further adjustments on the screw-type press furnished to the plaintiff as specified in the agreement. Meanwhile the plaintiff, encouraged by the intermittent successful operation of the contract machine and convinced that its perfection would involve only a few minor alterations, was instrumental in interesting several milling companies in the trade in the outcome of the joint experimental efforts of the respective parties with the original pellet-producing device. Upon learning of the defendant's activity in connection with the manufacture and marketing of the roller-type press, the plaintiff advised the defendant that it considered the newly-developed machine to be within the purview of the contract and that it would insist upon the recognition of its rights thereunder. The defendant dissented from this version of the scope of the agreement between the parties. In view of the defendant's determined stand on the matter, as well as its disinclination to do any more repair work on the original pellet press, the plaintiff in July, 1932, notified the defendant of its desire to return this machine and requested the refund of two installments, amounting to $1,000, which had been paid on account of the purchase price. At the same time the plaintiff made specific demand for its proportionate share of the receipts collected by the defendant as the result of the sale of these later-developed presses to various milling companies. The defendant refused to comply with the plaintiff's terms as to both matters, although after the suit was commenced and by way of an amended answer, the defendant did alter its position to the extent of conceding the plaintiff's right under the contract to return the machine and its own liability for the $1,000, with interest.

On September 14, 1932, the plaintiff instituted this action and, by way of an amended complaint, recited the contract and many of the facts above related. In particular, the plaintiff alleged that subsequent to the date of the contract the defendant had manufactured and sold eight presses under the trade name of California Pellet Mill; that such presses were merely improvements on and were based on the pellet press sold to the plaintiff; and that plaintiff had demanded twenty per cent of the gross selling price of the pellet mill presses and a twenty per cent interest in patents obtained thereon, and improvements thereon. In a supplemental complaint the plaintiff alleged further sales by the defendant of the pellet mill presses and asked for an accounting. The plaintiff also claimed to have performed all conditions by it to be performed under the contract. The defendant by its denials put all controverted matters in issue, and in addition pleaded certain affirmative defenses to which reference will be made later in this opinion.

After an extended hearing the trial court found, among other things, that the contract was a mutual agreement of the parties to cooperate and work together and pool their inventive ideas in an endeavor to perfect the pellet press agreed to be sold and the improvements thereon and to manufacture, market and introduce it into general use; that in the dealings of the parties under the contract they did so practically construe it in their operations and transactions thereunder; that with the exception of failure on the part of the defendant to disclose to the plaintiff the defendant's ideas and plans with reference to certain improvements in substituting roller pressure for screw pressure in extruding the feed through the die, the plaintiff and the defendant freely exchanged, for their mutual benefit, their ideas and plans with reference to the "pellet press" pursuant to the provisions of the contract, and the above-mentioned ideas and plans were the result of said cooperation and working together of the plaintiff and the defendant and of the demonstration of needful changes by the plaintiff's use of the "pellet press," delivered to the plaintiff for the purposes of the contract; that the "pellet mill press" was based on the "pellet press" originally furnished to the plaintiff and any changes were merely improvements on the "pellet press" within the meaning of the term as used in the contract. The court further found that the plaintiff fully performed all matters and conditions to be performed by it under the contract; that the plaintiff at all times acted in accordance with and insisted upon its rights under the terms of the contract; that the plaintiff kept the "pellet press" in operation and demonstration at its plant as long as any benefit to the parties could result from such activity; that the plaintiff did not fail, refuse or neglect to foster the sale of similar machines; that the plaintiff did not abandon or waive any of its rights or privileges under the contract by its offer to return the "pellet press" to the defendant and its demand for a refund of the installments paid; and that the defendant's concealment of its activities in connection with the manufacture and marketing of the "pellet mill press" was a breach of its legal duty and a violation of the contract both in letter and in spirit.

The defendant appeals from such portions of the judgment as declare that the plaintiff is entitled to a twenty per cent interest (1) in a so-called "pellet press," (2) in a so-called "pellet mill press," (3) in any patents heretofore or hereafter obtained by the defendant thereon, (4) in any patents heretofore or hereafter obtained by the defendant on any improvements thereon, (5) in the gross selling price of any and all future sales of both pellet presses or pellet mill presses, and (6) from such portion thereof as awards judgment against the defendant for $24,884.70, and interest in the sum of $5,665.69. The former figure represents twenty per cent of the gross proceeds of the "pellet mill presses" sold plus the $1,000 paid by the plaintiff upon the purchase price of the "pellet press" delivered to it.

[1, 2] The principal problem presented on this appeal consists of a determination of whether or not the language of the contract is sufficiently certain and definite to render unnecessary a resort to extraneous evidence respecting the circumstances surrounding the execution of the instrument, the situation of the parties, and their intention in executing it. It is the defendant's contention that under the plain terms of the agreement the plaintiff's offer to return the pellet press and its demand for the refund of the two installments paid on account of the purchase price constituted a rejection of the machine and cancelled the contract. In this connection controlling importance is assigned to the provision that upon the failure of the machine to operate properly or with sufficient capacity, the obligation of the plaintiff as purchaser to pay for it was removed and the liability of the defendant as seller should be exclusively limited to accepting the return of the press and refunding the payments made thereon. It must be conceded that if this language upon which the defendant relies with so much assurance is regarded as the sole measure of the rights and obligations of the parties under the contract, the defendant's contention is tenable. However, there are other provisions in the instrument which must also be taken into consideration. The fundamental canon of construction which is applicable to contracts generally is the ascertainment of the intention of the parties (Civ.Code, § 1636), and in accordance with section 1638 of the Civil Code, the language of the agreement, if clear and explicit and not conducive to an absurd result, must govern its interpretation. But this does not mean that a portion only of a written instrument, although it is clear and explicit, may be selected as furnishing conclusive evidence of the intentions of the parties. Section 1641 of the Civil Code embraces the true rule in providing that "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

[3] Application of the principle announced in the last-mentioned section makes it necessary, therefore, to consider the import of that part of the document referable to the plaintiff's share in the benefits to be derived from the development and sales promotion of the press and of machines based thereon, as well as its interest in the defendant's prosecution of patent applications covering the pellet-producing device or "any improvements thereon that may be thereafter made by either party." Other significant phraseology appearing in this connection is the stipulation that "This agreement shall remain in effect for seventeen years from date hereof and shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto." The correlation of this express reference to the duration of the agreement pursuant to the scheme for the marketing of the presses with the language measuring the rights, duties and obligations of the parties with respect to the agreed terms of sale and purchase contained in the forepart of the document creates an ambiguity upon the face of the contract as to the nature and scope of the transaction which the parties intended to cover. Such uncertainty in terminology must be resolved in accordance with recognized standards of interpretation. Civ. Code, § 1637; Restatement, Contracts, §§ 235-236.

[4-7] As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement (Civ.Code, § 1647; Smith v. Carlston, 205 Cal. 541, 550, 271 P. 1091; Katz v. People's Finance & Thrift Co., 101 Cal.App. 552, 558, 281 P. 1097; Meyers v. Nolan, 18 Cal.App.2d 319, 322, 63 P.2d 1216; 12 Am.Jur. 784, § 247), including the object, nature and subject matter of the writing (First National Bank v. Bowers, 141 Cal. 253, 262, 74 P. 856;

Weaver v. Grunbaum, 31 Cal.App.2d 42, 48, 87 P.2d 406; 12 Am.Jur. 776, § 242), and the preliminary negotiations between the parties (Balfour v. Fresno Canal & Irr. Co., 109 Cal. 221, 226, 41 P. 876; 12 Am.Jur. 757, § 234), and thus place itself in the same situation in which the parties found themselves at the time of contracting. Code Civ.Proc., § 1860; Tennant v. Wilde, 98 Cal.App. 437, 445, 277 P. 137; Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 272, 84 P.2d 313; 17 C.J.S., Contracts, p. 744, § 321. Also applicable here is the familiar rule that when a contract is ambiguous, a construction given to it by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight, and will, when reasonable, be adopted and enforced by the court. Work v. Associated Almond Growers, 102 Cal. App. 232, 235, 282 P. 965; 6 Cal.Jur. 304, § 184. The reason underlying the rule is that it is the duty of the court to give effect to the intention of the parties where it is not wholly at variance with the correct legal interpretation of the terms of the contract, and a practical construction placed by the parties upon the instrument is the best evidence of their intention. 2 Elliott on Contracts, § 1537; 12 Am.Jur. 787, § 249. As was said in Mitau v. Roddan, 149 Cal. 1, 14, 84 P. 145, 150, 6 L.R.A., N.S., 275: "It is to be assumed that parties to a contract best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by the parties contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be. Parties are far less liable to have been mistaken as to the intention of their contract during the period while harmonious and practical construction reflects that intention, than they are when subsequent differences have impelled them to resort to law, and one of them then seeks a construction at variance with the practical construction they have placed upon it. * * * In its execution, every executory contract requires more or less of a practical construction to be given it by the parties, and when this has been given, the law, in any subsequent litigation which involves the construction of the contract, adopts the practical construction of the parties as the true construction, and as the safest rule to be applied in the solution of the difficulty. [Citing cases.]"

[8] Measured in the light of these well-established principles of interpretation, the record reveals ample evidence in support of the findings in favor of the plaintiff as to the scope and purpose of the contract in controversy. It appears that in connection with its business operations, the San Francisco Milling Company (the plaintiff's parent company) had been using an English machine called a "cuber press" for the production of certain poultry feed in pellet form. Unsatisfied with the output of the English press, the superintendent of the Milling Company in November, 1930, conceived the idea of interesting the defendant, an established machinery manufacturing company, in the development of a pellet-making machine of greater efficiency, and he so expressed himself to the defendant's president. As a result of many conferences between the representatives of the respective companies and in January, 1931, a pellet press was completed by the defendant, and installed in the plant of the Milling Company, where it was initially operated on February 15, 1931. Meanwhile, the plaintiff corporation was organized for commercial exploitation of the new machine when perfected. Many defects appeared in the press during the following months of experimentation and numerous changes in construction were made by the defendant in response to suggestions of the representatives of the respective companies as to the improvement of the mechanism. While the machine was still in its imperfect state insofar as commercial operation was concerned, the contract in suit, dated March 2, 1931, was executed on April 30, 1931. The relationship between the parties did not change upon the signing of the agreement, and they persisted in their cooperative efforts to develop and market an efficient press. The parties continued to share in the expense attendant upon experimentation with the suggested improvements—such as the plaintiff's idea for the multiple extrusion of pellets involving the addition of a double worm and double knife to the original machine, and the defendant's frequent recommendations for alterations of the die in respect to various features of drilling and thickness—the plaintiff undertaking to demonstrate the working processes of the

press through its operation at a cost differential of $4 to $6 per ton on all pellets manufactured and the defendant making the necessary mechanical adjustments free of charge.

During this period the plaintiff, convinced of the ultimate success of the pellet-producing mechanism, began a selling and advertising campaign to create a market for the machine, interested several other milling companies as prospective purchasers and referred their inquiries to the defendant for appropriate consideration. Moreover, as evidence of its sincerity in this regard, the plaintiff took an option on two more of the pellet worm-type presses, and its parent company, the San Francisco Milling Company, purchased one of these machines. It was not until December, 1931, and following its manufacture of a press utilizing roller instead of screw pressure as the medium of force and its sale of several of these variant forms to milling companies previously recommended by the plaintiff, that the defendant manifested a change of attitude in its relation with the plaintiff by refusing to proceed further with repair work on the model delivered to the plaintiff. Learning of this marketing activity by the defendant and realizing the futility of attempting to cope longer with the defective features of the original press in view of the defendant's confessed lack of interest in that design and its refusal to recognize the plaintiff's assertion of certain rights in the new machine under the terms of the contract, the plaintiff, in July, 1932, offered to return the experimental press to the defendant and demanded both a refund of the installments paid on the original model and its proportionate share of the gross proceeds received by the defendant from the sales of the pellet mill presses, as contemplated by the agreement. Unable to prevail upon the defendant in either respect, the plaintiff in September, 1932, instituted the present litigation seeking a declaration of the rights and duties of the parties under the contract.

[9, 10] Upon the basis of these facts the trial court found that "under the terms of the said contract it was the mutual agreement of plaintiff and defendant to cooperate and work together and pool their inventive ideas in an endeavor to perfect the 'pellet press' agreed to be sold and the improvements thereon and to manufacture, market and introduce it into general use." The contract bears evidence that the parties did not regard the press supplied to the plaintiff as a pattern of perfection, for particular reference is made to the "testing" of it at the mill and the defendant's privilege of adjusting the machine if it should so desire. In other words, the defendant, having the facilities for the manufacture of machinery, desired the benefit to be derived in experimentation with the press incident to continuous milling operations and the plaintiff undertook to contribute to the venture practical demonstration of the mechanism under the direction of experienced employees, and to do advertising and promotion work for the purpose of creating a market for an efficient pellet-producing machine. This cooperation promotive of the common enterprise and involving the combination of the skill and efforts of both the plaintiff and the defendant suggests that the parties intended to establish a contractual relationship between themselves akin to that of joint adventurers. Further indication of this purpose is the royalty clause of the agreement referable to the plaintiff's share of the gross proceeds of sales of presses *based upon* the original model, *whether such sales be negotiated by the plaintiff or the defendant,* and the clause relating to the respective interests of the parties in any patent of the machine and *"any improvements thereon that may be thereafter made by either party."* While in a technical joint venture there is usually a sharing of profits and losses in the prosecution of the common enterprise (2 Rowley's Modern Law of Partnership, § 975; 33 C.J. 841, § 2), the mode of participating in the fruits of the undertaking may be left to the agreement of the parties. Hamer v. MacClatchie, 220 Cal. 720, 32 P.2d 620. Whether the parties to a particular contract have thereby created, as between themselves, the strict relation of joint adventurers or some other relation involving cooperative effort, depends upon their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts. 33 C.J. 845, § 16. Such a contract need not be express; it may be implied from the conduct of the parties. 2 Rowley's Modern Law of Partnership, § 976. The acts and conduct of the parties engaged in the accomplishment of the apparent purposes may speak above the expressed declarations of the parties

to the contrary. O. K. Boiler & Welding Co. v. Minnetonka Lumber Co., 103 Okl. 226, 228, 229 P. 1045. In the present case the trial court's interpretation of the parties' agreement as expressive of their intention to engage in a cooperative scheme calling for the pooling of inventive ideas in promotion of the common enterprise is consistent with the language of the contract as well as with the foregoing evidence showing that until the defendant refused to work further with the plaintiff, the plans and ideas of the parties were freely exchanged for their mutual benefit. It necessarily follows from such state of the record that the court was warranted in making the above-quoted finding referable to the cooperative undertaking of the parties.

The next point to be considered is whether, within the meaning of the contract, the new model is "based upon" the press made for the plaintiff so as to be treated as an "improvement thereon," as urged by the plaintiff, or embodies, as the defendant contends, a new invention which in no way concerns the plaintiff. The principal difference between the "pellet press" originally delivered to the plaintiff and the "pellet mill press" subsequently developed and sold to others by the defendant lies essentially in the means used to force the mash through the perforations in the die-plate. As previously stated, in the press furnished to the plaintiff the prepared material was fed to and forced through the perforated die-plate by means of a worm laid horizontally and enclosed in casing. In the new type of press a roller mechanism, standing vertically and without casing, supplants the horizontal, encased worm. The mash is then fed by gravity and forced into the die-plate by rotary action of the roller, which exerts its form of pressure without actual contact with the face of the die. The roller takes the place of the worm and the casing is no longer necessary. The plaintiff concedes that the "pellet mill press" embraces an improved extruding mechanism, but it attributes its annexation and efficacy to the demonstration of needful changes in the course of the many months of experimental operation of the original model as pursued by the plaintiff and the defendant at the mill of the San Francisco Milling Company.

[11, 12] At the trial avail was made of experts in patent law by both parties, and as would be inferred, those witnesses differed sharply in their opinions as to the equivalence of the roller and the worm as physical agencies for establishing, conjointly with other common factors, the functional relationship essential to commercial productivity. Based upon its consideration and evaluation of these conflicting views as well as the information gained from a visual inspection of the characteristic features of the two machines, which is proper evidence in a case (Ethel D. Company v. Industrial Acc. Comm., 219 Cal. 699, 704, 28 P.2d 919; Vaughan v. Tulare County, 56 Cal.App. 261, 265, 205 P. 21; MacPherson v. West Coast Transit Co., 94 Cal.App. 463, 466, 271 P. 509; 24 Cal.Jur. 752, § 34), the court found that "none of said differences changed the essential nature of said 'pellet press' and each difference was the substitution of a generic equivalent." It is well settled that the relative weight to be given opinion testimony and factual evidence is for the trial court. Rolland v. Porterfield, 183 Cal. 466, 469, 191 P. 913; Ross v. Hieronymus, 2 Cal.App.2d 258, 265, 37 P.2d 837; Shaw v. Owl Drug Co., 4 Cal.App.2d 191, 196, 40 P.2d 588.

[13] In considering whether under the language of the contract the plaintiff can be said to have any rights in the new press, the following phraseology is significant: "of all further sales of presses * * * *based upon* the press sold to the party of the first part (plaintiff) * * * twenty per cent of the gross selling price thereof *shall belong* to the party of the first part (plaintiff) and be paid by the party of the second part (defendant)." The broad scope of this clause predicate of the plaintiff's right to royalty payments, when related to the above-noted covenant embracing improvements, reasonably suggests that the parties did not intend to limit their agreement within the narrow confines and technical provisions of the patent law, but that it was their understanding to associate themselves in a common venture for the development of a marketable pellet machine, with the original model as a provisional rather than a perfected structure, and in contemplation of "improvements thereon" as the result of further operative experience. Consistent with this observation, the defendant's citation of cases turning on the refinements of the law governing patent infringement and holding that a contract to assign improvements included

only improvements to the particular machine secured by the patent, is of no avail here. McAuley v. Chaplin-Fulton Mfg. Co., 217 Pa. 477, 66 A. 750; Stitzer v. Withers, 122 Ky. 181, 91 S.W. 277; Allison Bros. Co. v. Allison, 144 N.Y. 21, 38 N.E. 956. Parenthetically it might be noted that it appears from the record that the machine as to which the parties were contracting was not patented, in recognition, no doubt, of the existence of certain defects in its then state of operative efficiency.

[14] The comprehensive character of the words "improvements thereon" as used by the parties should not be overlooked. In American Cone & Wafer Co. v. Consolidated Wafer Co., 2 Cir., 247 F. 335, 336, 159 C.C.A. 429, wherein was considered an assignment of a patent for a device for making ice-cream cones, "as well as all improvements that may be made thereto or thereunder," Judge Learned Hand, in taking occasion to draw a distinction between an "improvement to" and an "improvement upon" a machine, said at page 336 of 247 F.: "Every more efficient machine would be an improvement 'upon' it, in common speech, but not 'to' it. We attach significance to the word 'thereto', and we should attach an added significance as well to 'thereunder,' if we could find any meaning for it. * * * Groset [the patentee] was free to make a new cone baker, which might successfully compete with the plaintiff, so long as it was not an improvement 'to' the disclosure of his first patent." In similar vein in West Disinfecting Co. v. United States Paper Mills, Inc., 3 Cir., 44 F.2d 803, affirmed 3 Cir., 62 F.2d 1086, certiorari denied 283 U.S. 836, 51 S.Ct. 485, 75 L.Ed. 1448, the court with reference to the expression "improvements thereon or variations thereof" stated at page 804 of 44 F.2d: "From the foregoing it seems clear to us that what the parties had in view when this contract was made was not the technical provisions of the patent law but the improvement of a folding machine such as it was then using. To effect such improvement the contract provided for the plaintiffs obtaining not only the then discovered improvement Winter had made on the old folding machine and which was embodied in his patent application therefor, but it also contemplated that Winter might make 'improvements thereon,' or 'variations thereof,' or improvements 'affecting said folding machine.'" As was aptly noted by Judge Hand in the American Cone case, supra, 247 F. at page 337: "We must try rather to assume the posture of the parties at the time, and consider what most men would have thought such language covered." In this regard it must be borne in mind that what the parties had before them and what constituted the subject matter of the contract was a commercially impractical pellet press, so that their employment of the words "based upon" and "improvements thereon" in connection with their joint undertaking for the development and promotion of a marketable machine, strongly suggests that they were then contemplating the accomplishment of a specific result even though effected by some substitution for the original functional mechanism. Accordingly, whether the roller is a mechanical equivalent of the worm in the screw-type press under the canons of patent law is not a matter for determination in this case. The function which the roller performs as a compressing device is so similar to that of the worm that within the scope of the contract the new model as a unitary structure may well be treated as an improvement based upon the old, and the trial court's finding in harmony with this construction will not be disturbed.

[15-17] Nor is there any merit to the defendant's claim that the plaintiff's failure to pay the full price for the original machine indisputably constitutes a bar to its participation in the benefits attendant upon the development and sale of the improved press. In this connection the defendant refers to that portion of the contract wherein the defendant agrees to pay the plaintiff twenty per cent of the gross selling price of further sales of presses "in consideration of the purchase of said machine and the advantages of demonstration and advertising" that the defendant "will derive from the use of said machine" by the plaintiff. The words "purchase" and "sale" in a contract do not necessarily connote an executed or consummated purchase or sale, but are frequently used in the sense of an agreement to buy or sell. 23 R.C.L. 1347, § 171. The interpretation of these terms in any particular case is controlled by the context of the writing, and the whole instrument must be examined. Blackwood v. Cutting Packing Co., 76 Cal. 212, 218, 18 P. 248, 9 Am.St.Rep. 199; Walti v. Gaba, 160 Cal. 324, 116 P. 963; In re Estate of Goetz, 13 Cal.App. 198, 201, 109 P. 145; MacRae

v. Heath, 60 Cal.App. 64, 68, 212 P. 228. Here the plaintiff was not required to keep and pay for the machine unless it operated "properly and with sufficient capacity," and the defendant reserved the privilege of making adjustments to enable the machine "to operate satisfactorily." Thus, it is apparent the plaintiff's obligation to purchase was not absolute but was subject to the foregoing qualifications and conditions. It therefore would appear that the contract was open to construction on this point, and the trial court's finding that the parties meant "an agreement to purchase" by the plaintiff to serve as part of the consideration for the royalty payments will not be disturbed where such view is consistent with the surrounding circumstances and other provisions of the contract evidencing the intention of the parties. Katz v. People's Finance & Thrift Co., supra, 101 Cal.App. at page 557, 281 P. 1097. Moreover, the defendant did derive the advantages of demonstration and advertising from the plaintiff's use of the original machine in the working laboratory, as above stated; and undeniably the plaintiff did foster the sales effected by the defendant prior to the rupture of their relationship in July, 1932. Although the machines sold were the improved presses, yet the trial court's finding based upon substantial evidence that the "improvements" resulted from the experimental operation of the original model in the workshop furnished by the plaintiff in accordance with the parties' understanding effectively establishes that the plaintiff should not be deprived of the fruits of the valuable services rendered by reason of the defendant's secretiveness as to the development and marketing of the roller mechanism. In such circumstances there was no failure of consideration upon the plaintiff's part.

[18] Moreover, the above recital of the plaintiff's performance within the purport of the parties' understanding as found by the trial court furnishes a complete answer to the defendant's charge of lack of mutuality as to the respective promises or obligations of the parties under the contract. As stated, the plaintiff did with the press furnished to it whatever could be done in demonstrating the machine, advertising it and fostering sales thereof, and the record discloses ample evidence that the defendant has enjoyed the fruits of the plaintiff's missionary activities. In such situation and apart from any question of mutuality of obligation in the first instance, this performance by the plaintiff prior to institution of this action was sufficient to create a mutuality of remedy so as to justify its seeking appropriate relief in this litigation for the failure of the defendant to conform with the terms of the agreement. Thurber v. Meves, 119 Cal. 35, 37-39, 50 P. 1063, 51 P. 536; Sayward v. Houghton, 119 Cal. 545, 548, 51 P. 853, 52 P. 44; Wheat v. Thomas, 209 Cal. 306, 314, 287 P. 102; Gosnell v. Lloyd, 215 Cal. 244, 253, 10 P.2d 45; 23 Cal.Jur. 450, § 22.

[19-22] Likewise without force is the defendant's argument that the plaintiff's offer to return the machine coupled with its demand for a refund of the installments paid constituted a termination of the contract. The provision on which the defendant relies in this connection reads as follows: *"In the event that said machine shall not operate properly or with sufficient capacity,* first party (plaintiff) shall be under no obligation to pay for same, but second party (defendant) shall not be liable for consequential damages, and *the liability of second party shall be exclusively limited to accepting from the party of the first part the return of said machine and refund payments made thereon."* If by this language specifically restricted to the measure of the defendant's liability upon the plaintiff's return of the machine, the parties contemplated a stipulation for termination of the contract, necessarily involving the forfeiture of the plaintiff's rights thereunder, it would have been a simple matter to have so provided in plain terms. Instead the parties in a subsequent clause of their agreement expressly stated "This agreement shall remain in effect for seventeen years from date hereof." Settlement of such uncertainty existing on the face of the instrument as to the parties' intent with respect to the duration of their agreement calls for the trial court's application of the familiar rules of interpretation, as above stated. Pacific Indemnity Co. v. California Electric Works, Ltd., supra. "Liability" is a term which is frequently construed in the light of the surrounding circumstances to determine if it refers to *all obligations accrued and contingent* or only to some *particular* liability which the parties had in mind. Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939; Rowell v. Western Motor Transport Co., 94 Cal. App. 12, 270 P. 400. Relevant to the con-

sideration of the parties' purpose in thus incorporating in their contract a provision manifestly susceptible of varied shades of meaning is the apt observation of Mr. Justice Holmes: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372, L.R.A. 1918D, 254. In rejecting the defendant's theory that the provision in question embraced a scheme for the defendant's release from all liability under the contract, the trial court found in substance that the "liability" so prescribed meant *only liability for damages due to failure of the machine to operate properly, and not a forfeiture of all rights under the agreement.* This construction is not only consistent with the scope of the language in relation to the court's determination as to the purpose of the enterprise envisaged by the writing, but it likewise is in harmony with the settled policy of the law not to enforce a forfeiture in the absence of a clear statement to that effect. The principles governing this point are well stated in Nelson v. Schoettgen, 1 Cal.App.2d 418, 423, 36 P.2d 665, 667; "Forfeitures are not favored by the courts, and, if an agreement can be reasonably interpreted so as to avoid a forfeiture, it is the duty of the court to avoid it. The burden is upon the party claiming a forfeiture to show that such was the unmistakable intention of the instrument. Quatman v. McCray, 128 Cal. 285, 60 P. 855; McNeece v. Wood, 204 Cal. 280, 267 P. 877; 6 Cal.Jur. 362. 'A contract is not to be construed to provide a forfeiture, unless no other interpretation is reasonably possible.' McPherson v. Empire Gas & Fuel Co., 122 Cal.App. 466, 10 P.2d 146, 148; Hansen v. D'Artenay, 121 Cal.App. 746, 9 P.2d 889; Booth v. Los Angeles County, 124 Cal.App. 259, 12 P.2d 72."

[23-26] A further matter to be considered in connection with the trial court's findings, as above recited, is the relationship existing between the parties pursuant to their agreement regarding their cooperative undertaking. In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing. 17 C.J.S., Contracts, p. 778, § 328. Within the purport of this equitable principle, the defendant's conduct in withholding information regarding the fabrication of the roller-type press, its sale to the public and the application for a patent is a violation of the contract in letter and spirit. Since according to the evidence, the cooperative arrangement of the parties partook of the nature of a joint venture, the defendant owed to the plaintiff the duty of fair, open, honest disclosure, and it cannot by connivance, deceit or suppression of facts within the right or to the advantage of the plaintiff to know, secure or accept secret gains. 33 C.J. 851, § 36; 15 R.C.L. 501, § 3. Accordingly, it is unconscionable for the defendant to suggest that because its president made individual application for letters patent covering the improved machine—a corporation not being able to file for patents, that being a *personal* privilege (35 U.S.C.A. § 33)—he may keep for himself the benefits flowing therefrom and the plaintiff's rights to the fruits of the contract are destroyed. The defendant's president executed the agreement on behalf of the defendant, with full knowledge of the implications therein contained, and accepted all the advantages attendant upon the plaintiff's demonstration and use of the original press. Such situation compels the conclusion that the defendant may not evade its contractual obligations by reason of a technicality in the patent law. Analogous in principle is the case of Hamer v. MacClatchie, 220 Cal. 720, 32 P.2d 620, an action for accounting and for recovery of unpaid royalties on certain patents. It was there said at page 724 of 220 Cal., at page 622 of 32 P.2d: "Furthermore, the evidence shows that the plans and ideas of these parties were freely exchanged for their mutual benefit. It fully justifies the finding that, under the terms of the agreement, the patent issued to defendant was held in trust by him for the benefit of both parties." In like manner the record here establishes the equities of the plaintiff's claim to participate in proportion to its agreed interest in the gains incident to the development of the improved press.

[27] In summation of this branch of the case, it need only be said that the construction given the contract in suit by the trial court appears to be consistent with the true intent of the parties and where that is so, the appellate court will not sub-

stitute another interpretation though it seem equally tenable. Adams v. Petroleum Midway Co., Ltd., 205 Cal. 221, 224, 270 P. 668; Kautz v. Zurich Gen. A. & L. Ins. Co., Ltd., 212 Cal. 576, 582, 300 P. 34; McNeny v. Touchstone, 7 Cal.2d 429, 435, 60 P.2d 986; Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 562, 161 P. 25.

[28, 29] The remaining points presented for consideration upon this appeal require but brief comment. First to be noted is the defendant's challenge of the sufficiency of the amended complaint's plea of performance by reason of the omission of the word 'duly" in the allegation "That plaintiff has performed all conditions by it to be performed under said contract." Code Civ. Proc. § 457. In this connection the defendant urges that the strict rule of pleading followed with respect to a party's assertion of the bar of the statute of limitations according to the specific section and subdivision of the code (Code Civ Proc. § 458; Overton v. White, 18 Cal. App.2d 567, 64 P.2d 758, 65 P.2d 99) necessitates a like exactitude in the statement of the general allegation of performance permitted by the code. However, adoption of the defendant's theory as to the similarity of the statutory requirement regulating the method of pleading these respective matters as legal conclusions would not lend force to its present argument. The rule as to the proper plea of the statute of limitations is not self-operating but depends for its enforcement on the diligence of the plaintiff in objecting to the insufficiency of the plea either by demurrer to the answer or by timely objection at the trial. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155, 113 Am.St.Rep. 324, approved but distinguished on this ground in Overton v. White, supra, in affirming a judgment on the pleadings in favor of plaintiff. On a like basis the defendant's charge of inadequacy of the amended complaint to raise the issue of performance is of no avail here where the record shows that the parties, pursuant to their respective positions, exhaustively litigated this subject during the course of the main trial, the court properly made specific findings on the matter, and the defendant did not urge the point of defective pleading until after the trial had been completed as to all questions except the supplemental accounting aspect of the case. Code Civ.Proc. § 475.

[30-32] The defendant next contends that the terms of the judgment are so broad as to amount to a decree of specific performance rather than a declaration of the rights and duties of the parties under the contract. Particular objection is made to the recognition accorded the plaintiff's claim to the royalty payments and patent interests stipulated in the agreement. The defendant urges that such adjudication, operating *in futuro* and contemplating the continuance of a personalized relationship between the parties for the stated time, contravenes the settled principle of equity that a contract for personal services extending over a long period will not be specifically enforced. Civ.Code, § 3390; Poultry Producers of Southern California, Inc., v. Barlow, 189 Cal. 278, 208 P. 93. But the defendant mistakes the scope of the judgment rendered under authority of the declaratory relief act of this state, Code of Civil Procedure, sections 1060–1062a. Blakeslee v. Wilson, 190 Cal. 479, 213 P. 495. The present case, involving an *actual* controversy between the parties, is the precise type of situation that the statutory remedy in question was designed to meet and accommodate. The judgment simply declares the rights and duties of the parties under the terms of the contract and limits the money award in favor of the plaintiff to the sum to which it was entitled as of the date of the hearing on the supplemental complaint in 1935. The fact that considerations of personal service are involved in the contract does not render the agreement an improper subject for declaratory relief (Blakeslee v. Wilson, supra; Lane Mortgage Company v. Crenshaw, 93 Cal.App. 411, 269 P. 672; Herrlein v. Tocchini, 128 Cal.App. 612, 18 P.2d 73; Holley v. Hunt, 13 Cal.App.2d 335, 56 P.2d 1240) nor establish that such suit is governed by the rules relating to actions for specific performance. Lane Mortgage Co. v. Crenshaw, supra, 93 Cal.App. at page 433, 269 P. 672. The defendant's citation of Coykendall v. Jackson, 17 Cal.App.2d 729, 62 P.2d 746, does not strengthen its argument. That case merely decided that the trial court did not abuse its discretion in sustaining without leave to amend a demurrer to the plaintiff's complaint for declaratory relief. Consistent with the precise limitations of the question there presented for consideration, it is manifest that any language of that opinion purporting to intimate that a contract involving personal services because not specifically enforceable is likewise not a proper matter for declaratory relief is *dicta* and not controlling of the point here involved

in view of the well-settled law on the subject of this statutory remedy, as above noted. It follows therefore that the trial court's treatment of the present case as one correctly brought under section 1060 of the Code of Civil Procedure and the form of its judgment determinative of the points in litigation are unassailable.

[33] The defendant finally complains of the excessiveness of the judgment in the following respects: (1) its designation of the press as a unitary structure rather than the pellet-making mechanism thereof as the basis for computation of the commission payments due the plaintiff from sales of the machine; (2) its declaration in the conjunctive rather than in the disjunctive of the plaintiff's right to a twenty per cent interest in all patents obtained upon the "pellet press," the "pellet mill press," *and* improvements on either. The first charge of error predicated upon the claim that the term "press," as used in the contract, meant only the extruding mechanism of the machine sold and did not embrace the "accessories"—the mixer, the heater, the feeder and the motor—is nullified by the testimony of the defendant's president. He stated that the *entire* machine was considered the press and sold as a unit, that the specifications in the advertising literature he authorized for circulation to various milling companies included the so-called "accessories" as integral parts of the press offered for sale to the public. In view of this evidence in support of the plaintiff's claim that the parties used the word "press" in reference to the *whole* machine, the fact that some essential operative part thereof was purchased by the defendant from an outside source rather than manufactured by it would not serve to defeat the plaintiff's right to the royalty payments stipulated in the contract. Consequently the defendant's objection to this feature of the judgment cannot be sustained.

[34-36] As to the second charge of error—the declaration of the plaintiff's interest in the patents on the respective machines *and* improvements of either—the following quotation from the case of Homer Laughlin Engineers Corporation v. J. W. Leavitt & Co., 116 Cal.App. 197, 200, 201, 2 P.2d 511, 512, furnishes a complete answer: "We are of the opinion that it was within the province of the trial court to construe the contract from a reading of the whole thereof, and, where any word or phrase was subject to different meanings, then such meaning should be given as would harmonize with the provisions of the instrument in its entirety, and, in arriving at a true construction of the instrument, all of the surrounding circumstances should be considered. * * * And there is almost an unanimity of holding to the effect that the terms 'and' and 'or' may be construed as interchangeable when necessary to effect the apparent meaning of the parties. Arnold v. Hopkins, 203 Cal. [553], 563, 265 P. 223; Willis v. Robinson, 291 Mo. 650, 237 S.W. 1030, 1033; Poehlman v. Leinweber, 288 Ill. 58, 122 N.E. 834; Kales v. Houghton, 190 Cal. 294–298, 212 P. 21."

For the foregoing reasons the judgment is affirmed.

GIBSON, C. J., SHENK, and CARTER, JJ., concurred.

TRAYNOR, Justice (concurring).

I concur in the judgment. I do not agree with the premise implicit in the majority opinion that parol evidence as to the meaning of the contract was admissible only because the contract is ambiguous on its face. Words are used in an endless variety of contexts. Their meaning is not subsequently attached to them by the reader but is formulated by the writer and can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended. Cal.Code Civ.Proc. §§ 1856, 1860; see Wigmore on Evidence, 3rd ed., §§ 2458–2478; "The Theory of Legal Interpretation," 12 Harv.L.Rev. 417, by Oliver Wendell Holmes (then Chief Justice of Massachusetts.)

EDMONDS, J., concurred.

20 Cal.2d 777

CALIFORNIA PRESS MFG. CO. et al. v. SUPERIOR COURT OF SANTA CLARA COUNTY et al.

S. F. 16558.

Supreme Court of California.

Aug. 27, 1942.

Rehearing Denied Sept. 24, 1942.

1. Prohibition ⚿10(1)

Prohibition lies to restrain one court from assuming jurisdiction over controversy where another tribunal having concurrent jurisdiction has assumed and is exercising control over the same action.

2. Prohibition ⚿10(2)

The fact that second action in respondent superior court was based on the same written sales contract as action in another superior court which had previously acquired jurisdiction did not warrant issuance of writ of prohibition against respondent superior court on ground that it had no jurisdiction, where the second action was directed to an accounting for sales made subsequent to the filing of the first action.

In Bank.

Proceeding in prohibition by the California Press Manufacturing Company and others against the Superior Court of Santa Clara County and others to restrain respondent superior court from taking any further action in the cause entitled, Universal Sales Corporation, Ltd., against California Press Manufacturing Company, California Pellet Mill Company and others, on the ground that another tribunal having concurrent jurisdiction had assumed and was exercising control over the same action.

Alternative writ discharged and peremptory writ denied.

For prior opinion, see 118 P.2d 297.

Molkenbuhr & Molkenbuhr, of San Francisco, and Chas. O. Bruce, of Berkeley, for petitioners.

Hugh S. Center and Arthur G. Shoup, both of San Jose, and Carl R. Schulz, Harold C. Faulkner, and Gregory, Hunt & Melvin, all of San Francisco, for respondents.

CURTIS, Justice.

This is a proceeding in prohibition to restrain the respondent superior court from taking any further action in that cause entitled "Universal Sales Corporation, Ltd., a corporation, Plaintiff, v. California Press Manufacturing Co., a corporation, California Pellet Mill Company, a corporation, et al., Defendants," filed in the Superior Court of Santa Clara County on January 31, 1941. This latter suit and another similar suit filed on February 2, 1938, in the Superior Court of the City and County of San Francisco, are both based on a contract involved in a previously instituted declaratory relief action now on appeal to this court—Universal Sales Corporation, Ltd., a Corporation, Plaintiff, v. California Press Manufacturing Company, a Corporation, Defendant, S. F. No. 15988, 128 P.2d 665. Disposition of this latter cause was made in an opinion filed today and reference is made thereto for a full discussion of the provisions and effect of the mentioned contract.

While the main case [S. F. No. 15988] was pending in this court and while the second San Francisco action apparently was being held in abeyance until final decision by this court on the appeal before it, the plaintiff in the action before the Santa Clara court secured an order therein for the taking of the depositions of certain officers of the defendant companies. The defendants filed objections to the jurisdiction of that court to proceed in the case with the taking of the depositions or in any other manner. Following that tribunal's overruling of the objections, the defendants sought relief in this court and an alternative writ of prohibition was issued.

[1, 2] Petitioners' application for the issuance of a peremptory writ is based on the premise that prohibition will lie to restrain one court [Santa Clara Superior Court] from assuming jurisdiction over a controversy when another tribunal having concurrent jurisdiction [San Francisco Superior Court] has assumed and is exercising control over the same matter. While this proposition is fundamentally sound, it is not applicable here for the reason that although the Santa Clara action is based on the same contract, it is directed to an accounting for sales made *subsequent* to the filing of the second San Francisco action. The Santa Clara Superior Court therefore has jurisdiction to proceed in the action pending before it.

The alternative writ heretofore issued is discharged and the petition for a peremptory writ of prohibition is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

54 Cal.App.2d 173

McCARTHY v. MITCHELL et al.

Civ. 2852.

District Court of Appeal, Fourth District, California.

Aug. 27, 1942.

1. Executors and administrators ⚷400

Where property of the estate in hands of public administrator was sold, and after discovery of will, but before admission thereof to probate, estate was distributed, legatee under will could follow proceeds of sale into hands of distributee.

2. Executors and administrators ⚷388(1)

Where real property of estate in hands of public administrator was sold in ordinary course of probate, the sales were valid and legatee under will subsequently admitted to probate could not take property from purchasers who purchased it in good faith and for value. Probate Code, §§ 510, 525.

3. Executors and administrators ⚷380(2)

Action by administratrix with will annexed to set aside sale of land made by public administrator on ground of fraud ten years after will was admitted to probate at which time administratrix discovered fraud was barred by three-year statute of limitations. Civ.Code, § 2224; Probate Code, § 793.

4. Executors and administrators ⚷380(2)

Statute barring action for recovery of property sold by an administrator after three years from settlement of final account of administrator, or after three years from discovery of fraud, refers to settlement of final account of administrator who made sales sought to be set aside. Probate Code, § 793.

5. Executors and administrators ⚷380(2)

Action of administratrix to set aside sale of estate lands by public administrator, which action had been delayed ten years after appointment of administratrix to the prejudice of purchasers, was barred by "laches". Probate Code, § 793.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

◆

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Marie L. McCarthy against James Mitchell and others to recover real property sold in a probate proceeding and to quiet title thereto. From an adverse judgment plaintiff appeals.

Affirmed.

Jesse George, of San Diego, for appellant.

Wright, Thomas & Dorman and Leroy A. Wright, II, all of San Diego, for respondents.

BARNARD, Presiding Justice.

This is an action to recover four parcels of real property which had been sold to certain of the defendants in a probate proceeding and to quiet title thereto in the plaintiff. From an adverse judgment the plaintiff has appealed. The appellant is the sole devisee and legatee under the will of W. O. Mitchell. He died in San Diego on January 23, 1927, leaving as a part of his estate the real property in question. On February 11, 1927, the public administrator was appointed as administrator of his estate. In the process of such administration he sold these parcels of real property to various of these defendants, the sales being made on November 23, 1927, November 25, 1927, March 2, 1928, and on September 14, 1928, respectively.

In the meantime, the appellant petitioned for the probate of a lost will of the deceased, which was denied on June 5, 1928. The last will of the deceased was not found until January 10, 1929. A petition for its probate was filed on January 12, 1929, and denied on September 5, 1929, on the ground it should have been filed in the original case. On December 31, 1929, appellant filed another petition for the probate of this will which was denied on January 22, 1930. That order was reversed on appeal on July 16, 1931. In re Estate of Mitchell, 115 Cal.App. 348, 1 P.2d 536. The will was finally admitted to probate on September 25, 1931, and this appellant was appointed administratrix with the will annexed. However, the public administrator having filed his final account and petition therefor, distribution had been ordered to an alleged brother of the deceased on May 10, 1929, at which time the first petition for the probate of the will was still pending. Apparently, no appeal was taken from that decree of distribution. The administrator was discharged on January 24, 1930.

The present action to set aside these probate sales was not filed until September 15, 1941. The above facts are alleged in the complaint and it is further alleged that at the time the probate sales were made the respective purchasers knew that the deceased "had executed the aforesaid will to and in favor of plaintiff and that plaintiff was seeking said will and intended to have it presented for probate." A demurrer was filed to the second amended complaint setting up, among other things, that it does not state facts sufficient to constitute a cause of action and that it appears on the face of the complaint that the action is barred by the provisions of section 793 of the Probate Code, and by laches. The demurrer was sustained without leave to amend and this appeal followed.

It is not contended that these probate sales were not duly and regularly made. The appellant contends, however, that since it is alleged that the respective purchasers had knowledge of the fact that the appellant claimed that a will existed in which the property was devised to her and that she was searching for it and would present it for probate if and when it should be found, it must be held that in purchasing the properties they took title thereto in trust for her. The properties were sold in probate proceedings before the will was discovered, two of the sales being made after the court had denied a petition to admit a supposedly lost will to probate. While it is alleged that the purchasers knew that the deceased had executed a will in favor of this appellant, it is not alleged that they knew that this will was still in existence or that it would later be found. In many cases where it is known that a will had been executed at some former time no will is ever found. Not only were these probate sales regular in all respects, but they were not directly affected by the existence or non-existence of a will. There is nothing in the situation which appears to take this case out of the usual rule. Section 510 of the Probate Code provides for the revocation of letters of administration issued on the ground of intestacy, upon the admission to probate of a will of the deceased. The effect of section 525 is to confirm and make valid the acts of the administrator prior to the time his letters are revoked. Similar provisions were in effect at the times here in question.

[1, 2] While the appellant was entitled to follow the proceeds of these sales in the hands of those to whom these proceeds were distributed, the sales were valid and she cannot take the property from purchasers who bought it in good faith and for value from the administrator, who sold it at regular probate sales at a time when such proceedings appeared to be and were valid. Thompson v. Samson, 64 Cal. 330, 30 P. 980. So far as disclosed by the complaint these sales would have been perfectly good even if the will had been admitted to probate before distribution was ordered. There may have been undue haste in making distribution after discovery of the will, as the appellant claims. Her real grievance is not that there was anything wrong with the sales of the property, but that the proceeds of those sales were distributed to the wrong person. With this error or wrongful act, whichever it was, the purchasers at these probate sales had nothing to do. It follows that no sufficient reason for setting aside these sales is alleged in the complaint.

A further consideration is that this action was barred by the provisions of section 793 of the Probate Code, which provides that no action for the recovery of property sold by an administrator can be maintained unless it is commenced within three years after the settlement of the final account of the administrator or within three years after the discovery of any fraud. The complaint alleges that after the appellant was appointed administratrix with the will annexed in September, 1931, she made a search for the person to whom the balance of the estate had been distributed but could not find him at his address in Denver, Colorado, from which he had disappeared. It is further alleged that she thereafter prosecuted an action against this person and others "without success." It is argued that these efforts and the consequent delay explain the tardy filing of this suit.

[3] It is argued that "the respondents became trustees of plaintiff and appellant under section 2224 of the Civil Code" and that "an element of fraud, actual or constructive, is the basis upon which the trust here is founded." If this be true it would seem equally true that the appellant discovered this element of fraud when she found the will, or at least when the will was

admitted to probate. However, this action was not brought until ten years later.

It is further argued that any settling of the account of the public administrator was interlocutory in character, that no right of action accrued in appellant's favor until April 12, 1940, when distribution was finally made to her, and that the three-year period did not begin to run until that date, when her final account as administratrix was settled.

[4] It seems to follow from the language used in section 793 that the settlement of the final account referred to as starting the running of the period is that of the administrator who made the sale which it is sought to set aside. In Dennis v. Bint, 122 Cal. 39, 54 P. 378, 380, 68 Am.St.Rep. 17, where it was claimed the administratrix who made the sale had never qualified and that no final account had been approved, the court said: "Our whole scheme for settling the estates of decedents 'looks to a speedy close of administration.' * * * In our opinion, the administratrix was allowed, under the amendment of 1880, a reasonable time in which to obtain settlement of her final account, and that, failing in this, the statute began to run * * *." It is hardly thinkable that in thus limiting the time for bringing such an action, which affects third persons and the title to lands, it should have been intended to make the starting of the period dependent upon the act of some future administrator who might not even be appointed until many years later, and then possibly to finally wind up some forgotten matter in the estate.

[5] It appears from this complaint that the public administrator filed his final account with a petition for distribution, and that distribution was ordered on May 10, 1929. It not only inferentially appears that this final account was approved, since the public administrator was discharged on January 24, 1930, but as has been held under section 1573 of the Code of Civil Procedure, the predecessor of section 793 of the Probate Code, the three-year statute began to run after a reasonable time in which to obtain a settlement of that account had elapsed. Dennis v. Bint, supra; In re Estate of Bryan, 99 Cal.App. 113, 277 P. 1068. The appellant had a right of action at least upon her appointment as administratrix, no reason appears for the delay of more than ten years, and it also appears that the purchasers at these sales have been prejudiced by such delay in bringing this action. We think the court was justified in holding that the action was barred both by this statute and by laches.

The judgment is affirmed.

GRIFFIN, J., concurred.

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53 Cal.App.2d 667

CEDZO v. BERGEN et al.

Civ. 13057.

District Court of Appeal, Second District, Division 3, California.

July 29, 1942.

Hearing Denied Sept. 24, 1942.

1. Automobiles ⚷244(36)

In action against motorist for injuries sustained by passenger in another automobile in collision at street intersection, evidence sustained finding implied in verdict for defendant motorist that defendant was not guilty of negligence proximately contributing to the collision.

2. Appeal and error ⚷1064(1)

In action for injuries sustained in automobile collision wherein jury returned a verdict in favor of defendant, the fact that evidence would have amply supported a contrary verdict made it necessary for District Court of Appeal to give careful consideration to asserted errors in law relative to instructions.

3. Negligence ⚷93(1)

Evidence from which it could be deduced that driver of colliding automobile in which passenger was riding had failed to make boulevard stop, which on account of intervening street car tracks he was required to make 180 or 140 feet from extended curb-line of intersecting street would not warrant charging passenger with responsibility for negligence of the driver so as to render passenger guilty of contributory negligence barring recovery.

4. Appeal and error 🔑382(12)

Where pleadings in action against motorist for injuries sustained by passenger in another automobile raised issue as to passenger's contributory negligence, passenger did not request an instruction that evidence was insufficient to support a verdict against him on such issue but did request an instruction that driver's negligence was not imputable to passenger, passenger was "estopped" from asserting error in the giving on court's own motion of instructions submitting issue of passenger's contributory negligence notwithstanding there was no evidence thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

5. Trial 🔑203(1)

Generally it is proper for court to state to jury issues raised by pleadings.

6. Appeal and error 🔑882(12)

A party is "estopped" from asserting error in an instruction requested by him or by an adversary, if the instruction requested by adversary merely invokes the same proposition that has been asserted by party complaining.

7. Trial 🔑296(4)

In automobile passenger's action for injuries sustained in collision, an erroneous instruction relative to negligence of driver of automobile in which passenger was riding in failing to stop before entering intersection was not prejudicial to passenger in view of other instructions that driver's negligence was not imputable to passenger.

8. Appeal and error 🔑1064(1)

Where question of defendant motorist's negligence was substantially the same whether automobile in which plaintiff was riding was required to stop at stop sign or stop line, which due to intervening street car tracks alongside highway were placed some distance from intersection, or at curb line of highway, error in giving instruction in terms of statute as amended after collision, from which it might be inferred that stop at curb line was required, was not prejudicial to plaintiff. Vehicle Code §§ 82.5, 577, St.1937, p. 413, St.1935, p. 190, St.1939, p. 1608; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Stephen Cedzo against Robert Bergen and another for injuries sustained in an automobile collision at street intersection. From a judgment for defendants, plaintiff appeals.

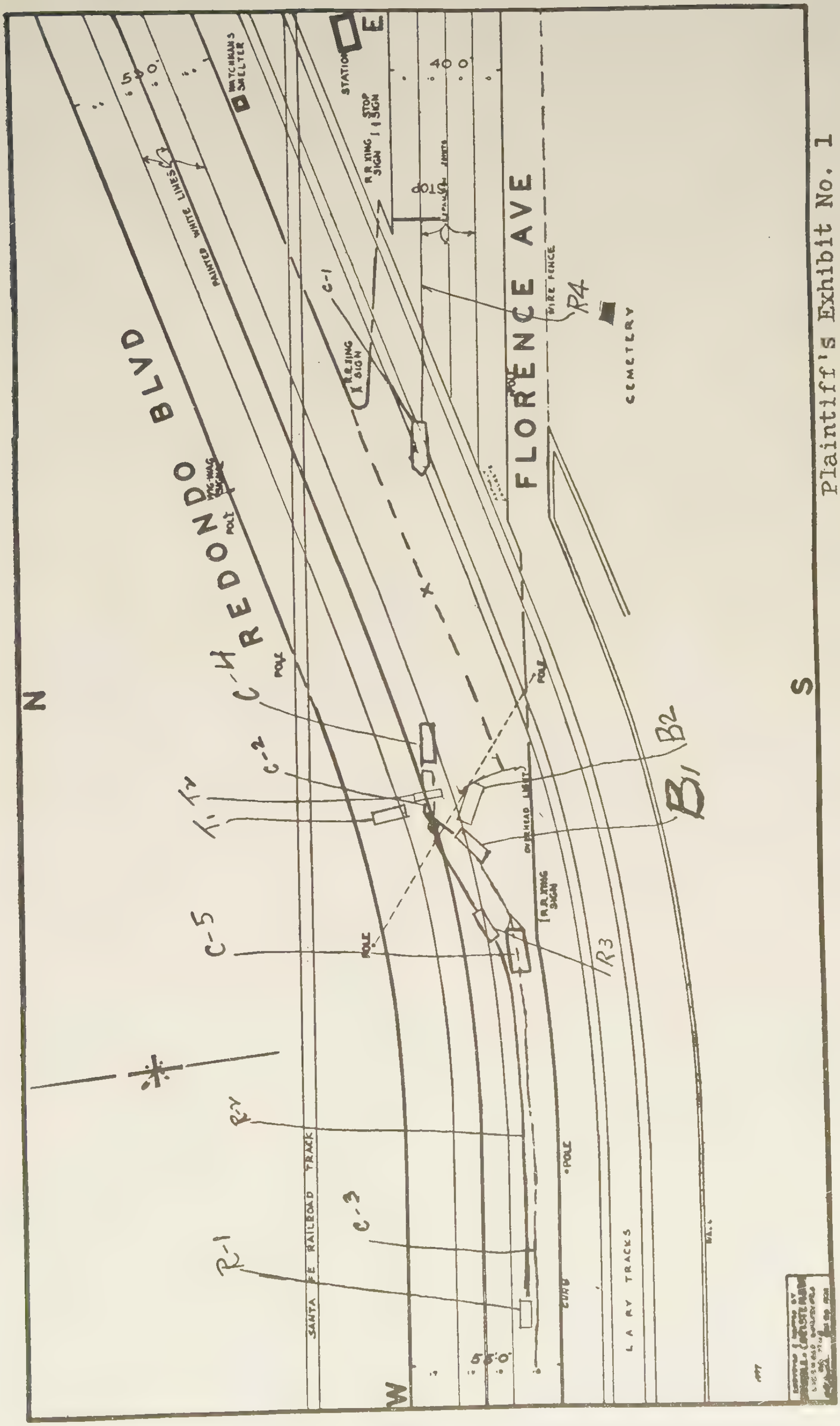
Judgment affirmed.

Lawrence E. Drumm and H. Spencer St. Clair, both of Los Angeles, for appellant.

Spray, Davis & Gould, of Los Angeles, for respondents.

SCHAUER, Presiding Justice.

This case arises out of a collision of automobiles at an intersection of highways, the configuration of which presents a situation of particular difficulty for vehicular traffic and is of basic importance in determining this appeal. The intersection is that of Redondo Boulevard and Florence Avenue in the city of Inglewood. Both thoroughfares are broad, paved highways, the Florence Avenue roadway being 40 feet in width and Redondo Boulevard being 50 feet wide. Redondo Boulevard is signposted as a through highway. Florence Avenue runs approximately east and west and converges with Redondo Boulevard, which latter highway continues westerly almost directly in line with the extended lines of Florence. At the intersection, Redondo Boulevard curves slightly (about 19 degrees) toward the north and continues in a general east northeasterly direction. Complicating the problems of the intersection is the fact that throughout the area in question double streetcar tracks of the Los Angeles Railway (on its private right of way) parallel Redondo Boulevard adjacent to it on the southerly side. Apparently to avoid the hazard of stopping motor vehicles on the street railway company's right of way as it crosses Florence Avenue, the stop sign and white line marker controlling traffic on Florence Avenue approaching the intersection from the east are placed east of the streetcar tracks. Thus vehicles on Florence Avenue traveling west are required to make the boulevard stop for Redondo Boulevard at a point considerably east of the actual position of the extended easterly curb line of the through highway. According to unchallenged statements in respondents' brief (assertedly based on a diagram in evidence) the stop sign is 180 feet east, and a white line marker on the roadway with the word "Stop" painted in front of it, is 140 feet east, of the extended easterly



Plaintiff's Exhibit No. 1

curb line of Redondo Boulevard. It must also be noted that according to an unchallenged statement in appellant's opening brief (likewise assertedly based on the diagram in evidence) the easterly car track paralleling Redondo Boulevard is approximately 80 feet west of a point in the center of the north half of Florence Avenue, opposite the stop sign. The intersection is open and unimpeded so far as visibility is concerned. Comprehension of all of the foregoing locale facts is essential to intelligent consideration of the reciprocal rights and duties of the parties to this action and the rules regulating their conduct in the premises.

On July 9, 1939, at approximately 2:25 a.m., plaintiff was a guest in a Ford coach which was being driven in a westerly direction on Florence Avenue by one Roberts. It is undisputed that the night was clear and the visibility good. According to testimony of the plaintiff and the driver Roberts a stop was made either at the stop sign or at the white line in the roadway. Plaintiff fixed the stopping point as just in front of the white line on the roadway while Roberts, the driver of the Ford, testified that he stopped at the flashing stop sign. As previously noted, the stop sign was approximately 40 feet east of the white line, about 80 feet east of the easterly car track, and about 180 feet east of the extended southeasterly curb line of Redondo Boulevard. Both plaintiff and the driver said that while stopped they saw defendants' automobile about 600 or 700 feet away, traveling east (toward them) on Redondo Boulevard. The lights on the car in which plaintiff was riding were burning and at least one head lamp on defendants' car was lighted. The Ford (plaintiff's car) then started up, according to plaintiff's evidence, and proceeded (at a speed not exceeding 20 miles per hour) across the street railway tracks to the point of collision, which, likewise according to plaintiff's evidence, was about 90 feet beyond the tracks (west thereof) and near the center of Redondo Boulevard. Defendants' evidence placed the point of collision at about the same point as did plaintiff's evidence so far as the east-west direction was concerned, but some 10 feet south of the center line of Redondo Boulevard. Defendant Bergen, who was the operator of the automobile owned by defendant Enochs, testified that he did not see the Ford until it was "just about" to the railway tracks, that it was then traveling about 40 miles per hour, and that the distance between the two automobiles, when he first saw the Ford, was about 200 feet. He said that he was traveling about 30 miles per hour in his right hand (the southerly) lane of traffic and that he did not slow up when he first saw the Ford but "When the cars were about 50 feet apart, I saw he was not going to stop at all, so I stepped on the brake and swerved to the left." Defendant driver also stated that his car traversed about 80 feet from the point where he first saw the Ford to the point of impact. At 40 miles per hour it would require about one and one-half seconds to travel 80 feet. It is undisputed that plaintiff received severe injuries in the collision, that he was a guest in the Ford, and that negligence of the Ford driver, Roberts, is not imputable to him.

The verdict of the jury was for defendants and plaintiff appeals from the judgment, contending (1) that the evidence is insufficient to support the judgment in that defendants' own evidence establishes that the defendant driver Bergen was guilty of negligence as a matter of law in failing to see the approaching Ford until it was approximately at the railway tracks (within 200 feet of the defendants' car) and in failing, after seeing it, to take any action to avoid the collision until the two automobiles were within 50 feet of each other; (2) that the trial court erred to the prejudice of plaintiff in instructing the jury, of its own motion, and contrary to an instruction requested by both plaintiff and defendants, that contributory negligence of plaintiff was an issue in the case; (3) that the trial court erred prejudicially to plaintiff in giving on its own motion an instruction based on a section of the Vehicle Code as amended subsequent to the accident. None of these contentions can be sustained.

[1, 2] On plaintiff's first point we are not disposed to hold that the implied finding of the jury that defendant driver was not guilty of negligence proximately contributing to the accident is as a matter of law untenable. The evidence in this regard is more thoroughly discussed later on in this opinion. Certainly, however, we must recognize that the evidence would amply support a contrary verdict. This latter fact makes it necessary for us to give careful consideration to the two asserted errors in law occurring at the trial.

Defendant pleaded contributory negligence as a defense, in the following language: "That plaintiff was guilty of negligence which proximately contributed to and caused the happening of the accident in question, in this: That at said time and place he was riding in an automobile which he knew was being driven, or as a reasonable and prudent person should have known was being driven, in a careless, reckless, negligent and unlawful manner."

[3] At the trial no evidence was elicited which could support a finding that plaintiff was guilty of negligence which proximately contributed to his injuries. There is no evidence of any lack of ordinary care by the driver of the Ford prior to the time that the boulevard stop was made on approaching the Redondo Boulevard intersection and the events thereafter disclose no negligent act or omission on the part of plaintiff. Neither defendant driver nor his witnesses claimed to have seen the Ford until it was approximately at the railway tracks—about 80 feet beyond (west of) the point where it was required to make the boulevard stop—but even if we could deduce from the evidence of defendants as to the rate of speed of the Ford at the car tracks that it had failed to make the boulevard stop we should still lack a reasonable basis for charging plaintiff with personal responsibility for such negligence of the driver Roberts (see Chapman v. Pacific Electric Ry. Co. (1927), 85 Cal.App. 69, 74, 258 P. 1006).

Plaintiff urges that the case was tried by both parties on the theory that contributory negligence of the plaintiff was not in issue and points out that both plaintiff and defendants requested the court to instruct the jury as to the issues to be determined, as follows: "Issues to be Determined. The issues to be determined by you in this case are these:

"First: Was the defendant negligent?

"If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely:

"Was that negligence the proximate cause of any injury to the plaintiff?

"If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you then will find what damage plaintiff has suffered and return a verdict in his favor for the amount thereof.

"As indicated in this instruction, you should first determine the question of liability.

"Requested by Plaintiff. Requested by Defendant."

The above quoted requested instruction, however, was refused and the court of its own motion gave an instruction reading as follows: "By The Court No. 1. The issues to be determined by you in this case are these:

"First: Was the defendant negligent?

"If you answer that question in the negative, you will return a verdict for the defendant. If you answer it in the affirmative, you have a second issue to determine, namely:

"Was that negligence a proximate cause of any injury to the plaintiff?

"If you answer that question in the negative, plaintiff is not entitled to recover, but if you answer it in the affirmative, you then must find on a third question:

"Was the plaintiff negligent?

"If you find that he was not, after having found in plaintiff's favor on the other two issues, you then must fix the amount of plaintiff's damages and return a verdict in his favor.

"If you find that plaintiff was negligent, you then must determine a fourth issue, namely:

"Did that negligence contribute in any degree as a proximate cause of the accident?

"If you find that it did, your verdict must be for the defendant, but if you find that it did not, and you previously have found that there was negligence on defendant's part which proximately caused plaintiff injury, you then must fix the amount of plaintiff's damages and return a verdict in his favor.

"As indicated in this instruction, you should first determine the question of liability." It will be noted that by this instruction the jurors were told that plaintiff's negligence *was an issue to be determined by them* and that if they found that plaintiff was negligent and that his negligence contributed in any degree as a proximate cause of the accident "your verdict must be for the defendant." Appellant further urges that the impropriety of the above quoted instruction was aggravated by the court through its giving, likewise of its own motion, an instruction defining contributory negligence as follows: "Contributory Negligence—Definition. Contributory negligence is negligence on the part of a person injured which, cooperating in *some degree* with the negligence of another, *helps* in proximately causing the injury of which the former complains.

"One who is guilty of contributory negligence may not recover from another for the injury suffered. (The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation." (Italics added.) It is argued, in effect, that the definition quoted coupled with the fact that there was no evidence which justified submitting the issue to the jurors, would reasonably tend to confuse them.

[4-6] If the matter stood just as above delineated the error would be apparent, but in fairness to the trial court it must also be noted that the issue as to plaintiff's contributory negligence was raised by the pleading, that the plaintiff did not request an instruction that the evidence was insufficient to support a verdict against the plaintiff on the issues so raised, and on the contrary plaintiff did request the following instruction (which was given): "Direction Against Imputation As to a Plaintiff—Contributory Negligence. You are reminded of the fact that the vehicle in which plaintiff Stephen Cedzo was riding at the time of the accident in question was then being operated by Melbourne T. Roberts. I instruct you that the driver's negligence, if any, may not be imputed to the plaintiff and that, therefore, you shall find that there was no contributory negligence on the part of the plaintiff Stephen Cedzo unless you find that there was personal negligence on his part—that is, some negligent conduct of his own, which contributed as a proximate cause to his injury." Plaintiff's request for that instruction was impliedly a request that the issues on plaintiff's contributory negligence be submitted to the jury and having requested such instruction the plaintiff cannot complain either that it was given or that the court gave the other two instructions above quoted. The first one merely told the jury that the issue was before them—as plaintiff impliedly requested—and the other defined the term. While the definition is vague there is no contention that it is prejudicial in form; the objection is to the fact that it was given at all, not to its form or substance as such. As a general rule it is proper for the court to state to the jury the issues raised by the pleadings (24 Cal.Jur. 825) and it is also true that a party is estopped to assert error in an instruction requested by him. The same rule prevails as to instructions requested by an adversary if they merely invoke the same proposition which has been asserted by the party complaining (Yolo Water & Power Co. v. Hudson (1920), 182 Cal. 48, 51, 186 P. 772; Vickerson v. Standard Auto Sales Co. (1923), 64 Cal.App. 287, 290, 221 P. 392; Hunt v. Sutter-Butte Canal Co. (1924), 66 Cal.App. 363, 369, 225 P. 884; Chase v. Southern Pac. Co. (1931), 119 Cal.App. 341, 345, 6 P.2d 540; Musante v. Guerrini (1932), 125 Cal.App. 556, 562, 13 P.2d 965). We hold that this rule likewise governs instructions given by the court of its own motion under the circumstances shown here.

Plaintiff's third point presents a more serious problem but one which upon analysis appears not to be prejudicial. At the time the accident occurred, July 9, 1939, section 577 of the Vehicle Code provided that "The driver of any vehicle upon approaching any entrance of a highway or intersection signposted with a stop-sign as provided in this code shall stop *at such sign* before entering or crossing such highway or intersection." St.1935, p. 190. (Italics added.) In 1939, but effective *after* the date of the accident in question, that section was amended to read, "The driver of any vehicle upon approaching any entrance of a highway or intersection signposted with a stop sign as provided in this code, except as otherwise permitted or directed in this code, shall stop before entering the nearest crosswalk or, if none, then at a limit line when marked, otherwise before entering such highway or intersection." (Stats.1939, ch. 320, p. 1608, sec. 5.) It was in this last quoted form that the section was read to the jury as an instruction by the court of its own motion. The instruction as given included the heading, "Vehicles Must Stop at Through Highways." Plaintiff also quotes another instruction, given at the defendants' request (modified by the court in a portion not material here), reading as follows: "I instruct you that as a matter of law Redondo Boulevard at the place where this accident occurred was outside a residential or business district*;* ~~and was what is commonly known as 'a through highway'~~ *;* and in this connection I further instruct you that if *you find that Redondo Boulevard was a through highway and that* the defendant Mr. Bergen was exercising ordinary care, he had a right to assume that other drivers would obey the law and before crossing Redondo Boulevard at Florence Avenue would bring their cars to a stop before entering or crossing Redondo.

"You are further instructed that if Mr. Bergen was exercising ordinary care he had a right to further assume that any driver about to cross Redondo Boulevard which had brought his car to a stop *as is required* at the entrance to a through highway, would yield the right of way to him or any other cars traveling on Redondo Boulevard which were approaching so closely thereto as to constitute an immediate hazard." In this connection plaintiff contends that "The natural effect of the erroneous instruction complained of [section 577 as amended in 1939] together with the last quoted instruction, would be to inform the jury that the Ford automobile in which appellant was riding should have come to a stop before it entered Redondo Boulevard at the line drawn on the Plaintiff's Exhibit No. 1, [a map of the locale] indicating the prolongation of the southerly curb line of Redondo Boulevard which said prolongation was placed thereon by respondents' attorney." Plaintiff also calls attention to the fact that the jury were instructed that a violation of section 577 of the Vehicle Code would be negligence *per se* and urges that the effect of that instruction, coupled with the other two instructions last mentioned, was to inform the jury that the driver of the car in which plaintiff was a guest was guilty of negligence on his own testimony in failing to stop again precisely at the entrance (curb line prolongation) to Redondo Boulevard even if he had already stopped at the stop sign.

[7] We do not find such contention reasonable. Examination of Plaintiff's Exhibit No. 1 discloses that it portrays the position of the stop sign, the white line painted on the roadway, and other topographical features, as well as a dotted line indicative of the prolongation of the southerly curb of Redondo Boulevard. There is no justification for inferring that such dotted line on the diagram could have been construed by the jury as indicating a "limit line" marked on the roadway. It appears to us that the jury most probably would have construed the words "limit line" as used in section 577 as denoting the white line painted on the roadway and depicted on Plaintiff's Exhibit No. 1. It is true that there was a conflict in the testimony of plaintiff and the driver Roberts as to whether the Ford stopped at the stop sign or at the stop line. But it was plaintiff himself who testified that the stop was made at the white line. If the jury believed plaintiff's testimony in that respect they must have concluded that the law as erroneously stated in the instruction being discussed was complied with by Roberts. If they believed Roberts' testimony that the stop was made at the stop sign and concluded that the law was violated by him in not stopping at the white line, they still could not, under the instructions given, have imputed Roberts' negligence to plaintiff. In either event the stop would have been made before the defendant Bergen saw the Ford and the question as to whether Bergen was or was not negligent in failing to see the Ford sooner or, after seeing it, in failing to take some action sooner to avoid the collision, would have been substantially the same. The very fact that the stop sign and the stop line were placed at such a considerable distance back from the curb line (extended) of Redondo Boulevard obviously placed on the driver of the car in which plaintiff was riding the responsibility of recognizing that a car approaching from the west on Redondo Boulevard, even though a considerable distance away from the actual intersection, might constitute an immediate hazard to a car attempting to cross such intersection from a start on Florence Avenue at either the stop sign or the stop line.

As to the right of way rule the jury were correctly instructed that "The driver of any vehicle which has stopped as required by this code at the entrance to a through highway shall yield the right of way to other vehicles which have entered the intersection from the through highway or which are approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on the through highway shall yield the right of way to the vehicle so about to enter or cross the through highway." The phrase "at the entrance to a through highway" cannot be narrowly construed to mean precisely at the extended curb line. In many instances it would be impracticable, if not impossible, to erect stop signs exactly "at the entrance" to the highway if such a narrow construction were placed on those words. Section 82.5 of the Vehicle Code, St.1937, p. 413, defines "through highway" as "a highway or portion thereof *at the entrance* to which vehicular traffic from intersecting highways is required by law to stop before entering or crossing the same, and when stop signs are erected as provided in this code." (Italics added.) In the case before us it is obvious that in the liberal view both the stop sign and the stop line must be regarded as being "at the entrance" to the through highway even though they are a substantial distance from the extended curb line bounding the limit of the intersection.

It is apparent that the jury, in the light of all the circumstances depicted in evidence, must have concluded that defendants' car constituted an immediate hazard to the one in which plaintiff was riding at the time the latter made its stop, if it did stop, and that defendant Bergen was not negligent either in failing to see Roberts' car sooner or in failing to stop or turn sooner than he did. It is to be recognized that according to defendant Bergen's evidence the Ford car was approximately at the railway tracks when he first saw it, that the cars were then about 200 feet apart, that the Ford car was traveling at 40 miles per hour and defendants' car at about 30 miles per hour. The cars were therefore approaching each other at a combined speed of about 70 miles per hour (102.66 feet per second) which means that only two seconds would have been consumed in reaching the point of impact if neither slowed down. The fact that during the last few moments each did perhaps decrease its speed would add but little to the seconds separating them. If we accept the witness Roberts' testimony that defendants' car was traveling at 50 miles per hour and was 600 feet away at the time he stopped at the stop sign and deduct the approximately 200 feet which Roberts' car traversed from the stop sign to the point of impact we have 400 feet left for defendants' car to travel which, at 50 miles per hour (73.33 feet per second) would have consumed less than five and one-half seconds. We cannot hold that it was unreasonable for the jury to conclude that a car approaching at 50 miles per hour on a through highway so close to an intersection as to reach approximately its center in less than five and one-half seconds was an immediate hazard to a car which had stopped at a stop sign or line 180 to 140 feet back of the extended curb line of that intersection. If the jury believed that the Ford car was stopped at either the stop sign or the stop line but notwithstanding such fact had attained a speed of 40 miles per hour by the time it reached the railway tracks (a distance of 40 to 80 feet) they may also have inferred that the driver Roberts was hurrying in an effort to beat defendants' car across the intersection.

[8] The jury apparently believed that it was the duty of the Ford driver to yield the right of way and that defendant driver had a right to, and did, in the exercise of ordinary care, assume that he would do so. The result of failure to yield such right of way would be the same whether the failure be regarded as coming from not stopping or from not slowing down. In view of the fact that defendants' approaching car did constitute an immediate hazard to the Ford driver and that the latter did not yield the right of way, we cannot say that it is probable (Cal.Const. Art. VI. § 4½) that a different conclusion as to defendants' negligence would have been reached without the reading of section 577 as amended in 1939 and other instructions on the same subject.

From the foregoing discussion we believe it adequately appears (1) that the evidence is sufficient to support the jury's verdict, (2) that the act of the court in instructing the jury that contributory negligence was an issue in the case was invited by the plaintiff and hence cannot be availed of by him as prejudicial error, and (3) that the error in instructing the jury in the language of section 577 of the Vehicle Code as amended after the accident was not prejudicial.

The judgment is affirmed.

SHINN and PARKER WOOD, JJ., concur.

54 Cal.App.2d 136

BENDLAGE v. KOHLSAAT et al.
Civ. 12035.

District Court of Appeal, First District,
Division 1, California.
Aug. 24, 1942.

1. Judgment 🔑564(1)

An erroneous judgment, from which no appeal had been taken within time in which the right to appeal must be exercised, was "final".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

2. Appeal and error 🔑870(3)

On plaintiff's appeal from adverse judgment after demurrer had been sustained without leave to amend by reason of judgment in former action between the parties, where trial court had jurisdiction of former action and judgment was substantially in conformity with the findings but was erroneous, appellate court was without power to correct the alleged errors in such judgment.

3. Judgment 🔑576(1)

A judgment in a former action between the same parties involving the same issues is, though erroneous, a bar to a subsequent proceeding. Code Civ.Proc. §§ 1908, 1962.

4. Judgment 🔑720

In seller's action to enforce sales contract brought after former action on same contract against same defendant upon the matters pleaded and previously adjudicated, the first judgment was "res judicata". Code Civ.Proc. §§ 1908, 1962.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

5. Appeal and error 🔑770(1)

Where respondents filed no brief on appeal and did not otherwise acquaint court with grounds, if any, different from those previously litigated upon which judgment could have been sustained, District Court of Appeal could assume that point made by appellant for reversal was meritorious.

6. Pleading 🔑225(1)

Complaint, in action to set aside sheriff's sale, which was insufficient but which raised fact question of inadequacy of consideration for sale resulting in crediting 5 cents on judgment totalling in excess of $5,000, could possibly have been amended and sustaining demurrer thereto without leave to amend was error.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Theodore J. Bendlage against Deitrich Kohlsaat and others upon a contract of sale of personal property. From a judgment following an order sustaining defendant's demurrer to plaintiff's amended complaint without leave to amend, plaintiff appeals.

Reversed with directions.

C. W. Braswell, of Long Beach, for appellant.

Martin Goldman, of Los Angeles, for respondents.

WARD, Justice.

Appeal from a judgment following an order sustaining defendants' demurrer to plaintiff's amended complaint without leave to amend.

From the demurrer, both general and special, and its accompanying memorandum of points and authorities, it appears that the question involved is the effect of a judgment rendered in a prior action between the same parties; in addition, the inadequacy of consideration paid following an alleged wrongful and fraudulent levy of execution, which will be hereafter referred to.

The complaint, cross-complaint, findings and judgment in the former action are annexed to the amended complaint herein and give in detail a history of the case. The answer and the answer to the cross-complaint do not appear.

In the amended complaint in the present action it is alleged that on April 20, 1937, plaintiff and defendants, Kohlsaat and Krieger, entered into a contract whereby the former agreed to sell, and the latter agreed to purchase, personal property, consisting of formulae for the manufacture of medicinal remedies, a stock of merchandise, office and other equipment used in the manufacture and sale of the remedies, and the exclusive right to the use of the trade names "Vesodyne" and "Anthony Lily Company"; that the contract in addition to other considerations provided for the payment of a royalty based upon sales, with a provision for reconveyance for breach of this obligation.

The finding in the former case on the question of possession of the property conveyed was not outside the issues since plaintiff prayed for possession.

In that action the court found that the formulae were not secret, and that plaintiff did not and could not make delivery thereof in accordance with his representations. There is no finding that the formulae were valueless or that the products, valueless or otherwise, were sold to the public. The judgment does not rescind the contract but provides that defendant Anthony Lily Company shall retain the property, evidently upon the theory that it should be retained until formulae conforming to the representations made should be delivered, and awards monetary relief. It is not explicit as to whether sales might continue without liability or subject to royalty payments. The trial court found that defendants were not indebted to plaintiff in any amount. However, the judgment is not in excess of the court's jurisdiction and is not so irregular in matter or form that it can be said that justice was denied. The parties, the subject matter, etc., were all before the court subject to the right of the trial court to determine the question of its jurisdiction. Refraining from passing upon the form and substance of the particular judgment presented, we may adopt appellant's second theory on appeal, that the judgment was erroneous.

[1] There must be an end to litigation. In the task which has fallen to human agency to wisely and justly determine controversies, it has been found necessary to adopt certain rules to which all litigants must conform. Among these rules is one prescribing the time in which the right to appeal must be exercised. Under that rule the judgment in the first action has become final.

[2] This is not a summary proceeding. Concluding that the trial court had jurisdiction of the first action, but assuming, as appellant contends, that the judgment is erroneous, we are powerless in the present proceeding to correct the alleged errors. The judgment is substantially in conformity with the findings. On appeal, or on motion before the trial court, the judgment might have been set aside.

[3, 4] A former judgment between the same parties involving the same issues is, though erroneous, a bar to a subsequent proceeding. Edmonds v. Glenn-Colusa Irr. Dist., 217 Cal. 436, 19 P.2d 502. "If the court finds contrary to the evidence or misapplies the law—in all of these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled the controversy in accordance with the principles of abstract justice." Freeman on Judgments, 4th Ed., § 260, quoted in Estate of Harrington, 147 Cal. 124, 81 P. 546, 548, 109 Am.St.Rep. 118. The former judgment between the same parties upon the same subject, if introduced in evidence herein, would have been conclusive (Hamilton v. Carpenter, 15 Cal.2d 130, 98 P.2d 1027), or, if pleaded, as in the present amended complaint, would be conclusive as to the condition and relation of the parties upon the matters directly adjudged. Code Civ. Proc., §§ 1908, 1962. We must conclude that upon the matters pleaded and previously adjudicated, the first judgment is res judicata.

The amended complaint herein, in addition to a recital of the success of the defendants and cross-complainants in the previous litigation, alleges that, notwithstanding money had accumulated under the contract between the parties in excess of the amount of the judgment in that case, a writ of execution was wrongfully and fraudulently levied against plaintiff's title and interest in the royalties, and, in pursuance of the writ, all property and credits due under the contract were sold to plaintiff, and the original judgment credited in the sum of five cents. Plaintiff prays that the "pretended sale under execution * * * be declared of no force and effect."

[5] Respondents failed to file a brief herein, nor have they otherwise acquainted the court with the grounds, if any, different from those previously litigated upon which the demurrer could have been sustained. It may be assumed, therefore, that the point made by appellant for reversal is meritorious. Zeigler v. Bonnell, 52 Cal.App.2d 217, 126 P.2d 118; Duisenberg-Wichman & Co. v. Johnson, 123 Cal.App. 125, 128, 10 P.2d 1010. On appeal no attention has been given by them to the following question raised by appellant: "Does inadequacy of consideration paid under sheriff's sale, accompanied with unfairness, authorize the court to set aside a sale under an execution?"

[6] We assume it is respondents' theory that the prior judgment adjudicated the question of appellant's right to royalties, a position somewhat inconsistent with the return on execution which shows that included in the sale was "All right, title and interest of Theodore J. Bendlage in and to that certain contract entered into on or about April 21, 1937, by and between Theodore J. Bendlage, party of the first part, and Deitrich Kohlsaat and Mendel Krieger, parties of the second part, together with all rights or claims of whatever nature which defendant Theodore J. Bendlage, may have as against Deitrich Kohlsaat, Mendel Krieger or Anthony Lily Company, Inc." Eliminating this phase of the matter, still the amended complaint herein—possibly subject to special demurrer—raises the question of inadequacy of consideration. Five cents is the amount evidently credited upon a judgment totaling upon its face a sum in excess of $5,500. Inadequacy of consideration is a question of fact. Assuming that the complaint is insufficient in this respect, it could possibly be amended. On this latter point alone, the judgment should be reversed, with directions to overrule the demurrer, to afford plaintiff an opportunity to amend, and to take further proceedings in the cause in accordance with the views herein expressed.

It is so ordered.

PETERS, P. J., and KNIGHT, J., concurred.

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54 Cal.App.2d 99

CHILBERG et al. v. CITY OF LOS ANGELES et al.

Civ. 12034.

District Court of Appeal, First District, Division 1, California.

Aug. 19, 1942.

Hearing Denied Oct. 15, 1942.

1. Pleading 🔑87

The defense of laches must be raised by answer except when laches is apparent on the face of the complaint when defense may be raised by demurrer.

2. Action 🔑63

The application of the doctrine of "laches" is not dependent upon a delay of sufficient duration to call into operation the statute of limitations.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

3. Cancellation of Instruments 🔑34(1)

An action for rescission may be maintained only when filed with reasonable diligence, and when the subject of the controversy has been appropriated to the public use, greater diligence is required as a matter of protection of the public interest.

4. Municipal corporations 🔑742(3)

Where a municipal project for the use of water, land, power, etc., by the public has matured to the extent of having been put into service and its benefits enjoyed, any attempt to interfere with such vested public use by means of injunction, ejectment or a suit to quiet title is not approved.

5. Cancellation of instruments 🔑34(1)

Where complaint for rescission of deed to city for fraud disclosed that a public use in land had matured by erection of high tension power lines by city, cause of action based on fraud was barred by "laches" and plaintiff was relegated to an action for damages only. Civ.Code, § 1691.

6. Municipal corporations 🔑1025

Where plaintiff's only claim against City of Los Angeles was notice of rescission of deed filed more than two years after execution of deed and seven months after alleged ascertainment of true facts, action against city for damages for fraudulent representations in obtaining deed was barred by charter requirement that claims for damages be filed within six months of occurrence from which damages arose or after the claim accrued.

7. Municipal corporations 🔑1008

Under Los Angeles charter requirement that claims for damages be filed within six months of occurrence from which damages arose, filing of a claim with a department not authorized to order its payment, or a claim that does not set forth a demand for compensation, is futile.

* * *

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Suit by A. Eugene Chilberg and others against the City of Los Angeles and others for rescission, cancellation of a deed, and damages. From a judgment for defendants, dismissing the suit following the sustaining of their demurrer without leave to amend, plaintiffs appeal.

Affirmed.

Morris Lavine, of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Russell B. Jarvis, Deputy City Atty., all of Los Angeles, for respondents.

WARD, Justice.

This is an appeal by plaintiffs from a judgment in favor of defendants dismissing the action following the sustaining of their demurrer without leave to amend.

On October 31, 1938, plaintiffs executed a deed to the city of Los Angeles conveying an easement of right of way for an electric transmission line across a half section of land owned by them in consideration of a payment of $50. Plaintiffs claim they were induced to sign the deed through misrepresentation, fraud and deceit; that had they known the real facts they would not have done so; that they were inexperienced in business and legal transactions and believed the right of way was for the privilege of erecting a few poles for electric wires and that such installation would not impair their use and enjoyment of the land, nor diminish its value; that they were altogether unaware that defendants contemplated the construction of high tension electric light, heat and power lines consisting of steel towers, supporting insulators and cables, which when in operation, would carry heavy charges of electrical current and energy and would be dangerous, unsightly and injurious; that it was their understanding that the deed would not convey any interest in the land but would simply be a privilege granted for the purpose above stated; that they were unaware the contemplated installation would require a private and permanent roadway running approximately through the center of their property and containing an area of about twenty-two acres. They further claim that it had been fraudulently represented to them that similar documents and deeds were being executed by others without any compensation, and that the greatest amount defendants would pay for the desired privilege was the sum of $50.

Plaintiffs contend that they ascertained the true facts in the month of June, 1940, and that they served written notice of rescission on the defendants City of Los Angeles and Department of Water and Power of the City of Los Angeles on January 6, 1941. The notice, dated November 25, 1940, set forth the matters above enumerated, was accompanied by a tender of the consideration paid, and a demand for the cancellation and redelivery of their deed. This being refused by the defendants, the complaint in the present action was filed on March 17, 1941.

The complaint sets forth in a single count a claim for cancellation, rescission, a reconveyance of the easement of right of way, for $2,500 damages and for other relief.

There are sixteen grounds of special demurrer many of which overlap those of general demurrer. The respondents, in urging that the demurrer was properly sustained without leave to amend, advance a number of grounds, namely, (1) The facts alleged in the complaint are not sufficient to show fraud; and in this behalf they argue (a) that it was the duty of appellants to read the deed, which would have fully informed them of what they were conveying thereby, and the burden is on them to overcome the presumption that the written instrument correctly expresses the intention of the parties; (b) if they did not read the deed before signing it they have not shown such a clear and convincing case of fraud as to satisfactorily explain their failure to do so; (c) the matters alleged to have been misrepresented were all disclosed to one reading the deed; and moreover were either true, or matters of opinion, or were not material facts. (2) Appellant's right to rescind is barred by laches, and their right to recover damages is barred by their failure to file a claim within six months, as required by the charter of the city of Los Angeles.

[1, 2] The main question for decision is—does the complaint state a cause of action based on fraud not barred by laches? Unless the complaint shows laches as a matter of law this defense should be raised by answer. However, the defense of

laches "may be raised by demurrer, where laches is apparent upon the face of the complaint." Garrity v. Miller, 204 Cal. 454, 455, 268 P. 622; Goodfellow v. Barritt, 130 Cal.App. 548, 20 P.2d 740; Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987. "The application of the doctrine of laches is not dependent upon a delay of sufficient duration to call into operation the statute of limitations." Warfield v. Anglo & London Paris Nat. Bank, 202 Cal. 345, 356, 357, 260 P. 881, 885. "If, in the course of an inexcusable delay in the assertion of a right, changes occur in the subject matter of the transaction in suit or in the relative positions of the parties thereto, as a result of which it is impossible to place the parties in statu quo, and the enforcement of the right would work inequity, relief will be denied because of laches. Prejudice to defendant may prevent relief whether the change in circumstances is the result of the delay itself, or is due to the voluntary act of defendant." 30 C.J.S., Equity, § 118, p. 540. Warfield v. Anglo & London Paris Nat. Bank, supra; Stevenson v. Boyd, 153 Cal. 630, 96 P. 284, 19 L.R.A., N.S., 525; Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516; Beck v. Cagle, 46 Cal. App.2d 152, 115 P.2d 613.

[3-5] An action for rescission may be maintained only when filed with reasonable diligence. Toomey v. Toomey, 13 Cal.2d 317, 320, 89 P.2d 634; Hellman Commercial T. & S. Bk. v. Alden, 206 Cal. 592, 275 P. 794; Stevens v. Bryson, 135 Cal. App. 684, 27 P.2d 932. When the subject of the controversy, as in the present case—land—has been appropriated to public use greater diligence is required as a matter of protection of the public interest. In Hillside Water Co. v. Los Angeles, 10 Cal.2d 677, at page 688, 76 P.2d 681, at page 687, a proceeding in which it was sought to enjoin the defendant city from flowing, pumping or otherwise exporting water from certain wells, the court said: "When a public use has attached a prohibitory injunction should be granted only in the event that no other relief is adequate. Montecito Valley Water Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113. In such cases compensation in lieu of injunction is preferred. Newport v. Temescal Water Co., 149 Cal. 531, 538, 87 P. 372, 6 L.R.A., N.S., 1098. The doctrine that intervention of a public use will foreclose the right to an injunction rests not only on estoppel. The doctrine may be applicable even though the aggrieved party be in ignorance of the violation of his rights. In other words, implied dedication to public use is not essential to the operation of the doctrine. Public policy in favor of a continuance of the public use may also be invoked to prevent a prohibitive injunction. Peabody v. Vallejo, supra, 2 Cal.2d 351 at page 378, 40 P.2d 486. When public use has attached for any recognized reason, reverse condemnation proceedings may be invoked and applied." When a project for the use of water, land, power, etc., by the public has matured to the extent of having been put into service and its benefits enjoyed, any attempt to interfere with such vested public use by means of injunction, ejectment or a suit to quiet title is not approved. "Under such circumstances, his remedy will be confined to a mere right to recoup adequate damages to compensate him for the loss of his property on account of such appropriation. This remedy is based on the theory that although the intervening public rights prevent interference with the use and control of the property on the part of the owner, he is, nevertheless, entitled to compensation on the principle applicable to a proceeding in reverse condemnation. Private property may not be taken, even for the benefit of the public, without just compensation. That principle has been frequently announced by the decisions of our courts. Gurnsey v. Northern California Power Co., 160 Cal. 699, 117 P. 906, 36 L.R.A., N.S., 185; Collier v. Merced Irr. District, 213 Cal. 554, 563, 2 P.2d 790; Peabody v. City of Vallejo, 2 Cal.2d 351, 377, 40 P.2d 486; Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677, 688, 76 P.2d 681." Peckwith v. Lavezzola, 50 Cal.App.2d 211, 218, 122 P.2d 678, 682. This rule is equally applicable to a remedy by rescission. Civ.Code, § 1691. In the present case, the complaint alleged the erection and maintenance of high tension electric light, heat and power lines, which consist "of steel towers, supporting insulators and cables, and [defendants] did construct and now maintain a private and exclusive permanent roadway with 'no trespassing' signs thereon, all of which runs approximately through the middle of plaintiffs' property and has taken approximately twenty-two acres thereof." Upon the allegations as they appear in the complaint, a public use having matured, plaintiff is relegated to an action for damages. Wil-

liams v. Merced Irr. Dist., 4 Cal.2d 238, 48 P.2d 664; Los Angeles Athletic Club v. Long Beach, 128 Cal.App. 427, 17 P.2d 1061.

[6, 7] The complaint alleged that the deed was executed October 31, 1938, and that "in the month of June, 1940, plaintiffs ascertained and learned the fact and truth," etc. The "complaint on rejected claim for cancellation, rescission and damages" was filed March 17, 1941. It appears that approximately two years, two months and four days expired from the date of the execution of the deed to the date of service of written notice of rescission, and that over seven months passed between the alleged ascertainment of the "truth" and the service of the notice of rescission.

The complaint does not allege that a claim for damages was filed with the city within six months after the occurrence from which the alleged damages arose, or within a similar time after the claim accrued. Los Angeles Charter, § 376. Such a claim is a condition precedent to suit. The claim filed was in the form of a notice of rescission directed to the city of Los Angeles and the Department of Water and Power of the city of Los Angeles. The only claim filed, assuming that it could be construed as a claim for damages, was not within the six months' period after accrual. It is unnecessary therefore to discuss the form, etc., of the claim as the remedy of damages is barred by failure to file the claim contemplated by the provisions of the charter. The filing of a claim with a department not authorized to order its payment, or a claim that does not set forth a demand for compensation, is futile. Continental Ins. Co. v. Los Angeles, 92 Cal.App. 585, 268 P. 920; Haigh v. City of Los Angeles, 139 Cal.App. 595, 34 P.2d 779; Los Angeles Athletic Club v. Long Beach, supra; Chapman v. City of Fullerton, 90 Cal.App. 463, 265 P. 1035; Crescent Wharf, etc., Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028; Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712; Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106; Douglass v. City of Los Angeles, 5 Cal.2d 123, 53 P.2d 353; Skinner v. City of Los Angeles, 5 Cal.2d 317, 54 P.2d 446; Wilkes v. City, etc., of San Francisco, 44 Cal.App.2d 393, 112 P.2d 759.

For the reasons stated, it is not necessary to consider the other grounds of demurrer. In view of the fact that the complaint can not be amended to state a cause of action, the judgment should be and it is hereby affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

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54 Cal.App.2d 105

SAN FRANCISCO UNIFIED SCHOOL DIST. v. CITY AND COUNTY OF SAN FRANCISCO (BUSH et al., Interveners).

Civ. 12174.

District Court of Appeal, First District, Division 2, California.

Aug. 20, 1942.

Hearing Denied Oct. 15, 1942.

1. Schools and school districts 🔑64

The legislature had power to designate school districts as successors in title to school boards which had theretofore held property in trust for school purposes, since public schools are matters of state concern, and the legislature has control over the management and title to school property, at least so long as it is not diverted from school purposes. School Code, §§ 2.140, 2.141.

2. Schools and school districts 🔑64

The purpose and effect of statutes providing that every school district must be designated by the name and style of the district and of the county, and in that name the trustees may sue and be sued, and hold and convey property for the use and benefit of such district, was to designate the school districts as successors in title to school boards which had theretofore held property in trust for school purposes. School Code, §§ 2.140, 2.141.

3. Schools and school districts 🔑41(1)

Where realty in the City of San Francisco was originally conveyed to the Board of Education of the city and county of San Francisco in 1858 by the commissioners of the funded debt of the City of San Francisco, pursuant to statute enacted earlier in the same year, and subsequently the San Francisco unified school district was created, title to the realty passed under statute to the district. St.1858, p. 341; School Code, §§ 2.140, 2.141; School Code, § 2.2120, as added by St. 1935, p. 2160.

4. Schools and school districts ⚷22

A trust created by conveyance of realty in 1858 to the Board of Education of the city and county of San Francisco by the commissioners of the funded debt of the City of San Francisco, pursuant to statute enacted earlier in the same year, was not revoked by an implied repeal by enactment of subsequent statutes authorizing board of supervisors of city and county to lease the realty for term of 20 years by public bid, and to use the rentals solely for paying school bonds. St.1858, p. 341; St.1873-4, p. 848, §§ 1–5, 6–8.

5. Statutes ⚷158

Repeals of statute by implication are not favored.

6. Statutes ⚷159

The legislature will not be presumed to have intended by a later act to repeal a former one if by a fair and reasonable construction, effect can be given to both, and to overcome that presumption the two acts must be so inconsistent that they cannot have concurrent operation.

7. Records ⚷18(1)

Under the McEnerney Act providing that an action to quiet title may be brought if public records be lost or destroyed by any person who claims an estate in realty and who is by himself or his tenant, or other person, holding under him, in actual and peaceable possession of any realty, possession so required of a plaintiff is essential to give the court jurisdiction over the subject-matter of the action. Gen.Laws 1937, Act 1026, § 1.

8. Judgment ⚷499

Where jurisdictional defect was admitted by a stipulation of the parties, that defect could be taken advantage of by collateral attack though the defect did not appear on the face of the judgment roll.

9. Judgment ⚷499

Though judgment is valid on its face, if the party in favor of whom the judgment runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, it is court's duty to declare the judgment void.

10. Records ⚷18(10)

Where city and county did not have actual and peaceable possession of realty at time of action to quiet title under the McEnerney Act, decree establishing title in city and county was void for want of jurisdiction, and that decree was no defense to city and county in subsequent action to quiet title by school district against city and county. Gen.Laws 1937, Act 1026, § 1.

11. Limitation of actions ⚷44(2)

Where school district not only was seized and possessed of realty through its tenant within five years of commencement of suit to quiet title, but still had seisin and possession up to time of the institution of the action, the suit was not barred by limitations. Code Civ.Proc. § 318.

◆

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Suit by the San Francisco Unified School District against the City and County of San Francisco to quiet title to certain realty in the City of San Francisco, wherein Philip L. Bush and others, constituting the Board of Education of the City and County of San Francisco, intervened. From a decree in favor of the plaintiff, the City and County of San Francisco and the interveners appeal.

Affirmed.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for defendant and appellant.

Norman J. Hearn, of San Francisco, for interveners and appellants.

Cooper, White & Cooper and Irving G. Breyer, all of San Francisco, for respondent.

DOOLING, Justice pro tem.

From a decree quieting the title of San Francisco Unified School District to a parcel of land at the corner of Fifth and Market Streets in San Francisco, defendant City and County of San Francisco and plaintiffs in intervention constituting the Board of Education of the city and county both appeal.

The lot in question was originally conveyed in 1858 to the Board of Education of the City and County of San Francisco by the Commissioners of the Funded Debt of the City of San Francisco, pursuant to a statute enacted earlier in the same year. Stats.1858, p. 341. In 1908 the Board of Education executed a lease of this property to a private corporation for a term of thirty-five years. With the end of this term drawing near a controversy arose as to whether title to this lot was vested in San Francisco Unified School District or in the City and County of San Francisco, and the suit now before us on appeal was commenced to determine this controversy.

A preliminary question is presented as to whether title, if it has not become vested in appellant city and county, is now in respondent San Francisco Unified School District or in its Board of Education. This question hardly passes beyond the academic since, to protect the school district in any event, the Board of Education filed a complaint in intervention asserting title in itself and the board, as noted, has taken an appeal from the judgment.

Under the statute of 1858 above referred to, and the deed made by the Commissioners of the Funded Debt to the Board of Education pursuant to its terms, title to the property vested in the grantees and "their successors in office." Without pursuing the subsequent statutory history further back than 1872, with the adoption of the Political Code in that year, the Legislature incorporated into that code section 1575 reading as follows:

> "Every school district must be designated by the name and style of '——— district (using the name of the district), of ——— county' (using the name of the county in which such district is situated); and *in that name the trustees may* sue and be sued, and *hold and convey property* for the use and benefit of such district." (Italics ours.)

[1-3] This section remained in full force and unamended from 1872 until the adoption of the School Code in 1929 when its provisions were reenacted in sections 2.140 and 2.141, School Code, and have been in effect as so enacted ever since. During this seventy-year period appellants have not called to our attention any legislative enactment purporting to authorize Boards of Education or of School Trustees to hold school property in their names and during that entire period the legislative intention as expressed in the sections above quoted has apparently been that school property should be held in the names of the school districts and not in the names of their governing boards. Since the public schools are a matter of state concern (Butterworth v. Boyd, 12 Cal.2d 140, 152, 82 P.2d 434, 126 A.L.R. 838; Esberg v. Badaracco, 202 Cal. 110, 115, 259 P. 730) and the Legislature has control over the management and title to school property, at least so long as it is not diverted from school purposes (Pass School District v. Hollywood City School District, 156 Cal. 416, 105 P. 122, 26 L.R.A.,N.S., 485, 20 Ann.Cas. 87), we must hold that the Legislature had power to designate the school districts as successors in title to school boards which had theretofore held property in trust for school purposes, and we are satisfied that such was the purpose and effect of Political Code, section 1575. Upon the creation of the San Francisco Unified School District the title to this property passed to it under School Code, section 2.2120, as added by St. 1935, p. 2160.

[4] Appellant city and county calls attention to statutes 1873–4, page 848, and bases upon its provisions a claim that the trust created by the deed of 1858 from the Commissioners of the Funded Debt to the Board of Education was revoked as to the lot in question by an implied repeal. The statute of 1858 above referred to, under which the deed was executed, provides in section 7:

> "This trust may, at any time, be revoked by the Legislature of this state." Stats. 1858, p. 342.

In considering the effect of this statute of 1873-4 it must be borne in mind that under the statute of 1858 the lot in question had been conveyed to the Board of Education "in trust for said city and county * * * for the use and benefit of the school department of said city and county * * *" (Stats.1858, p. 341, § 1) and that the Legislature of the State had plenary power over its disposition so long as it was not diverted from the purposes of such trust. Pass School District v. Hollywood City School District, supra. It was also true, of course, that prior to 1879 the Legislature was not prohibited from the enactment of special legislation dealing with this particular lot. Nevada School District v. Shoecraft, 88 Cal. 372, 26 P. 211.

By section 1 of this statute of 1873-4 "the Board of Supervisors of the City and County is hereby authorized to lease, for a term of twenty years" the lot here in suit by public bid under certain provisions therein set out. By section 2 the rentals from the lot were to be used solely for the purpose of paying the principal and interest of the school bonds authorized to be issued under section 3 of the act. The proceeds of the sale of such bonds by section 5 were authorized to be expended "for the sole purpose of purchasing school sites and erecting school buildings." Section 6 imposed the duty on the Board of Supervisors to pay any deficiency of principal and interest of such bonds, if any occurred, from the general fund. Section 7 provided for the retirement of the bonds and section 8 read:

"All Acts and parts of Acts, so far as they are inconsistent with the provisions of this Act, are, for the purposes of this Act, hereby repealed."

It will be noted that rather than diverting the property from the purposes of the trust to which it was devoted under the statute of 1858, this statute was in furtherance of that trust: "for the use and benefit of the school department of said city and county." The unusual form of the repealing section is also enlightening. By its terms inconsistent acts are not absolutely repealed. They are repealed only "for the purposes of this Act." It is a fair construction of this statute that it was the purpose of the Legislature in its enactment not to repeal the trust as to this lot created under the statute of 1858, but only to grant certain special powers to the Board of Supervisors over the lot for a limited period in furtherance of that trust; and not to divest the title of the school district to this lot, but to repeal its powers over it only so far as inconsistent with the carrying out of the purposes of the act, i.e., the making of a lease of the lot for a period of twenty years by the Board of Supervisors in the manner therein provided for the benefit of the public schools of San Francisco. Ample reason for this special procedure is to be found in the fact that by section 6 the full faith and credit of the city and county were placed behind the bonds authorized to be issued and paid from the proceeds of the leasing of the lot.

[5, 6] This construction comports with the settled rule that repeals by implication are not favored; that it will be presumed that the Legislature did not intend by a later act to repeal a former one, if by a fair and reasonable construction effect can be given to both; and that to overcome this presumption the two acts must be so inconsistent that they cannot have concurrent operation. Boyd v. Huntington, 215 Cal. 473, 482, 11 P.2d 383; Penziner v. West American Fin. Co., 10 Cal.2d 160, 176, 74 P.2d 252; Fay v. District Court of Appeal, 200 Cal. 522, 538, 254 P. 896; Railroad Comm. v. Riley, 192 Cal. 54, 57, 218 P. 415; 23 Cal.Jur. 694.

It is inconceivable to us that merely as an incident to a statute by which a valuable parcel of land devoted to school purposes was made the means of financing a twenty-year bond issue also for school purposes it was the legislative intent that at the expiration of the twenty-year period the land should no longer be devoted to the purposes of public education. The unwisdom of killing the fabled goose to get the golden eggs is classic in our literature.

While the record is silent on the subsequent history of this lot between the time that the bonds authorized by the statute of 1873-4 were retired and 1908, in that year it was the Board of Education and not the City and County of San Francisco which executed the lease to a private party, and we are entitled to assume that in the interim the title of the school district to the lot had been unquestioned, thus adding the weight of contemporaneous construction to our conclusion that the statute of 1873-4 did not impliedly repeal the trust in this lot for the benefit of the public schools of San Francisco.

It is next claimed by appellant city and county that title is vested in it by reason of a McEnerney decree made and entered in 1916, by which title was established in the City and County of San Francisco. The trial court found that insofar as it purported to adjudicate title to this lot this decree was beyond the jurisdiction of the court and void.

With a fairness to be highly commended in a public official appearing in a proceeding affecting the rights of the public, as involved in a controversy between two public agencies both set up for the furtherance of the public good, the city attorney of the appellant City and County of San Francisco stood on no narrow technical ground in the trial court and entered into a stipulation fully and fairly stating the facts underlying the controversy between the City and County of San Francisco on the one hand and the San Francisco Unified School District and its Board of Education on the other. From this stipulation it appears that in 1908 a lease of this property was made and executed to Wise Realty Company for a term of 35 years "by the Board of Education of said City and County," that on July 1, 1908, the Board of Education consented to the assignment of this lease to Lincoln Realty Company and that "the Board of Education, or said plaintiff herein, as its successor in interest, has at all times since the execution of said lease received for its own uses and purposes all rentals paid for the lease and use of said property, and said plaintiff school district is now receiving the same."

It thus appears from the facts so stipulated that at the time of the commencement of the McEnerney suit relied upon by appellant city and county as a source of title herein the city and county did not have actual and peaceable possession of the property here in litigation, but that such actual and peaceable possession was then and at all times since has been in the lessor school district through its lessee in possession under the aforesaid lease.

[7] The McEnerney Act provides that an action may be brought under it by any person who claims an estate in real property and "who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property." Deering's Gen.Laws 1937, Act 1026, § 1. In one of the earliest decisions of our Supreme Court construing the provisions of this statute it was determined that the possession so required of a plaintiff is essential to give the court jurisdiction over the subject matter of the action. Lofstad v. Murasky, 152 Cal. 64, 70, 91 P. 1008. The rule so established has never been questioned or departed from by our courts and was expressly reaffirmed over twenty years later in Stanley v. Westover, 93 Cal.App. 97, 105, 269 P. 468.

[8, 9] It is true that this jurisdictional defect is not shown to appear on the face of the judgment roll and ordinarily could not be taken advantage of by way of collateral attack for that reason. But the stipulation of the parties brings the case within the exception to that rule recently reaffirmed in Thompson v. Cook, 20 Cal.2d 564, 127 P.2d 909. In that case our Supreme Court reviews the previous authorities and announces the exception in the following language at page 569 of 20 Cal. 2d, at page 912 of 127 P.2d: "* * * although the judgment or order is valid on its face, if the party in favor of whom the judgment or order runs admits facts showing its invalidity, or, without objection on his part, evidence is admitted which clearly shows the existence of such facts, then it is the duty of the court to declare the judgment or order void."

In the case last quoted from and in those cited therein the lack of jurisdiction shown was of the person of the defendant. However, a judgment void for lack of jurisdiction of the subject matter is equally subject to collateral attack when that fact appears on the face of the judgment roll. (Capital Bond & Investment Co. v. Hood, 218 Cal. 729, 24 P.2d 765) and equally subject to the rule as quoted in Thompson v. Cook, supra, from Hill v. City Cab, etc., Co., 79 Cal. 188, 191, 21 P. 728:

"If the party, however, should admit the facts which show the judgment to be void * * * then, as a question of law upon such facts, we do not see why the case is not like that where a judgment is void upon its face."

[10] We arrive at this conclusion the more readily because to hold otherwise would be to deprive an agency of the state, created by the State Legislature for the purpose of carrying out the important governmental duty of public education under the mandate of our Constitution, of title to public property expressly vested in that agency as a public trust under legislative authority. It strikes us that were that problem before us a serious question of public policy would be presented as to whether by mere inaction or failure to assert its rights against another agency of the state such a public agency could legally allow the legislative trust so created to be destroyed by transfer of title to the other. Our conclusion that the McEnerney decree on the record before us is void for want of jurisdiction of the subject matter makes it unnecessary for us to explore this larger question.

[11] From what has been said regarding the possession of this property during the entire period of the present thirty-five-year lease it is clear that the action

is not barred by the Code of Civil Procedure, section 318, since plaintiff not only has been seised and possessed of this property through its tenant, within five years of the commencement of this action, but still has such seisin and possession.

The judgment appealed from is accordingly affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

COCK et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 2992.

District Court of Appeal, Fourth District, California.

Aug. 18, 1942.

Hearing Granted Oct. 15, 1942.

1. Workmen's compensation 🔑1430

Where a domestic servant, in home occupied by a son, his wife and his mother, had been interviewed and employed by the son, that in the interview son used the words "we" and "us" with reference to the work and that the mother frequently gave orders as to what was to be done, was insufficient to show that son also acted as mother's "agent" and that servant was also employed by the mother so as to justify compensation award to servant for injuries sustained while accompanying the mother on a pleasure trip.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent".

2. Workmen's compensation 🔑597

In order for injury to be compensable as being "proximately caused" by the employment, there must be some causal connection between the employment and the injury in the sense that by reason of the employment there was an unusual or additional exposure of the employee to the kind or character of hazard or danger which caused the injury. St.1937, p. 269, § 3600(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

3. Workmen's compensation 🔑664

Where a domestic servant engaged by son to work in home occupied by son, his wife and his mother, was invited by the mother and her daughter to accompany them on a ride in mother's automobile during a time when the domestic's services were not required at the home, an injury sustained by servant in an accident occurring on the trip was not compensable as one "arising out of employment" and was not "proximately caused" by the employment. St.1937, p. 269, § 3600(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of Employment".

4. Workmen's compensation 🔑1172

In proceeding by domestic servant to recover workmen's compensation for injuries sustained in automobile accident, while accompanying employer's mother on an automobile trip, on ground that injury arose out of employment, in that servant was ordered to make the trip, where servant had previously made an affidavit that she had not been ordered to make trip and it was stipulated that the statements made in such affidavit were true, the facts so recited were conclusive.

◆

Proceeding under the Workmen's Compensation Act by Nellie Rockwell, claimant, opposed by Viola W. Cock, and another, as alleged employers. To review an order of the Industrial Accident Commission awarding compensation for injuries, the alleged employers bring certiorari.

Award annulled.

Head, Wellington & Jacobs and Winthrop O. Gordon, all of Santa Ana, for petitioners.

Everett A. Corten, of San Francisco, for respondents.

BARNARD, Presiding Justice.

Petitioners seek to annul an award of the Industrial Accident Commission in favor of Nellie Rockwell on account of injuries sustained in an automobile collision. The commission found that the injury occurred in the course of and arose out of the applicant's employment by both of the petitioners.

L. Andrew Cox is the son of Viola W. Cock. He and his wife and Mrs. Cock lived in a house in Tustin which belonged to some trust created in connection with the estate of Mrs. Cock's deceased husband. At the time in question Mrs. Cock's daughter, Mrs. Elmslie, was also staying in the home, having come to care for her mother, who was quite elderly, while Mrs. Cox was in the hospital. Shortly before May 3, 1941, Cox interviewed the applicant with the idea of engaging her as a domestic servant. The applicant testified that at this conversation "he used the word 'we' or 'us' and he told me what they wanted in the way of a worker"; that he told her they wanted someone to keep the house, buy the food, cook the meals, be company for his mother, play rummy with her, help her with her flowers, "in fact, anything that she might desire"; that he said they would pay $26 a month with board and room and she agreed to work for that. She went to work on May 3, 1941, and worked until May 10, 1941, when the accident happened. She testified that during this time she cleaned the house, bought the groceries, cooked the meals and did the washing. She testified that she did not assist Mrs. Cock with her flowers and that she spent a part of one evening with her playing rummy. On the afternoon of May 10, 1941, she accompanied Mrs. Cock and Mrs. Elmslie on a trip to Huntington Beach. The car was owned by Mrs. Cock and driven by Mrs. Elmslie. While on this trip a collision occurred between that car and another automobile, causing the injuries in question.

[1] It is admitted that the applicant was the employee of Mr. Cox and the first question presented is whether an employment relationship also existed as between her and Mrs. Cock. Mr. Cox hired her and he is the person who made the agreement to pay her, although the accident happened before a cash payment became due or was paid. The respondents argue that Cox's use of the words "we," "us" and "they" in his first conversation with the applicant indicates that in hiring her he was acting both for himself and for his mother. Aside from the rather unusual circumstance of having two employers in one small family, Mr. Cox had told the applicant how particular his wife was about the house work and it would be as reasonable to suppose that in using the plural he was referring to himself and his wife as to suppose that he was referring to his mother in the sense of purporting to act for her in making a contract of employment. If it be inferred that he had reference to his mother it would also be reasonable to infer that he was speaking of her merely as a member of the family. If it be inferred that he was speaking for his mother in hiring the applicant, it would be necessary to further infer that he was authorized to thus act and that he intended to act both as principal and as agent at the same time.

Mr. Cox told the applicant the time at which he desired his meals on several occasions but apparently gave no other specific instructions after the first interview. The applicant testified that Mrs. Cock and Mrs. Elmslie gave her orders from time to time as to what they wanted done, what she should cook, and the like. Mrs. Elmslie gave most of these orders, as Mrs. Cock was hard of hearing. It is not contended that Mrs. Elmslie was also an employer of the applicant and for the purpose of establishing the employment relationship here in question it seems to have been inferred throughout that she acted as the agent of her mother but was not acting as the agent of Mr. Cox. At the same time, for the purpose of showing that the accident occurred within the scope of the applicant's employment, it is inferred not only that the sister was the agent of the mother but that she was also the agent of the son in giving the orders in connection with taking this trip, so as to bind him also.

The giving of these orders, with inferences from inferences thus based upon other inferences, is cited as sufficient to show an employment of the applicant by both the son and his mother. It has been frequently pointed out, in connection with matters relating to the course of employment, that the status of a domestic servant, with indefinite hours and being somewhat subject to call at all times, is quite different from that of the ordinary employee who works certain fixed hours in a business location. It is equally true, with respect to the question as to who is the employer, that the value and effect of evidence as to who gives the orders, directions or suggestions, is quite different in the two situations. That various members of a family or household may make suggestions or give instructions to a servant, with respect to things that it is desired to have done, is in accord with common experience, but that the giving of such "orders" indicates an employment relationship and makes such persons also the employers of the servant, in a legal sense, seems both an unusual and somewhat tenuous conclusion. The evidence relied upon by the respondents to establish an employment insofar as Mrs. Cock is concerned is unsatisfactory, to say the least.

[2] The next question presented is whether there is substantial evidence to support the finding that the applicant was acting within the scope of her employment in going upon this trip, or whether it was a mere pleasure excursion unconnected with her duties. One of the conditions for imposing liability for compensation upon an employer is that the injury in question be one which "is proximately caused by the employment." Labor Code, § 3600, subd. (c), St.1937, p. 269. "There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be some causal connection between the employment and the injury in the sense that, by reason of the employment, there was an unusual or additional exposure of the injured party to the kind or character of hazard and danger * * * which caused the injury. The injury must have its origin in a risk connected with the employment, and must have flowed from that source as a rational and natural course." Lumbermen's M. C. Co. v. Industrial Acc. Comm., 134 Cal.App. 131, 25 P.2d 22, 23.

[3] Disregarding the evidence on behalf of the petitioners, the applicant's testimony in this connection may be briefly summarized as follows: On the morning of May 10, "they" had mentioned that they were going to Huntington Beach that afternoon to get some dahlias "and said if it didn't interfere with my work, they would take me with them." That morning Mr. Cox had said that he wanted his dinner about four o'clock that afternoon. About noon she "practically aside from the meals had completed the day's work" and Mrs. Cock told her she might go and visit her sister until time to prepare the four o'clock dinner. She did so and returned about 3:30. She then found that Mr. Cox had returned early, had eaten his meal and gone, and that a meal would not be required at that time. She testified: "And they told me they were ready to go, and I was tired—I had had an exceptionally hard week and a hard day, and I asked to be excused, and said that I had some work of my own to do. As a matter of fact, it was some letters I was going to write, but they told me I could do that some other time, and that I could prepare their meal after our return." She was then asked: "Then what was done?" She replied: "Well, it rather left me without a choice." She was then asked: "Anyway you were requested to go with them?" and she answered: "Yes, it amounted to a request." She further testified that Mrs. Elmslie was the one who did the talking and when asked to tell what was said she replied "She said they were ready to go on this trip." When asked if anyone had ordered or instructed her to go she replied: "No, but they argued that I should go." When asked if Mrs. Elmslie had not given her permission to decide whether or not she wanted to go, she replied: "Well, I wanted to keep my job."

The applicant's contention was and is that in her own mind she construed Mrs. Elmslie's statement that they were ready to go as amounting to a request to her that she accompany them and that she considered this necessary in order to keep her job. That she had no reasonable grounds to fear the loss of a job appears from her own testimony as to the manner in which the request or invitation came about and was made, and from the further fact that a day or two earlier Mrs. Cock had expressed both satisfaction with her work and a desire to take her with her when she later moved to a house in Santa Ana which she had purchased.

It appears without contradiction that Mrs. Cock said nothing to the applicant about her going just before they started on this trip and that she did not tell anyone else to do so. Mr. Cox knew nothing either about the trip or about the applicant's participation therein. The fact that the mother and daughter had mentioned the trip that morning, and had said that they would take her with them if it did not interfere with her work, strongly indicates an intention on their part that her going was to be something apart from her work and that she was to be given the pleasure of the trip only in the event that this could be done without interference with her duties. At that time they all expected Mr. Cox to come for his meal about 4 o'clock and the preparation and serving of this meal might well have interfered with her going. When she returned to the house about 3:30 o'clock it had developed that such service was not needed and there was nothing for her to do for a few hours. She had completed all of her work with the exception of that in connection with the evening meal, she had already been off duty since noon, and that all parties concerned had it in mind that this situation was to continue for several hours more is rather strongly indicated by the fact that they had previously told her they would take her on this trip only if it did not interfere with her work and by her testimony that when they said they were ready to go she demurred saying she was tired, that she told them she had some letters to write, and that Mrs. Elmslie replied "You can write letters any time, and you can prepare what Mother and I want for dinner after our return." While the applicant testified that "they argued that I should go" an argument of the nature which here appears is quite different from express, or even implied, instructions to a servant as to service required of her and the evidence in its entirety quite clearly suggests that this was an accepted invitation for a pleasure trip during a time when the applicant's services were not required, rather than an act done in the course of and within the scope of her employment.

Considering this portion of the evidence and viewing it in the light most favorable to the applicant it seems almost unbelievable that she could have regarded the suggestion that she accompany the others on this trip as a request amounting to an order, rather than as a mere invitation or friendly courtesy intended to contribute to her pleasure, which left her free to accept or not without endangering or affecting the security of her employment.

[4] If we assume, however, that a contrary inference could be drawn by the finder of fact and further assume that thus far there is some evidence which is sufficiently substantial to support the finding made in this connection, we are confronted by the fact that the applicant had theretofore sworn to an affidavit in which she said: "That Viola Cock and Mrs. Elmslie then invited affiant to go on an automobile drive with them, which she did, and on this trip the accident occurred. The affiant was not ordered or instructed to go on said drive, but was permitted to decide for herself whether or not she wanted to go." That affidavit was prepared by applicant's counsel in connection with a damage action which he stated to the referee he contemplated bringing. Apparently, it was desired in that action to establish the fact that this applicant was a guest of Mrs. Cock and Mrs. Elmslie. At the hearing in this matter this evidence was produced and it was stipulated that the statements made by the applicant in that affidavit were true. Counsel for the respondents now argues that a conflict exists between what the applicant had said in this affidavit and what she said as a witness in this proceeding, and that the referee was free to accept her present testimony as true. Passing over the question whether the applicant's testimony in this proceeding was substantially in conflict with what she had said in the affidavit, and disregarding other considerations which seem obvious, a situation is here presented which differs materially from a mere conflict in the evidence. The stipulation was not merely that the witness had made these other statements which were somewhat at variance with the state of facts which she was seeking here to inferentially establish, although she was apparently careful not to directly testify to such a state of facts. The stipulation was that the statements she had made to the effect she was invited to go on this trip, that she was not ordered or instructed to do so, and that she had been left free to decide whether or not she wanted to go, were true statements. As a result of this stipulation these became established facts in this case and no longer did any conflict exist with respect to the facts in that regard. Regardless of any possible but doubtful inferences from other portions of the evidence the essential facts that the applicant was not instructed to go on this trip but that she exercised her own choice and accepted an invitation tendered to her were thus established. Those matters were conclusive, under the circumstances which here appear, upon the question of whether the making of this trip was an act within the scope of the applicant's employment. It follows that the finding that the injury here in question was one "arising out of and occurring in the course of said employment" is not sustained by any substantial evidence.

The award is annulled.

GRIFFIN, J., concurred.

54 Cal.App.2d 141

STANHOPE v. LOS ANGELES COLLEGE OF CHIROPRACTIC.

Civ. 13489.

District Court of Appeal, Second District, Division 1, California.

Aug. 24, 1942.

Hearing Denied Oct. 22, 1942.

1. Principal and agent ⚷99

Before recovery can be had against a principal for acts of ostensible agent, person dealing with agent must do so with reasonable belief in agent's authority generated by some act or neglect of principal and without negligence on his own part. Civ.Code, § 2300.

2. Physicians and surgeons ⚷18(8)

In malpractice action against chiropractic college for failure to discover that plaintiff's back was broken, evidence that plaintiff, after his injury, was carried to chiropractic college and examined and then taken to X-ray laboratory in college building for X-ray examination and was not placed on notice that X-ray laboratory was not part of college, sustained implied finding that technician in charge of X-ray laboratory was "ostensible agent" of college. Civ. Code, § 2300.

See Words and Phrases, Permanent Edition, for all other definitions of "Ostensible Agent".

3. Principal and agent ⚷24

Agency is always a question of fact for the jury.

4. Appeal and error ⚷1170(9)

Where instructions, which were challenged as not being supported by the evidence, fully and impartially informed jury as to principles of law applicable to the facts established by the evidence, appellate court would not reverse judgment because of such instructions. Const. art. 6, § 4½.

5. Physicians and surgeons ⚷18(8)

In malpractice suit, evidence that technician in examining plaintiff's broken back did not follow accepted practice of skillful roentgenologists in community of taking a lateral X-ray whenever an injury to the spine was indicated, and upon reading pictures positively stated they confirmed diagnosis of doctor that no bones were broken, established negligence of technician and that such negligence was "proximate cause" of plaintiff's damage.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

6. Appeal and error ⚷1004(1)

An appellate court will not disturb a verdict unless it is so grossly excessive as to immediately suggest that it was the result of passion, prejudice, or corruption on the part of the jury, since the assessment of damages is first the province of the jury and secondly that of the trial court when passing upon a motion for a new trial.

7. Physicians and surgeons ⚷18(11)

$3,500 awarded against chiropractic college and technician for failure correctly to diagnose patient's condition a broken back, with the result that patient was compelled to spend considerably more time than average in convalescing, was not excessive.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Francis D. Stanhope against Los Angeles College of Chiropractic and others to recover for alleged malpractice of defendant in examining, treating, and X-raying plaintiff after he had sustained a broken back in an accident. From a judgment for plaintiff and an order denying named defendant a judgment notwithstanding the verdict, named defendant appeals.

Affirmed.

Max E. Gilmore, of Hollywood, for appellant.

David L. Sefman, Leonard Wilson, and Nat A. Rosenstein, all of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff instituted the instant litigation against the defendants above named to recover damages for personal injuries alleged to have been sustained by him as a result of the alleged malpractice of defendants in examining, treating and X-raying him after he had sustained a broken back in an accident. Defendant corporation in its answer admitted that Dr. Metzinger was its employee and denied that Dr. Joyant was its agent or employee. By way of affirmative defenses, said corporation pleaded unavoidable accident and contributory negligence.

When the cause came on for trial and before the jury was drawn, plaintiff dismissed the action as to defendant Dr. Charles Henry Wood. At the conclusion of the trial, the jury brought in its verdict for plaintiff and against defendants Dr. C. J. Joyant and Los Angeles College of Chiropractic, assessing plaintiff's damages at $3,500. Thereafter the trial court denied defendant corporation's motion for judgment notwithstanding the verdict or for a new trial, whereupon defendant corporation took this appeal from the judgment as well as from the order denying said judgment.

A brief résumé of the facts disclosed by the evidence, in the aspect most favorable to respondent, follows:

Between 9:30 and 10:00 in the morning of March 13, 1940, respondent, then aged 63 years and retired, sustained a broken back in an accident which occurred in the cellar of his home. When respondent attempted to move a water heater six feet high, two feet in diameter, and weighing three hundred fifty pounds, it swung off balance knocking him flat on his face upon a hard dirt and cement floor and fell with crushing force on the lower portion of his back. His associate removed the heater from respondent's back, and after remaining on the floor screaming with pain for about five minutes, respondent was taken by George K. Phoenix in the latter's automobile to the Los Angeles College of Chiropractic which was located two blocks away. Respondent had never before been treated at said institution and knew no one connected therewith. Defendant Dr. Metzinger was called into the clinic room by Mr. Phoenix, who was a former student of the college. After questioning respondent regarding his injury, Dr. Metzinger placed him on a chiropractic adjustment table for examination, during which time respondent was lying on his face supported by his face and knees with a hassock or cushion underneath his abdomen. At the conclusion of such examination, defendant Dr. Metzinger told respondent there were no bones broken; that he had a bad sprain and should rest at home for a few days; also, that he should have some X-ray pictures taken. Respondent in company with Mr. Phoenix was taken into the X-ray laboratory operated by the defendant Dr. Joyant which occupied space on the ground floor of the building which housed the college. Mr. Phoenix explained to Dr. Joyant, according to the latter's testimony, that respondent had been in an accident and that Dr. Metzinger had examined him, had found no bones broken but had suggested X-ray pictures; and that he (Phoenix) would like Dr. Joyant to make an anterior-posterior X-ray of respondent's pelvis, including the lumbar vertebrae and the lower dorsal vertebrae. Because respondent was suffering excruciating pain, it was impossible to get him to lie flat on the table, so Dr. Joyant placed a pillow about four inches thick under respondent's body. When the pictures were taken respondent was propped up with his buttocks flat on the table and his feet and knees folded up because he could not straighten his legs. Respondent remained in the laboratory while Dr. Joyant developed the X-rays at which time the latter advised respondent, "Well, this confirms the doctor's diagnosis. There are no bones broken." Respondent was then taken home where he remained in bed suffering great pain for three days. On the fourth day another doctor was called who examined respondent and had him removed to the General Hospital where both lateral and anterior-posterior X-rays were taken and several doctors examined him, it being discovered that he had sustained a compression fracture of the twelfth dorsal vertebra.

Dr. Marianne Scarborough, a doctor of medicine connected with the General Hospital, who personally attended and rendered medical services to respondent from March 29, 1940 to November 1, 1940, testified that the accepted practice in this community, insofar as taking X-rays for a possible spinal injury is concerned, where the patient to be X-rayed is in great pain, is always to take both lateral and anterior-posterior views. This testimony was corroborated by other doctors who testified at the trial herein.

Appellant urges (1) that there is no evidence that Dr. Joyant was an employee or agent of appellant on March 13, 1940; (2) that the trial court committed prejudicial error in its instructions to the jury; (3) that Dr. Joyant was not negligent and that his negligence, if any, did not proximately cause damage to respondent; (4) the verdict is excessive and patently the result of passion and prejudice; and (5) the trial court erred in denying appellant's motion for judgment notwithstanding the verdict.

Appellant denied in its answer to the complaint herein that Dr. Joyant was either its agent or its employee at the time respondent was treated in its institution. Upon the issue thus created, the following testimony was presented at the trial:

Defendant Dr. Charles Henry Wood, who had been the president and a director of appellant college for twenty-eight years, testified that the college was housed in two buildings at 920 Venice Boulevard, in the city of Los Angeles, one of which was a three-story building containing 17,000 square feet; that there were three store rooms on the ground floor of said building facing on Venice Boulevard; that as one faced said building the store room on the left was occupied by the Los Angeles X-ray Laboratory; that the middle store room served as a waiting room for the college, and the store room on the right was occupied by a chemical laboratory; that on March 13, 1940, the equipment in the X-ray laboratory personally belonged to the witness, who had owned the laboratory for many years. On March 13, 1940, the said X-ray laboratory was operated by Dr. Joyant who had complete control of it; that said witness together with Dr. Royce "founded that laboratory and operated it, and I made an arrangement with Dr. Joyant that in return for doing my work on my patients—I have quite a large clientele—and in return for doing the work for me and doing the teaching X-ray analysis and diagnosis to the student body, that he would not be compelled to pay any rent or any telephone service, or any janitor service, but there were no fees collected from Dr. Joyant for the college. That was just an understanding that in return for teaching these subjects, and he did that for a considerable time, but was not at the time you mentioned." Further, that no portion of the fees collected by Dr. Joyant was received by the college; that when patients of the clinic of the college had X-rays taken at the Los Angeles X-ray Laboratory, they paid Dr. Joyant whatever fee he exacted; that there was "just an oral agreement" between Dr. Joyant and the witness with regard to the X-ray laboratory, which could be cancelled at will by either party.

Dr. Wilma Churchill von Walden testified she was the secretary and treasurer and a director of the Los Angeles College of Chiropractic; had charge and control of the faculty of the college; that on March 13, 1940, Dr. Joyant operated an X-ray laboratory in a portion of the building occupied by the college; that he taught X-ray analysis at the college when that subject appeared in the school curriculum; that the name of Dr. Joyant's laboratory appeared on the front window thereof as follows: "Los Angeles X-ray Laboratory."

Dr. Clement J. Joyant testified that he was a doctor of chiropractic and an X-ray technician and on March 13, 1940, operated the laboratory known as "Los Angeles X-ray Laboratory" at 918½ Venice Boulevard, occupying space on the ground floor of a building which also housed the Los Angeles College of Chiropractic, the entrance to the latter being at 920 Venice Boulevard; that on his laboratory door facing Venice Boulevard was this sign: "Entrance, Los Angeles X-ray," and on the front window facing Venice Boulevard was the sign reading: "The Los Angeles X-ray Laboratory—Clement J. Joyant"; that he had operated said laboratory continuously from 1930; that he had an agreement with Dr. Wood that whenever the X-ray course appeared in the college curriculum he would teach it for the use of the space occupied by his laboratory, light, gas and telephone service; that said agreement was made in 1929 and continued in force and effect through March, 1940; that he made X-rays for any of the doctors in the field who referred their patients to him; that the college did not prescribe the charges he made for X-rays, nor did it dictate or prescribe rules for him relating to the conduct of his X-ray business, nor the hours during which the laboratory was to be open for business.

Respondent Stanhope testified that prior to March 13, 1940, he had never been treated at the Los Angeles College of Chiropractic and did not know anyone connected with said institution; that after Dr. Metzinger had treated him he was carried into an X-ray room; that he had never been in the building before and was not acquainted with the premises; that when they arrived in the X-ray room, "I don't think anybody was in there because I saw within a few seconds, ten or fifteen seconds, maybe, I saw a doctor come out of an inside room." When he was leaving Dr. Joyant told respondent that the usual charge would be $15 and respondent thought it included both the X-rays and the examination made by Dr. Metzinger. "I didn't know whether I had to pay Dr. Metzinger or pay Dr. Joyant or pay a cashier, or what. He (Joyant) simply asked me for $15.00, or said the charges would be $15.00. * * * But owing to Mr. Phoenix's connection with the college, that they were going to cut it in two, fifty per cent. My bill would be $7.50."

[1] "An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." § 2300, Civ.Code. In this connection it is urged by appellant that 'before a recovery can be had against a principal for the alleged acts of an ostensible agent, three things must be proved, to-wit" (quoting from Hill v. Citizens Nat. Tr. & Sav. Bank, 9 Cal.2d 172, 176, 69 P.2d 853, 855): "[First] The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; [second] such belief must be generated by some act or neglect of the principal sought to be charged; [third] and the third person in relying on the agent's apparent authority must not be guilty of negligence. 1 Cal.Jur. 739; Weintraub v. Weingart, 98 Cal.App. 690, 277 P. 752."

[2, 3] An examination of the evidence hereinbefore referred to which was produced on the issue of agency convinces us that respondent has met the requirements enumerated in the Hill case. So far as the record reveals appellant did nothing to put respondent on notice that the X-ray laboratory was not an integral part of appellant institution, and it cannot seriously be contended that respondent, when he was being carried from room to room suffering excruciating pain, should have inquired whether the individual doctors who examined him were employees of the college or were independent contractors. Agency is always a question of fact for the jury. The evidence produced on this issue is sufficient to support the jury's implied finding that Dr. Joyant was the ostensible agent of appellant college.

Appellant complains of error in the giving of certain instructions to the jury, on the general ground that "There was no evidence that Dr. Joyant was an employee of the college, so it was error to submit that issue to the jury."

[4] Without discussing each of the instructions objected to, suffice to say that this court has examined the fifty or more instructions given and is convinced that the jury was fully and impartially informed as to the principles of law applicable to the facts established by the evidence without resulting prejudice to appellant. § 4½, art. VI, Cal. Const. Moreover, as heretofore stated, the evidence was sufficient on the question of agency to present that issue to the jury.

Appellant urges that "there can be no recovery against an X-ray technician unless two facts are established:

"(a) Negligence on the part of the technician;

"(b) Evidence that the pictures were used by physicians in treating plaintiff or as a diagnostic aid."

[5] The record herein reveals that Dr. Joyant did not follow the accepted practice of skillful roentgenologists in this community of taking a lateral X-ray wherever an injury to the spine is indicated. Additionally, he developed and read the X-rays immediately after he took them while respondent was still in the room, at which time he made the positive statement, "Well, this confirms the doctor's diagnosis. There are no bones broken." Therefore, it must be assumed that the X-rays were taken as a diagnostic aid and that if Dr. Joyant had discovered through that medium that respondent's back was broken, he would have made known that fact so that appellant's doctors could have given further attention to respondent's injury.

Dr. Scarborough testified that in her opinion, as an expert, the period of respondent's convalescence was greatly lengthened because of the lack of care received by him at the hands of defendants; that the average case of spinal fracture with a compression such as respondent suffered, and for a man of his age, would require the back to be placed in a cast for four months and that such patient is usually back at work in six months, whereas respondent was still convalescing from his injury at the expiration of one year and eight months.

The evidence adduced at the trial herein amply supports the judgment based on the jury's verdict that Dr. Joyant was negligent and that such negligence proximately caused damage to respondent.

[6, 7] The assessment of damages is first of all the province of the jury, and secondly, that of the trial court when

passing upon a motion for a new trial, therefore, an appellate court will not disturb the verdict unless it is so grossly excessive as to immediately suggest that it was the result of passion, prejudice or corruption on the part of the jury. Peckham v. Warner Bros. Pictures, 42 Cal.App.2d 187, 108 P.2d 699; Loeb v. Kimmerle, 215 Cal. 143, 9 P.2d 199. Moreover, the jury's award of damages cannot be set aside on appeal where there is nothing to suggest that the jury acted through passion, prejudice or corruption. Osrowitz v. Market Investment Co., 40 Cal.App.2d 179, 104 P. 2d 681.

From what has been said, it follows that there was no error in the denial of appellant's motion for judgment notwithstanding the verdict.

The judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concurred.

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54 Cal.App.2d 169

RAINE v. SPRECKELS et al.

Civ. 12170.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1942.

Rehearing Denied Sept. 25, 1942.

1. Fraud ⚷50

In actions based upon fraud, where the evidence is equally balanced, there is a presumption against fraud approximating in strength that of innocence of crime.

2. Fraudulent conveyances ⚷299(12)

In action to set aside conveyance by husband to wife as a fraud on husband's creditors, where undisputed evidence established a state of facts from which conflicting inferences could be drawn, one in favor of fair dealing and one in favor of fraud, trial court properly applied presumption against fraud, and upheld the conveyance.

3. Fraud ⚷58(1)

When a plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a "preponderance of evidence", since indirect evidence and inference of fraud to be drawn from the proved facts must be so convincing as to satisfy court or jury that fraud was designed and accomplished.

See Words and Phrases, Permanent Edition, for all other definitions of "Preponderance of Evidence".

Appeal from Superior Court, San Mateo County; Maurice T. Dooling, Jr., Judge.

Action by B. F. Raine against Rudolph Spreckels and others to set aside a conveyance of real estate by named defendant to his wife as a fraud on creditors. From a judgment for defendant, plaintiff appeals.

Affirmed.

Keyes & Erskine, Louis Ferrari, and George D. Schilling, all of San Francisco, for appellant.

Brobeck, Phleger & Harrison, L. S. Mana, and Cushing & Cushing, all of San Francisco, for respondents.

NOURSE, Presiding Justice.

On June 17, 1930, Rudolph Spreckels sold to his wife Eleanor their residence in Hillsborough for the sum of $100,000, which was paid to him in cash out of the separate funds of Mrs. Spreckels. The entire sum was deposited in Mr. Spreckels' account in the Bank of America and used by him to pay existing obligations. On November 9, 1936, the plaintiff, as assignee of the Bank of America, commenced this action to set aside the sale upon the grounds that the transaction was made without consideration and with the intent to defraud the creditors of the grantor. A trial was had before the court and judgment followed for the defendants. Plaintiff's appeal from this judgment, in the final analysis, raises the single question whether the findings of the trial court are supported by substantial evidence.

In the year 1928 Mr. Spreckels had a net taxable income of over $13,000,000, on which he owed a federal income tax of over $2,000,000. In September, 1929, he borrowed from the Bank of America $500,000 to pay the third instalment of this tax. In December, 1930, this indebtedness was paid by a substituted note of a corporation which was guaranteed by Mr. Spreckels. Execution on a judgment based upon this note was returned unsatisfied, and in November, 1936, this action was commenced. The answers denied the allegations of fraud and alleged that Mrs. Spreckels had purchased the property for cash paid out of her separate property, that the sum paid was not less than the market value of the property, that the proceeds of the sale were used by Mr. Spreckels in paying various obligations, including interest paid to the Bank of America on the existing indebtedness, and that Mr. Spreckels was not insolvent at the time of the sale.

The trial court found that the property, consisting of 20.65 acres, was sold as alleged for the sum of $100,000 which was paid in cash out of the separate property of the grantee, that "the said sum of $100,000 was a substantial and valuable consideration for said purchase and represented the fair and reasonable market value of said property for cash at said time; that defendant Rudolph Spreckels in making said sale and defendant Eleanor J. Spreckels in making such purchase dealt at arm's length.

"V That said sum of $100,000 was received by said defendant Rudolph Spreckels, and was deposited in the Bank of America of California, predecessor in interest of said Bank of America National Trust and Savings Association, and became part of the estate of said Rudolph Spreckels, and was disbursed by him in the payment of then existing and subsequently accruing debts and obligations, and in part upon obligations owing to said Bank of America of California.

"VI That at the time of the sale of said property, towit, on the 17th day of June, 1930, the defendant Rudolph Spreckels was insolvent, but the defendant Eleanor J. Spreckels neither knew nor had reason to believe that defendant Rudolph Spreckels was insolvent.

"VII That in selling said property and in making and delivering the said deed defendant Rudolph Spreckels did not nor did defendant Eleanor J. Spreckels, in buying said property and accepting said deed, have or entertain any intent to defraud the then existing or future creditors of defendant Rudolph Spreckels, including plaintiff and plaintiff's assignor; that said sale was not made up on any secret or other trust, but was an outright sale for cash, and said Rudolph Spreckels by said sale parted with all interest and ownership in said property, and said defendant Eleanor J. Spreckels thereupon became the sole and absolute owner thereof."

In support of these findings the respondents refer to the undisputed evidence (appellant concedes that these essential facts are not disputed) that, upon their marriage in 1895 the respondents moved to a home in San Francisco which Mr. Spreckels presented to his wife as her separate property In 1925 Mrs. Spreckels sold the place for $90,000. In 1922 Mr. Spreckels purchased the 20.65 acres here involved for $82,000. They also owned a home in Sonoma County which had cost them over $300,000. This was sold in 1934 for $118,000. In 1927 Mr. Spreckels became heavily involved in financial transactions in the east and moved to the city of New York. Mrs. Spreckels continued to maintain the family home in Hillsborough. She testified that during this period she had no knowledge that Mr. Spreckels was insolvent or in financial difficulties, that she merely assumed that he wanted some ready money, that he never discussed his business affairs with her. and that "I knew nothing about his business affairs. I knew he was a rich man, but beyond that I did not know what he had."

The circumstances of the sale are that Mr. Spreckels, while in New York, notified his son, who was his attorney in fact in San Francisco, to sell the residence. The son notified his mother who offered to pay $50,000 in cash and give a mortgage in a like sum. Mr. Spreckels replied that this was not acceptable and that he wanted the full sum in cash. The son consulted Mr. Wheeler, who was Mr. Spreckels' attorney and who prepared the deed and the escrow instructions. But Mr. Wheeler advised that Mrs. Spreckels should have independent legal advise and upon her request he suggested that she consult Mr. Sidney Ehrman. Mrs. Spreckels went to Mr. Ehrman's office, but, not finding him in, she consulted Mr. Jerome White who acted for her throughout the transaction. Mrs. Spreckels borrowed $50,000 from one bank on securities which she owned and raised the balance on loans upon her personal savings accounts. On June 12, 1930, $50,000 was paid, the papers were placed in escrow pending search of title, and on June 17 the final payment was made and the deed then recorded. Mrs. Spreckels has lived in the house continuously since it was built, but in November, 1930, Mr. Spreckels discontinued an allowance of $2,500 a month which he had paid her from the time of their marriage, and in August, 1931, she sold fourteen acres of the property to Thomas Fortune Ryan III for $144,000.

It is appellant's theory that "all these unusual and excessive motions" preceding the sale were taken because the parties feared it might subsequently be questioned by creditors, that the employment of separate counsel for Mrs. Spreckels was done "to give the transaction the outward appearance of a bona fide sale in case it was later questioned." In support of this theory appellant refers to the failure to offer the property for sale in the open market, the "unusual and excessive" efforts to give the transaction appearance of fairness by employing counsel of high reputation and integrity, the personal interest of Mrs. Spreckels in saving her home property, her failure to inquire about her husband's financial condition, and her failure to pay an adequate consideration for the property.

All these references present a combination of circumstances upon which the conjecture of fraud in the transaction is based. It would serve no purpose to lengthen the opinion by a recital of the evidence relating to each item. It is sufficient to say that the trial court had all the witnesses for observation, that evidence was taken showing the unusual financial conditions of the period, the sudden changes from affluence to poverty, and the recurrent difficulties of those in this class to maintain large and expensive homes. As to the value of the property at the time of the sale an expert witness testified "There was no market value for the property in 1930, if you speak of market value from the standpoint of selling. There was just no purchasers for that type of property in June, 1930."

[1-3] The rule of law which governs here, as in any case where the evidence is equally balanced, rests upon the sound principle that "The presumption is always against fraud,—a presumption approximating in strength to that of innocence of crime; and it should not be deemed overcome, even prima facie upon a showing so intangible and shadowy." Truett v. Onderdonk, 120 Cal. 581, 588, 53 P. 26, 29. It is stated more at length in 10 Cal.Jur. 741, as follows: "If there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, one favoring fair dealing and the other favoring corrupt practice, it is the duty of court or jury to draw the inference favorable to fair dealing. Fraud must always be proved, so that when a plaintiff's case goes no further than to establish a state of facts from which the inference of fraud may or may not be reasonably drawn, he has failed to establish his charge by a preponderance of the evidence. This does not, of course, mean that fraud must be proved by direct evidence. This is not always nor even often possible. But it does mean that the indirect evidence and the inference to be drawn from the proved facts must be so convincing as to satisfy court or jury that fraud was designed and accomplished." The trial court applied this doctrine to its judgment and found that the appellant had failed to prove fraud in the transaction and our examination of the record satisfies us that these findings should not be disturbed. The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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54 Cal.App.2d 130

BROOKS et al. v. FIDELITY SAVINGS & LOAN ASS'N et al.

Civ. 13575.

District Court of Appeal, Second District, Division 2, California.

Aug. 21, 1942.

1. Appeal and error 🔑1099(3)

Decision on former appeal, that creditor's agreement, during general business depression, to accept $10,000 cash to be borrowed from the Reconstruction Finance Corporation in full settlement of $11,000 note and trust deed was supported by sufficient consideration where debtor expended time and money in procuring loan, became the "law of the case".

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

2. Specific performance 🔑121(8, 11)

In suit for specific performance of creditor's agreement, made during general business depression, to accept $10,000 to be obtained by loan from Reconstruction Finance

Corporation in satisfaction of $11,000 note and deed of trust, evidence supported finding that agreement was supported by valuable consideration, that it was fair and equitable, that plaintiffs were able and willing to perform and that tender of performance by plaintiffs was refused without just cause.

3. Mortgages ⚿303

Where a creditor, during general business depression, agreed to accept $10,000 cash to be procured by Reconstruction Finance Corporation loan, in satisfaction of $11,000 note and deed of trust, but no time for the payment of the money was specified, a reasonable time must be allowed within which to complete the loan.

4. Mortgages ⚿303

Where a creditor, during general business depression, agreed to accept $10,000 cash in satisfaction of $11,000 note and deed of trust and the parties thereto contemplated that such funds should be raised by a loan through the Reconstruction Finance Corporation but no time was specified when the money should be paid, completion of the loan and tender of the money within four months was within a "reasonable time".

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

5. Interest ⚿50

Where creditor after agreeing to accept $10,000 cash in satisfaction of $11,000 note and deed of trust, refused to accept plaintiff's tender of the money and took title to the property under foreclosure sale, in suit for specific performance of the contract and for an accounting of all moneys collected by creditor in use of property, a judgment requiring creditor to account for all moneys so received without charging plaintiff with interest upon the $10,000 was proper, as the tender stopped the running of interest.

6. Specific performance ⚿130

In suit for specific performance of creditor's agreement to accept $10,000 for $11,000 note secured by deed of trust on bungalow court property and for an accounting for all moneys received by creditor for use of property after foreclosure sale, trial court improperly refused creditor allowances for salary of the manager of the property, for social security, workmen's compensation, fire insurance and bond premiums paid, which expenditures were necessary in the operation of the property.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Suit by George W. Brooks and others against Fidelity Savings and Loan Association and others for specific performance of a contract and for an accounting. From a judgment for plaintiff, defendants appeal.

Modified and affirmed.

George S. Dennison, of Los Angeles, and W. G. Harmon, of San Francisco, for appellants.

Charles R. Holton, of Whittier, Paul G. McIver, of Montebello, and Burke, Hickson, Burke & Marshall, of Los Angeles, for respondents.

GOULD, Justice pro tem.

Plaintiffs on or about February 3, 1928, borrowed from Fidelity Savings & Loan Association $15,000, payable at the rate of $210 per month with interest at 8.4 per cent per annum, secured by deed of trust upon a 13-unit bungalow court property owned by them at Montebello, California. Soon thereafter an additional borrowing of $1,500, secured by the same trust deed, increased the indebtedness to a total of $16,500. In June, 1935, the unpaid principal balance upon the indebtedness amounted to $11,118.56, and interest was owing from December 5, 1934. Before that date Fidelity assets were transferred to defendant Pacific States Savings & Loan Company, and negotiations hereinafter referred to for the settlement of said indebtedness were had between plaintiffs and officers or agents of defendant Pacific States Company.

In the early months of 1935 several proposals back and forth, looking to the settlement of the indebtedness, were submitted, and finally on June 25, 1935, it is alleged and so found by the trial court to be a fact, Pacific States accepted a proposition made by the owners to take the sum of $10,000 cash in full payment and settlement of the entire obligation, then amounting to more than $12,500. A letter to this effect was written by Pacific States, and plaintiffs proceeded to open an escrow to complete negotiations theretofore pending to borrow $7,500 upon the same property from the Reconstruction Finance Corporation and to raise an additional $2,500 by borrowings upon life insurance policies and from other sources, as well as to expend money in surveys, insurance policies, escrow fees and other necessary disbursements for refinancing said property.

The loan from the Reconstruction Finance Corporation was approved by that agency September 27, 1935, and, so plaintiffs alleged, they were ready, able and willing to complete the transaction and to carry out their contract with Pacific States by paying the $10,000 to satisfy the note and trust deed held by the latter. Pacific States, however, never became a party to the escrow, but by a letter dated October 23, 1935, refused to proceed unless plaintiffs would pay $11,000. Plaintiffs did not acquiesce in this demand for $1,000 additional, and Pacific States thereupon proceeded with the foreclosure of its trust deed, and pursuant to a sale had in such proceedings purported to bid in said property and take title thereto, at the same time foreclosing a chattel mortgage upon the furniture and furnishings of said bungalow court, held as additional security for said indebtedness. After the sale Pacific States took possession of the property and proceeded to administer it as its own, placing a manager in charge, renting and collecting rents, paying expenses of upkeep, taxes, insurance and other costs.

The present litigation was initiated by a complaint filed November 14, 1935, asking that defendants be required to specifically perform the contract of June 25, 1935, by which it was charged they agreed to accept the sum of $10,000 for their liens, and also that the foreclosure sale, then pending, be enjoined. Demurrer was filed and sustained. An amended complaint was filed, to which a demurrer alleging failure of consideration for said alleged contract of June 25 was sustained, and, plaintiffs refusing to amend, the court entered an order dismissing the complaint. Upon appeal the district court of appeal, in Brooks v. Fidelity, etc., Ass'n, 26 Cal.App.2d 114, 78 P.2d 1175, 1177 (hearing denied by the Supreme Court), reversed the judgment of dismissal, holding that the facts alleged in the amended complaint did constitute sufficient consideration for the agreement sought to be specifically enforced, and that said complaint did state facts sufficient to constitute a cause of action. As stated by the court in that case: "Under the facts pleaded in the complaint, it would appear that the respondents had considerable time to act during which they had the right of election of availing themselves of selling the property, or of accepting the sum of $10,000 in full satisfaction. Weighing all of the conditions then existing—a depressed market for real property, the value of ready cash, the scarcity of bidders at foreclosure sales due to financial conditions which then existed in the general business depression—defendants may have preferred an agreement for the payment of $10,000 in cash rather than to take over the real property on foreclosure. It is also alleged that plaintiffs expended money and time in procuring the consent of the Reconstruction Finance Corporation to advance the money, something plaintiffs were not called upon to do by the terms of their note. We believe that sufficient consideration did exist for the execution of the agreement, and on that issue the complaint stated a cause of action."

Upon return to the superior court pleadings were brought down to date by amended and supplemental complaints, in which the State Building and Loan Commissioner, who had taken charge of defendant Pacific States, was made a party defendant, and in which accounting was asked of defendants for their administration of the property during the several years they had held it after the foreclosure sale. Issue finally was joined upon a third amended and supplemental complaint and answers thereto. Upon trial plaintiffs prevailed. The trial court ordered that the property be returned to plaintiffs upon their payment of the agreed $10,000, and against this sum credit was allowed in the amount of $9,829.04, which it was found represented the rents, issues and profits received by defendants from the operation of the bungalow court during their long period of possession, less certain sums allowed for operating and maintenance expenditures. As a net result it was decreed that plaintiffs recover back their property, free from any lien or claim of defendants, upon the payment to defendants of the sum of $170.96, less plaintiffs' trial costs and such sums as might become due between the date of judgment and the final delivery of the property to plaintiffs. Defendants appeal.

[1,2] Most of the questions involved herein are disposed of by the determination of the former appeal, coupled with the findings of the court upon the trial presently appealed from. In the former appeal it was held—and this must be accepted as the law of the case—that a consideration was pleaded sufficient, if found to be true, to uphold a judgment decreeing specific per-

formance. Upon the trial of the instant action the court, upon abundant evidence, found favorably to respondents in every particular—that "there was a good, sufficient, valuable, adequate and valid consideration," and that "the contract * * * was fair, adequate, just, equitable and reasonable." It was further found that respondents were ready, able and willing to comply with said agreement for the payment of $10,000, and so notified appellants within a reasonable time; that respondents duly tendered said money to appellants about October 15, 1935, but that such tender was refused "without just or lawful reason or excuse."

[3, 4] While no time for the payment of the $10,000 was indicated in the writing or agreement of June 25, 1935, appellants contend that they were justified in withdrawing their offer and proceeding with the foreclosure after waiting six weeks. No time being specified, it follows that a reasonable time must be allowed. Jones & Laughlin Steel Co. v. Abner Doble Co., 162 Cal. 497, 123 P. 290. It was known to appellants that the money to pay them would be obtained from a new loan to be placed on the property by the Reconstruction Finance Corporation, and the delays in dealing with that agency were known to all parties equally well. It was with knowledge of the proposed source of the money to pay off appellants that the contract was entered into, all details of the negotiations as they progressed were disclosed to appellants, and it must be held that the contract was entered into in contemplation of the facts within the knowledge of the parties existing at the date of the agreement. Giberson v. Fink, 28 Cal.App. 25, 151 P. 371. The court found that respondents proceeded diligently and in good faith, and its conclusion that the time elapsed was reasonable appears to be justified and to be amply supported by the record.

[5] When an accounting was undertaken between the parties for the time during which the property was in the possession of appellants, respondents, as was their right, chose to require appellants to account for the actual money received in the use of the property, rather than to recover for the fair value of its use for that period. Although respondents never paid the $10,000 to appellants nor deposited it to the latter's credit, and in fact never suffered any loss or detriment in connection therewith except the preliminary incidental expenditures in soliciting the loan from the Reconstruction Finance Corporation, the court refused to charge them with any interest upon the $10,000, although appellants were required to account for the rents, issues and profits of the bungalow court during the entire period. The court's action must be sustained as proper in the circumstances. Having determined that there was a valid tender made in good faith on October 15, 1935, such tender, under well established law, when unjustifiably refused, placed appellants in default, permitted respondents to exercise their remedies for breach of contract, stopped interest running—in fact, stopped all the incidents of the original obligation—and left only the original obligation itself, shorn of all its incidental burdens. Civ.Code, § 1504; Walker v. Houston, 215 Cal. 742, 12 P.2d 952, 87 A.L.R. 937; Lockhart v. J. H. McDougall Co., 190 Cal. 308, 212 P. 1. Appellants call our attention to decisions holding a contrary doctrine in other states, but there can be no doubt that in California it is settled that a valid tender stops the running of interest upon the debt.

[6] There remains for consideration the allowance or disallowance of various specific items in the accounting. Without reviewing the entire accounting in detail it is sufficient to say that generally the court's findings are to be approved. The total receipts from the operation of the bungalow court from December 14, 1935, when appellants took possession, until February 28, 1941, amounted to $21,147.04. Against this the court allowed expenditures in maintenance, operation and upkeep and payment of necessary charges against the property totalling $11,318, all of which in our opinion were proper deductions. Certain other items for which credit was asked by appellants were, we believe, improperly disallowed by the court. These were as follows:

Salary of apartment house manager........	$1,072.83
Social Security for employees..................	102.17
Workmen's Compensation......................	21.13
Fire insurance premiums......................	469.27
Bond premiums.................................	40.12
	$1,705.52

We see no valid reason why these expenditures, proper and necessary in the operation of the property, were not allowed as credits to appellants.

The judgment and findings are therefore modified to provide such additional credits to appellants and to decree that the amount to be paid by respondents to appellants shall be changed by the addition thereto of said sum of $1,705.52, said amount being fixed at $1,876.45 instead of $170.96. Otherwise the judgment is in all respects affirmed. Appellants to recover costs.

MOORE, P. J., and W. J. WOOD, J., concurred.

54 Cal.App.2d 165

CURRY v. MARKET ST. RY. CO.

Civ. 12115.

District Court of Appeal, First District, Division 2, California.

Aug. 26, 1942.

1. **Appeal and error** 🔑930(1)

On appeal from judgment for plaintiff, evidence will be viewed in a light most favorable to plaintiff.

2. **Street railroads** 🔑93(1)

Operator of municipal street car which struck passenger intending to board a street car of another system on parallel rails while passenger with others was standing between the rails of the different systems was negligent where motorman saw or had reason to see the passengers, knew that they were intending to board the car of the other system, and must have seen the crowded condition of that car which prevented them from boarding it.

3. **Street railroads** 🔑98(1)

If a passenger seeks to enter street car operated upon inner rails, he is entitled to assume that a different line operating cars on the outer rails will exercise due care to see that he may do so safely, and whether such care has been exercised is for jury.

4. **Street railroads** 🔑98(1)

A passenger who took a position between the rails of parallel street car systems at the invitation of the motorman of a municipal street car, and who was struck by such car when she was unable to board the car of the other system due to its crowded condition, was not contributorily negligent so as to prevent recovery against the city street railroad, since she could assume from the motorman's signal that he would not start the municipal car while she was in a position of danger.

Appeal from Superior Court, City and County of San Francisco; Everett C. McKeage, Judge.

Action by Ada Curry against the City and County of San Francisco, a municipal corporation, and another, for injuries sustained when plaintiff was run over by a street car operated by named defendant. From an adverse judgment, named defendant appeals.

Affirmed.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for appellant.

John G. Reisner, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff, as a result of a trial by jury, was awarded damages in the sum of $8,500 against the two defendants. A new trial was granted to the Market Street Railway Company and denied to the defendant city and county. The latter appeals from the adverse judgment. The only question raised by the appeal is whether the verdict is sustained by the evidence as to the negligence of this defendant and as to the absence of contributory negligence of the plaintiff.

The two defendants operate independent street railways on Market Street in San Francisco. The lines of rails run parallel with a distance of six feet between the inner rails, which, with an overhang of two feet upon each car, left a clearance of two feet between the cars of the respective lines. At the intersection of Market Street and Van Ness Avenue a long safety zone is maintained for the protection of passengers using the two lines. On a rainy day in February, 1941, during the peak of traffic congestion at about 5:15 p. m. the plaintiff left this safety zone for the purpose of boarding a westbound car No. 17 operated by the defendant Market Street Railway Co. To reach her destination it was necessary to pass in front of a car standing on the outer or northerly rails and she waited until she received a signal to pass from the motorman operating that car, which was an "N" operated by the city and county, and hereafter referred to as the municipal car. At that time the No. 17 car had stopped in the safety zone with the front end opposite the extreme westerly end of the zone. The municipal car had stopped with the front end opposite the rear steps of the No. 17 car upon which passengers boarded. When the plaintiff reached these steps she found them crowded with passengers; she was unable to board the car, and was left standing with four others between the two cars. At this time the municipal car started forward; something struck one of those standing at the steps of No. 17; then the latter car also started forward and these expectant passengers were thrown to the ground. There was some evidence that one of these persons was struck by the municipal car and that he caused the others to fall. There was also evidence that some of them were struck by the passengers standing on the steps of car No. 17. The plaintiff was thrown in such a position that a wheel of the municipal car passed over her foot causing the injuries for which she recovered damages.

[1-3] Viewing the evidence in the light most favorable to respondent, the negligence of the operator of the municipal car is not open to question. He saw or had reason to see this group of persons standing between the rails; he knew they were intending to board car No. 17 and must have seen the crowded condition of that car. It was his duty to wait until the other car cleared the zone or until those standing in the street had a chance to reach a place of safety. These two street railway lines are maintained and operated for the service and benefit of the public; they are the only means of travel provided for a large number of people and their operation is a joint invitation to the public to accept a reasonably safe and efficient service from both of the competing lines. When a passenger seeks to enter a car operated upon the inner rails he is entitled to assume that those operating cars on the outer rails will exercise care to see that he may do so safely.

Whether such care has been exercised is a question of fact to be determined by the jury under the circumstances of each case. It was so held in Pevonak v. City and County of San Francisco, 206 Cal. 648, 275 P. 785, a case very much like this in its facts, with the exception that both cars were moving through the loading zone at the same time. On reversing a judgment upon directed verdict for the two railways the court said: (206 Cal. page 651, 275 P. page 786) "In other words, it is our view that it was a question of fact for the jury whether or not these two cars should have simultaneously traversed their respective tracks when a group of ten or twelve persons were crouched together in such a narrow space, there being also ample evidence that the crowd had been placed in this position without fault upon their part, having crossed said municipal tracks for the purpose of boarding a car which the agent of respondent Market Street Company did not allow to stop and having been prevented from retracing their steps to a place of safety by the oncoming of the two other cars."

[4] The case is also authority in answer to appellant's argument that respondent was guilty of contributory negligence as matter of law. She took the position between the rails at the invitation of appellant's motorman. She could assume from his signal to her to pass in front of the municipal car that he knew she intended to board car No. 17 and that he would not start the municipal car while he knew she was in a position of danger until she had either boarded the car or had been able to retrace her steps to a place of safety.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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54 Cal.App.2d 155

GOVE v. LAKESHORE HOMES ASS'N et al.

Civ. 11923.

District Court of Appeal, First District,
Division 1, California.

Aug. 26, 1942.

Rehearing Denied Sept. 25, 1942.

Hearing Denied Oct. 22, 1942.

1. Trial ⇨139(1), 165

A nonsuit may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is entitled, the result is a determination that there is no evidence of sufficient substantiality to support a judgment in favor of the plaintiff if such a judgment were given.

2. Municipal corporations ⇨845(4)

In action against city for damages to residence property allegedly caused by the negligent construction and maintenance of a city storm water drainage system, evidence that earth sliding from under foundation was due to removal of lateral support of adjoining property by erosion of creek bank at point where city storm sewer pipe emptied into creek and that city with full knowledge thereof failed to prevent such erosion by erecting protective structures along creek bank, would have been sufficient to support judgment for plaintiff, hence granting city's motion for nonsuit was erroneous. Gen. Laws 1937, Act 5619, § 2.

3. Municipal corporations ⚿832

Where earth sliding from under foundations of plaintiff's house was due to removal of lateral support of adjoining property by erosion of creek bank at point where city storm sewer pipe emptied into creek, and city with full knowledge thereof failed to prevent erosion by erecting protecting structures along bank, the city was liable under the Municipal Liability Act as against contention that such injury was "damnum absque injuria". Gen.Laws 1937, Act 5619, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Damnum Absque Injuria".

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Minerva Lesoine Gove against Lakeshore Homes Association, and others, to recover damages for injuries to city residential property allegedly caused by the negligent construction and maintenance by the city of a storm water drainage system. From a judgment of nonsuit as against defendant City of Oakland, plaintiff appeals.

Reversed.

Cornish & Cornish, of Berkeley, for appellant.

Hagar, Crosby & Crosby and F. Bert Fernhoff, both of Oakland, for respondent.

KNIGHT, Justice.

Plaintiff appeals from a judgment of nonsuit in an action to recover damages for injury to residential property in the city of Oakland. Lakeshore Homes Association, a corporation, East Bay Municipal Utility District, and the city of Oakland were joined as parties defendant; but the association's demurrer to the complaint was sustained and no appeal was taken from the trial court's ruling, nor from the judgment of nonsuit in favor of the utility district. The appeal is narrowed down, therefore, to the question of the liability of the city of Oakland.

The evidence introduced by plaintiff shows that her home was practically destroyed by the earth sliding from beneath the concrete foundations, and that the sliding thereof was proximately caused by the negligent construction and maintenance by the city of a portion of the storm water drainage system it had built on and across lands adjoining plaintiff's property; and the evidence shows also that the department of the city government having charge of the drainage system was given notice and had actual knowledge of the dangerous and defective condition prior to the injury to plaintiff's property, but failed and neglected to take the necessary action to protect the surrounding property from the apparent danger. The city contends that since it was within the power of the city to construct a storm water drainage system to take care of the water that fell within the watershed in which plaintiff's property was situate, and since at no time it diverted any water from outside the natural watershed into the system so constructed, the case is one of damnum absque injuria, and that therefore even though the damage to plaintiff's property was proximately caused by the negligent construction and maintenance of any portion of said system, plaintiff is not entitled to be compensated therefor. The city's contention cannot be sustained.

The legislative act of 1923 (Stats.1923, p. 675, Deering's Gen.Laws, 1937, Act 5619, § 2) imposing liability upon municipalities for the payment of damages for injuries to property declares: "* * * municipalities * * * shall be liable for injuries to * * * property resulting from the dangerous or defective condition of * * * works and property in all cases where the * * * officer or person having authority to remedy such condition, had knowledge or notice * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or * * * take such action as may be reasonably necessary to protect the public * * *." The facts of the present case, which bring it within the provisions of the foregoing statute, may be stated as follows: Plaintiff purchased the land in 1924 for $1,850, and erected a dwelling thereon at a cost of more than $10,000, and which at the time of the damage thereto was reasonably worth $7,900. The property is described on the official map as Lot 11, Block 6, South Lakeshore Glen, and is known as 794 Brookwood Road. It fronts south on Brookwood Road and is bounded on the east by the lands of the Lakeshore Homes Association through which runs Trestle Glen Creek. The north boundary of plaintiff's property lies within several feet of the south bank of the creek, but no part of her property is riparian thereto. The southerly two-thirds of her property, fronting on Brookwood Road, is fairly level, and it was on that portion that she built her dwelling. The northerly third slopes rather sharply toward the creek bank; and the contour of the Lakeshore Homes Association's property to the east is steep throughout. The property on the southerly side of Brookwood Road is also steep, and is occupied by dwellings.

Trestle Glen Creek is approximately three miles long and its course is circuitous. Included in its watershed are 649 acres. Starting in the foothills above the city of Piedmont, it flows through a portion of that city, then into and through a portion of the city of Oakland and empties into Lake Merritt. Upon reaching the vicinity here involved, it flows through the north portion of the property of said association, takes a sharp bend to the north, and continues on westerly but does not touch plaintiff's property. It passes through the property of said association about 50 feet from and runs on a line approximately parallel with Brookwood Road, and is about 32 feet lower than the level of the road. As the land in the watershed in this particular locality became gradually utilized for residential purposes and streets were laid out and paved, less of the rain water that fell seeped into the ground, and in order to take care of the surplus water the city of Oakland in 1931 constructed certain conduits, storm drains and culverts whereby the water was collected on Brookwood Road, then conveyed across the lands of the association to Trestle Glen Creek, and a short distance below, the waters of the creek are picked up in a concrete culvert and carried half a mile to Lake Merritt. That is to say, two storm water inlets were built on Brookwood Road, one on each side, just east of the easterly line of plaintiff's property and in front of that of the association; and from said inlets and connected therewith there was laid underground and across the association's property a ten-inch concrete pipe or conduit to Trestle Glen Creek, so that all storm waters falling upon said road and those drained to it by means of gutters and drains from the sides of the canyon in that locality were concentrated in said storm water inlets and then passed through said ten-inch pipe or conduit and discharged into Trestle Glen Creek at the point of the bend on the association's property. But nothing whatever was done to fortify or protect the banks of the creek at the end of the ten-inch pipe against erosion by the increased and intensified volume of water thus thrown into the creek at this point; and soon after that part of the drainage system was completed the surface strata of the soil of the association's property started to slip downward toward the creek. This caused the sidewalk on the north side of Brookwood Road to subside and the ten-inch pipe to separate from the storm water inlets. The city engineer caused repairs to be made to the pipe and the inlets, but nothing was done at the other end of the pipe to fortify the banks of the creek or to prevent erosion. Thereafter there was a settling of the pavement of Brookwood Road which the city repaired from time to time. But during January and February of 1938 there was a heavy rainfall, which greatly increased the flow of water through the ten-inch pipe into the creek, and the banks not being protected at that point, the increased water gradually washed away the south bank. This took away the lateral support for the land above, and the earth started slipping toward the creek. The concrete pipe across the association's land was laid parallel with and close to a ten-inch water main installed by the utility district in 1924; and on February 12, 1938, on account of the earth slippage, a blow-off valve on the water main broke. This was repaired immediately; but the earth slippage continued. On February 16, 1938, the water main again broke, and was thereupon abandoned. On February 21, 1938, Ernest Held, the owner of the property across the street from plaintiff, notified the city engineer that the earth was slipping toward Trestle Glen Creek and that something besides patchwork to the pavement of Brookwood Road should be done to prevent a disaster. On March 2, 1938, the city engineer replied that he was watching the situation and would undertake a survey to see what should be done. But nothing was done, and on March 14th an extensive land crack opened. It was "V" shaped, and had its apex at the storm water inlet on Brookwood Road. Its east arm extended along the north edge of Brookwood Road and thence northeasterly to the creek through the property of the association. Its west arm followed a distance along the edge of Brookwood Road, thence bent northwesterly across the association's property and entered plaintiff's property about 25 feet north of the road. It ran thence northwesterly to the east side of plaintiff's house, followed along the east side of the house, cut just under the northeast corner of the house, and thence to the creek. The crack when it first appeared was about half an inch wide; but from day to day the inside of the "V" lowered and the crack became wider. Nothing was done by the city authorities; but plaintiff, in order to prevent her house from slipping with the earth's surface, installed a cement pillar 12 feet deep under the northeast corner. As the slide continued, more lateral support was washed away by the waters of the creek, and in April, 1938, a second crack appeared. It paralleled the first crack generally, but crossed to plaintiff's land about 10 feet north of the north edge of Brookwood Road, ran under the southeast corner of plaintiff's house and came out about the middle of the rear, and from there ran down to the creek. It increased in intensity, the earth to the northeast slipping until it had dropped from 2 to 3½ feet. As the earth continued to slip the ground beneath the foundations of plaintiff's house slid away, and finally the plumbing was torn loose, the water pipes were broken, and the house settled and slid and was badly cracked and twisted; so that in May, 1938, plaintiff was forced to vacate.

The evidence definitely shows that the slides were due to the removal of the lateral support on the association's property by erosion of the banks of the creek where the ten-inch pipe emptied into the stream, and that had the city fortified and protected the banks from erosion at that point and constructed a culvert along a portion of the creek bed, the slippage of earth would have been prevented. But as stated, at no time, even after the slipping started in February, 1938, were any protective structures whatever placed in or along the banks of the creek; consequently the second slide took place, as the result of which plaintiff's residence was practically destroyed. Within ninety days after the damage occurred and in conformity with statutory requirements, plaintiff filed her verified claim with the city, but the claim was rejected, and thereupon she brought this action.

[1, 2] A nonsuit may be granted only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a judgment in favor of the plaintiff if such a judgment were given. In re Estate of Lances, 216 Cal. 397, 14 P.2d 768, citing cases. The same rule relating to evidentiary matters governs reviewing courts in the consideration of appeals from judgments of nonsuit. Montgomery v. Nelson, 211 Cal. 497, 295 P. 1034; Harper v. Northwestern Pacific Ry. Co., 34 Cal.App.2d 451, 93 P.2d 821. Applying the foregoing rules to the situation here presented, it is apparent that the evidence above narrated would have been amply sufficient upon which to base a judgment for damages in plaintiff's favor under the provisions of the 1923 municipal liability act, if such a judgment were given; and that being so, it must be held that the trial court's order granting the motion for nonsuit was erroneous.

[3] As supporting its contention that the injury done plaintiff's property is damnum absque injuria, the city cites and relies on two cases: San Gabriel Valley Country Club v. Los Angeles County, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200, and Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1. But an analysis of those cases demonstrates that for several reasons neither is here controlling. The appeal in the San Gabriel case was taken from a judgment based on findings of fact after trial on the merits, and was decided in 1919, several years before the 1923 municipal liability act was enacted, and the controversy did not concern surface waters. As stated therein, the waters causing the damage had already been gathered into a definite body and flowed as a stream in a natural watercourse. Moreover, the action was brought by a property owner whose land was riparian to the stream of water which caused the damage to its property, and the issue of negligence was not involved. Summarized, the facts of that case were these:

The county of Los Angeles constructed artificial conduits or drains in the natural channel of a watercourse which, to the extent of their length, but no further, acted as, and only as, a substitute for the natural channel which continued down to and through plaintiff's land a mile or so below. The conduits or drains added no water to that already in the channel and that which would come to it on the way, but merely served to pass such waters more completely and more speedily from one point in the channel to another, all entirely above plaintiff's land. Following the construction of the conduits or drains, extraordinary rains occurred in the region and a great volume of water was passed through the conduits or drains and emptied into the wash below and continued down the channel a mile or more through plaintiff's land, causing substantial damage thereto. The precise question presented in that case, as it was stated by the court [182 Cal. 392, 188 P. 556, 9 A.L.R. 1200], was: "Has the owner of land through which a natural water channel runs a right to complain of an improvement of that channel above his land (for the substitute conduit is but that) and has no other effect, when the improvement is a reasonable one for the benefit of the upper land through which the channel runs and is not constructed in an unreasonable manner?" Answering the question in the negative, the court went on to say that if the plaintiff's land is riparian to the natural watercourse the burden is on him to protect his land by erecting bulkheads or other structures along the banks of the watercourse against overflow or from being washed away, and that this is so even though the burden he is necessarily under of protecting his land against the stream is thereby increased and his land is injured because of his failure to meet such increased burden; moreover, that the rule stated is not subject to the limitation that the increased volume must not be such as to make the stream exceed the capacity of the channel. To quote further from the opinion: "The plaintiff's complaint is solely that the drains increased the volume and speed of the water in passing its land. *No complaint is made of the manner in which the drains are constructed,* or that they are not reasonable improvements for the district they are designed to protect, *or that they are unnecessarily injurious to the plaintiff,* or that they bring into the channel water for which it is not the natural drainage outlet, *or, in a word, that there has been any wrong committed* into which there enters any factor other than simply an increase in the volume of the stream and consequent increase of speed and height produced by artificial means." (Italics ours.)

Thus it will be seen that the factual situation and the legal problems there involved were entirely different fron those here prescribed. Here the issue was negligence—the defective construction and maintenance of a portion of the drainage system on and over lands not belonging to plaintiff; and obviously plaintiff could not have protected her property from the apparent danger by erecting bulkheads or other structures along the banks of Trestle Glen Creek, because no portion of her property was riparian thereto.

The city calls attention to an allegation in plaintiff's complaint to the effect that the association refused to give the city permission to enter upon the association's lands to make improvements to prevent the washing away of the banks. But it appears that in its answer to the complaint the city denied that allegation; and at the trial no testimony was elicited on that question. In any event the city in the exercise of its municipal power had or could have acquired the unobstructed right of control over its entire drainage system for the purpose of maintaining the system in a proper and safe condition; and obviously the pipe line it laid across the association's lands and the portion of the open channel of Trestle Glen Creek it used as a conduit to convey the waters to the intake of the concrete conduit in the channel below which picked up the waters in the channel and carried them on to Lake Merritt, formed two important links in the entire system. Kramer v. City of Los Angeles, 147 Cal. 668, 82 P. 334.

In the Archer case the right of recovery was based solely on article I, section 14 of the state Constitution, which requires the payment of just compensation for private property taken or damaged for public use. The municipal liability act of 1923 here invoked, which imposes liability upon a municipality for injury to property resulting from a "dangerous or defective condition" of its works or property, was nowhere there involved; furthermore, the factual situation out of which the consolidated actions there arose was entirely different from the one upon which the plaintiff herein claims the right of recovery. As set forth in the majority opinion in the Archer case, the essential facts thereof were these: Surface waters from an area covering some 134 square miles drained into a stream known as La Ballona Creek, which flowed down a natural watercourse into La Ballona Lagoon. The lagoon was about two miles long and two miles wide, and the waters therefrom emptied through a natural outlet into the Pacific Ocean. As the area drained by the creek urbanized, improved drainage increased the volume of water in the creek; consequently the watercourse was artificially straightened, widened and deepened. The improvements to the drainage system and the watercourse was done by the municipal authorities. A heavy rainstorm, lasting two days, occurred at the end of 1933 and the waters swept down La Ballona Creek, overflowed the banks of the lagoon and flooded plaintiff's property located "near" the lagoon. (In the dissenting opinion [19 Cal.2d 19, 119 P.2d 8] it is stated they were "located some three miles north of the lagoon" and that they were not riparian to the lagoon or the creek.)

It was claimed by the plaintiffs that the flooding of their lands was due to two causes for which the defendants were responsible: draining into the creek by means of artificial means greater quantities of surface waters, without artificially enlarging the outlet from the lagoon to the ocean; and obstructing the flow of the water through the lagoon by the building of a bridge across the lagoon which caught debris swept down the creek. On the appeal the majority of the court held that plaintiffs failed to show that the obstruction of the bridge contributed to the damage caused by the overflow; that the state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety or morals; that the defendants acted within the limitation of their power in draining the increased surface waters in the La Ballona Creek watershed into said creek, even though the volume of water in the creek was increased thereby; and that there was no duty imposed upon them to improve the outlet to the lagoon into which the creek emptied, even though by so doing the flooding of the nearby lands would have been prevented; that therefore the injury to the plaintiffs' lands caused by the overflow of the lagoon was damnum absque injuria.

The present case is fundamentally different. Plaintiff's property was not damaged by surface waters, stream waters, or flood waters. The damage was directly caused by landslides brought about, according to the evidence adduced at the trial, by a dangerous and defective condition of a portion of the public works of the municipality—a condition of which, so the evidence shows, the city officers having the authority to fix had notice and actual knowledge, but which they failed to remedy; and the plaintiff is seeking compensation for the damage under a special statute covering such case and affording such remedy. It is true, plaintiff's theory of her right to recover damages was based also on two additional legal grounds, to-wit: that the city was liable because it discharged increased surface waters with concentrated and destructive force into the stream; and that irrespective of the question of negligence or liability for dumping the increased surface waters it was liable under article I, section 14 of the state Constitution. And it may be well here to state that a considerable portion of her brief has been devoted to a discussion of those two additional theories. But in view of the conclusion we have reached that plaintiff is given a complete remedy for the recovery of damages for the alleged injury to her property under the 1923 municipal liability act, it becomes unnecessary to inquire into the merits of the remaining two grounds urged by her in support of the appeal.

The judgment is reversed.

WARD, J., concurred.

PETERS, Presiding Justice.

I concur. I agree with the reasoning and conclusions contained in the main opinion. There can be no doubt but that the complaint alleges, and the evidence shows, a good cause of action under the municipal liability act. However, I am also of the opinion that, independent of that act, a good cause of action has been stated and proved. There is no sound legal theory to justify the conclusion that a municipality, without liability, can collect all of the surface waters from a large drainage area, and discharge such waters into a stream with concentrated and destructive force to the damage of lower owners, where the municipality knows or should know that the stream cannot carry the increased burden. Under such circumstances, the municipality is liable under the eminent domain provisions of the Constitution. Such damage cannot be justified either under the police power or under any theory of exercising a riparian right. Although there is language in the majority opinion in the case of Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, that sustains respondent's position in the instant case, I do not believe that the Supreme Court intended by that case to overrule well settled principles to the contrary.

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54 Cal.App.2d 148

FRENCH v. BOARD OF EDUCATION OF UNIFIED SCHOOL DIST. OF CITY OF SAN DIEGO.

Civ. 2862.

District Court of Appeal, Fourth District, California.

Aug. 24, 1942.

Hearing Denied Oct. 22, 1942.

1. Contracts 🔑108(2)

It is not against "public policy" for an employer to be a party to an agreement under which a wife is to resign a position in order that her husband may secure employment which he could not otherwise obtain.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

2. Schools and school districts 🔑139

Where it did not appear that qualifications of husband of teacher having permanent tenure were not considered and it was arranged that teacher should retain her status with permanent tenure by taking annual leaves of absence until husband had proved that his qualifications justified his retention long enough for him to acquire tenure, teacher's resignation under agreement that husband would be employed as a teacher long enough for him to acquire tenure was not against "public policy" on ground that teacher's qualifications or those of her husband had not been considered by the board. School Code, § 5.500, as amended by St.1941, p. 1936.

3. Mandamus 🔑168(4)

In teacher's mandamus proceeding to compel board of education to recognize her alleged status as a permanent teacher and to pay her salary for a period during which she had not been assigned to a position, evidence sustained finding that board had established a policy of not employing, initially, both a husband and wife as teachers, precluding recovery because of agreement that teacher would take annual leaves of absence for a time, and then resign to permit employment of her husband long enough for him to acquire tenure. School Code, § 5.500, as amended by St.1941, p. 1936.

4. Schools and school districts 🔑139

Where husband of teacher having permanent tenure would not have been originally employed but for teacher's agreement to take annual leaves of absence during husband's probationary period and would not have been annually re-employed but for teacher's continued compliance with the agreement, and would not have been retained at completion of his probationary period, had teacher not resigned pursuant to the agreement, husband was not entitled to tenure without regard to teacher's resignation and hence where teacher had made her own free choice teacher's resignation was not void as having been given under compulsion or on ground that the parties had vested rights to their status under the Teachers' Tenure Act. School Code, § 5.500, as amended by St.1941, p. 1936.

5. Schools and school districts 🔑139

Where teacher having permanent tenure was allowed to substitute tenure of her husband for her own tenure rights by taking annual leaves of absence during her husband's probationary period and resigning when husband had acquired tenure, no evasion of the tenure act appeared authorizing recognition of teacher's alleged status as a permanent teacher on ground that her resignation was void. School Code, § 5.500, as amended by St.1941, p. 1936.

6. Schools and school districts 🔑133

Where it was impossible to put the parties back where they were before performance of agreement under which teacher having permanent tenure took annual leaves of absence to permit employment of husband for purpose of substituting tenure of husband for her own tenure rights, when teach-

er was to resign, and teacher had expressed no dissatisfaction with the arrangement for seven years, teacher was not entitled to repudiate the agreement and be restored to tenure on ground that the equities were in her favor. School Code, § 5.500, as amended by St.1941, p. 1936.

◆

Appeal from Superior Court, San Diego County; Charles C. Haines, Judge.

Mandamus by the People of the State of California on the relation of Marjorie S. French against the Board of Education of the Unified School District of the City of San Diego, to compel respondent to recognize petitioner's alleged status as a permanent teacher and to pay her salary for a period of time within the school year 1941-1942, during which she had not been assigned to a teaching position. From an adverse judgment, petitioner appeals.

Affirmed.

Luce, Forward, Lee & Kunzel, of San Diego, for appellant.

Thomas Whelan, Dist. Atty., and Bertram McLees, Jr., Deputy Dist. Atty., both of San Diego, for respondent.

BARNARD, Presiding Justice.

The petitioner applied for a writ of mandate to compel the respondent to recognize her alleged status as a permanent teacher and to pay her salary for a period of time within the school year 1941-1942 during which she had not been assigned to a teaching position. Respondent's answer admitted that she had formerly held permanent status as a teacher in said district and alleged that this status had been terminated by her resignation. After a trial the court found in favor of the respondent finding, among other things, that petitioner's permanent status had been terminated by her resignation, which was voluntary and not procured by fraud, coercion or duress. From the judgment which followed the petitioner has appealed.

There is no dispute as to the material facts. In 1934, the appellant was and for some years had been a teacher in respondent district with permanent tenure. She and her husband were living in San Diego but during the preceding school year her husband had been employed as a teacher at Lakeside, some 21 miles from San Diego. During the summer of 1934, appellant and her husband approached the respondent with the request that the husband be given work as a probationary teacher in respondent district. They were informed that it was the policy of the respondent board not to give initial employment as teachers to a husband and wife at the same time. After some discussion, an understanding was arrived at between the parties for the purpose of enabling the husband to substitute himself for the appellant as the member of the family having permanent status in said district. To this end, and in order to maintain her permanent status until her husband acquired tenure, it was understood and agreed that the husband would be employed on the condition that the appellant would take annual leaves of absence during his probationary period, and that she would resign her position as a permanent teacher if and when he acquired tenure. Incidentally, it appears that the appellant was suffering from tuberculosis for several years from and after 1934, although she testified that she did not know that she had this disease until December of that year.

Pursuant to this agreement, the terms of which were set forth in letters exchanged between the parties, the husband taught in this district the next three years, and each year the appellant was granted a leave of absence upon her written application in which she mentioned the understanding. For some reason which does not appear in the record the husband was not reemployed for the school year 1937-1938. During that year the appellant was assigned to a half-time teaching position upon her written request in which she said: "My physician says that it must be in the morning as he would like me to rest in the afternoons." Beginning with the next year, however, the understanding previously arrived at was reinstated by mutual consent and the appellant took annual leaves of absence and her husband was employed as a probationary teacher for the three school years between July, 1938 and June, 1941.

In March, 1941, the respondent's superintendent wrote to the appellant notifying her that her leave of absence would soon expire and requesting information as to whether or not she was planning to teach the next year. She called on the superintendent and was told by him that she would have to resign because her husband was on the list to be made permanent and that if she did not resign he would not hire her husband. She replied that she did not want to resign and was told that she could either go back to teaching or that she could resign and that her husband would be employed. Some days later, after further discussions with her and with her husband, she sent in her written resignation to take effect "at such time as my husband is made permanent" and in which she also said: "I am resigning because my husband would not become permanent unless I resign." This was accompanied by a letter to the respondent board in which she stated that she was tendering her resignation as a teacher; that she was resigning "to insure my husband's permanent status, upon request of the superintendent"; that "I wish my resignation to become effective at such time as my husband is made permanent"; and that "I do not want to sever relationships with the schools and I hope the board will reconsider my reemployment as a teacher."

After discussing this resignation the board instructed one of its members to talk the matter over with Mr. and Mrs. French and her father. This he did and at this conversation this board member asked the appellant if she really intended to resign and if there were any strings attached to the resignation. She replied that she wanted to resign, that she wanted to be sure that her husband would get tenure, and that she intended to stop teaching at any rate upon her husband's getting tenure. When the board member asked her why she sent the resignation in in that form she replied: "I wanted to be sure my husband will have permanent status." After some further discussion along this line she expressed a desire to occasionally do some work if called upon and this board member told her that he did not see why this could not be done after a time although, as he testified, he made no promises to her.

Her written resignation was dated April 28, 1941, and it was accepted by the respondent at a board meeting on May 6, 1941, and at the same meeting the appellant's husband was employed for the next year and he began his work in September, 1941, thus attaining permanent status. On September 10, 1941, the appellant wrote to the respondent stating that she was in good health and requesting an assignment to teach, naming her preference as to schools. She was not assigned as such teacher and this proceeding followed.

The appellant contends that the findings to the effect that she had resigned her position are not supported by the evidence for the reason that the evidence discloses that the purported resignation was void and ineffectual for any such purpose. No cases are cited which are particularly helpful. The appellant cites Dutart v. Woodward, 99 Cal.App. 736, 279 P. 493, and states that the facts therein cannot be distinguished from those in the instant case. In that case it was held that a teacher with a permanent status could not be penalized for marrying by transferring her to a position in a distant tuberculosis sanitarium. We see no similarity, factually or with respect to the principles involved, between the two cases.

[1, 2] The first point specifically presented is that "the resignation was invalid as against public policy." It is first argued that appellant's resignation was based wholly upon the consideration that her husband be employed as a teacher; that the qualifications of the appellant or of her husband played no part in the matter; that teachers are supposed to be selected wholly upon their qualifications; and that the respondent board acted contrary to our educational ideals and violated its duty to the public in thus making a "deal" for the employment of a teacher without regard to his qualifications. It in no way appears that the husband's qualifications were not considered, and it was arranged so that the appellant could retain her status until he proved that his qualifications justified his being retained long enough for him to acquire tenure. The appellant states that she does not argue that the policy of not employing two members of the same family is against public policy, but that she "does argue that a resignation is a contract and the compelling of the resignation under the circumstances here involved constitutes the resignation a contract in violation of public policy." Just what it is that the appellant contends is against public policy is not very clear. While we have been developing a new double standard in this country in the sense of permitting, and even encouraging, both husband and wife to become full time wage earners it can hardly be said, thus far, that it is against public policy for an employer to be a party to an agreement under which a wife is to resign a position in order that her husband may secure an employment which he could not otherwise obtain. The real question in this case is not one of public policy in the sense

contended for, but is as to whether or not the appellant's resignation was given as a result of an unlawful coercion or compulsion.

[3] Some contention is made that there is no evidence to sustain the finding that the respondent board had established a policy of not employing, initially, both a husband and wife as teachers. It is argued that the evidence shows that no resolution to that effect was ever adopted by the board, and that certain testimony shows that the policy followed was merely not to encourage such employment. The minutes of the board show that this matter had been rather extensively discussed; at least three witnesses testified that such a policy had been and was being followed; it clearly appears that the appellant was advised of the situation and that such a policy was carried out insofar as her husband is concerned; and that he would not have been given employment in the first place or allowed to obtain permanent status except for the agreement made. The evidence is sufficient to support the finding.

Appellant's main contention is that her resignation was and is void because it was given under compulsion. It is argued in this connection that throughout the controversy the respondent has overlooked the fact that both appellant and her husband have "vested rights" to their status under the teacher's tenure act, School Code, § 5.500, as amended by St.1941, p. 1936; that both "are entitled to permanent status"; that the respondent could not "arbitrarily deprive" either of them of their permanent tenure; and that, therefore, appellant's resignation was secured by compulsion and coercion and is ineffective. In effect, it is contended that she has been deprived of her tenure without her real consent since her resignation was not necessary in order to enable her husband to secure tenure, as he was also entitled to tenure, with a vested right thereto.

The fallacy in this part of the argument lies in the assumption that her husband was entitled to tenure without regard to whether or not she resigned. It clearly appears that he would not have been originally employed but for this agreement between the parties; that he would not have been reemployed each year but for her continued compliance with its terms; and that he would not have been retained after the completion of his probationary period had she not resigned. Had he not been reemployed for the year 1941-1942 he would not have acquired tenure or become entitled thereto. He did not acquire his right to tenure until after she resigned and he was then permitted to acquire tenure only because of her resignation.

[4] There was no conpulsion here in either a legal or equitable sense. The appellant was free to make her own choice, which she did. She fully understood the matter from the beginning and not only chose at that time, but probably then intended to follow it to completion, the course which she pursued to the desired final conclusion. Toward the end, while she did not regret the choice she had made and still wanted to abide by it if necessary in order to gain permanent status for her husband, she desired, if possible, to secure an additional benefit with a resulting elimination of all element of choice, past or present. When she found that she could not get this additional benefit, to which she was not entitled as a matter of right, she resigned in order to accomplish her main purpose. The respondent took rather unusual precautions to make sure that she desired and intended to exercise her choice in that manner. It clearly appears that she very much preferred to secure tenure for her husband, rather than keep it for herself, if only one of them was to be allowed to have tenure. The respondent was under no obligation to take the remaining step which would enable her husband to acquire tenure. It is not claimed that anything was at any time misrepresented to her. With full knowledge she exercised a free choice between two situations either of which, but only one of which, was available to her. The only element of compulsion assigned to respondent is its refusal to do something it was under no obligation to do unless she did something which she had agreed to do. Even in this regard the appellant was given the opportunity to abandon the agreement and to retain her own tenure if she so desired. She was left free to choose which course she desired to pursue, she voluntarily chose the benefit and course which she at all times had most desired, and no coercion or compulsion appears.

[5, 6] No evasion of the tenure act here appears. For her own purposes and of her own volition the appellant was

allowed to substitute tenure in her husband for her own tenure rights, which she gave up to that end. We are not impressed with the argument that the equities of the case are entirely in favor of the appellant. If there was anything wrong with the making and performing of this agreement the most equitable thing to do would be to put the parties back where they were, restoring her tenure and taking away his. Not only is this not now possible since the husband's employment has been continued beyond the probationary stage, but this is exactly what she does not want and what she most wants to avoid. He has now acquired tenure because of the respondent's reliance upon her agreement and her performance of its terms. She expressed no dissatisfaction with the arrangement for seven years. She confirmed her resignation when the respondent investigated before accepting it. She was careful not to withdraw her resignation until it had enabled her husband to acquire a position which he would have been otherwise unable to obtain and which cannot now be changed, and she not only desires to keep what she obtained through the agreement but she now seeks to repudiate the same in order to gain a further benefit.

The judgment is affirmed.

GRIFFIN, J., concurred.

54 Cal.App.2d 266

PEOPLE v. SEYMOUR.

Cr. 3581.

District Court of Appeal, Second District, Division 3, California.

Aug. 31, 1942.

Hearing Denied Sept. 28, 1942.

1. Embezzlement 🔑8
Sales 🔑205

An agreement between the owner of a jewel and a jewelry dealer providing that the jewel "is the sole property" of the owner and is received by the dealer "for inspection only", with the understanding that title is to remain in the owner and that before any sale can take place and title pass, a certain sum must be paid to the owner, that agreement was to be in effect for 90 days whereupon owner "is to receive" such sum or have right to demand "his property" from the dealer and that "all profits above" the sum stated are to be divided between the parties was not a "contract of sale or return", and hence did not vest title in the dealer, so as to preclude dealer's conviction for grand theft when he sold the jewel to a third person. Civ.Code, § 1739, Rule 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract of Sale or Return".

2. Sales 🔑199

The intention of the parties to a contract of sale controls as to the one upon whom the risk shall be placed and in the absence of an express agreement, the risk generally follows the ownership.

3. Sales 🔑199

Where the owner of a jewel and a jewelry dealer provided in their agreement that the jewel was the sole property of the owner and was received by the dealer at the risk of the latter, they thereby signified their intention that the risk should not follow the ownership. Civ.Code, § 1742.

4. Contracts 🔑143

In interpreting contracts, the whole contract is to be taken together, so as to give effect to every part. Civ.Code, § 1641; Code Civ.Proc. § 1858.

5. Embezzlement 🔑8
Sales 🔑205

An agreement between the owner of a jewel and a jewelry dealer that the jewel was the sole property of the owner, that the dealer received it for inspection only, with the understanding that title should not pass until a certain sum was paid, that all profits above that sum were to be divided between the parties, that dealer assumed the risk of damage or loss and that the agreement should remain in effect 90 days was not a sale on "condition subsequent" and hence did not vest title in the dealer so as to preclude his conviction of grand theft when dealer sold jewel to a third person.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Subsequent".

6. Customs and usages 🔑10

A usage operates on parties to a transaction where and only where they manifest an assent to each other that it shall so operate or where one party has reason to know that the other intends to be governed by the usage, or where the usage exists in such transactions and is generally known by persons under similar circumstances.

7. Customs and usages 🔑19(3), 20

Where neither an actor who owned a jewel nor a jewelry dealer manifested in their agreement for the sale of the jewel an intention to be governed by an alleged usage in the jewelry business and there was no evidence to show that the alleged usage was so general that the actor was chargeable with knowledge thereof or that there was in fact such a usage, actor's testimony that he bought jewelry on various occasions did not prove that he was familiar with a custom of jewelers whereby if merchandise delivered to other jewelers is not demanded back within a specified time, the transferee thereupon acquires title and owes the transferor the price thereof, and was insufficient to establish the usage itself.

8. Criminal law 🔑517(4)

The corpus delicti must be proved by evidence outside the extrajudicial admissions of the defendant, but slight or prima facie proof is all that is necessary.

9. Criminal law 🔑563

The corpus delicti may be proved by circumstance shown in evidence or by inferences drawn from the facts shown.

10. Criminal law 🔑409

In prosecution for the theft of a jewel, testimony of owner introduced prior to introduction of a letter containing admission by defendant that he was not the owner, sufficiently established the "corpus delicti", so as to render the letter admissible.

See Words and Phrases, Permanent Edition, for all other definitions of "Corpus Delicti".

11. Criminal law 🔑680(2)

In criminal prosecution, order of proof is discretionary and where the corpus delicti is finally established, a mere variation in the order of proof is not prejudicial to defendant.

12. Sales 🔑199

Where it appeared from the language of an agreement between the owner of a jewel and a jewelry dealer, and from the subject matter and the circumstances thereof, that they did not intend it to become one of sale at the time of the transaction, the mere passage of time would not operate to transfer title.

13. Criminal law 🔑108(1)

The Superior Court of Los Angeles County had jurisdiction of acts allegedly constituting the crime of grand theft committed within that county.

14. Embezzlement 🔑23

In prosecution for theft of a jewel, where it appeared from the evidence adduced and from the construction placed by the court upon a contract constituting defendant's justification for appropriating the jewel, that such appropriation was not made in good faith, defendant was not entitled to the benefits of a provision of the Penal Code making good faith a defense to the charge. Pen.Code, § 511.

15. Embezzlement 🔑44(1)

Evidence was sufficient to sustain conviction of grand theft of a jewel which defendant failed to return to the owner thereof but sold or pledged to another.

16. Criminal law 🔑1159(2)

If the circumstances shown in evidence reasonably justify the finding that defendant is guilty, a reviewing court will not disturb the finding although those circumstances might be reconciled reasonably with innocence.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

William Seymour was convicted of grand theft, and he appeals from an order denying his motion for a new trial.

Affirmed.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was adjudged guilty of grand theft of one star sapphire diamond clip. Trial was by the court, a jury having been waived.

Defendant appeals on the ground that the verdict is contrary to the law and the evidence and that the court erred in certain rulings.

On April 11, 1940, appellant and Franchot Tone, residents of California, were in New

York City and appellant, who conducted a jewelry store in California, made a sale of certain jewelry to Tone. During the course of that transaction, appellant showed Tone a star sapphire jewel which he then had on consignment from a wholesaler. The wholesale price was $14,000; appellant and Tone agreed that it should retail for considerably more and Tone purchased the jewel by paying appellant $14,000, evidenced by his check payable to appellant and indorsed by him. The jewel remained in appellant's possession pursuant to the terms of the following written instrument, dated April 12, 1940:

"The property described below is the sole property of Franchot Tone and is received by the undersigned at the risk of the undersigned for inspection only with the understanding that title is to remain with Franchot Tone and that the undersigned, William Seymour, will return said property on demand. Before any sale can take place and title pass the sum of $14,000.00 must be paid to Franchot Tone and all profits above the amount of $14,000.00 is to be divided between Franchot Tone and William Seymour equally. It being the understanding herein that in event said property is damaged, lost or stolen or destroyed before such sale, that the undersigned William Seymour, will be responsible therefor, whether caused by the undersigned or by another over whom the undersigned has no control. The agreement and memorandum is to be in effect for ninety days from above date and at the end of this period Franchot Tone is to receive $14,000.00 in currency of the United States or has the right to demand his above property from William Seymour in the same condition as when taken by William Seymour. If above property is sold all monies received by William Seymour are to be paid at once to Franchot Tone and before any profit is received by William Seymour Franchot Tone is to have been paid in full." (There followed a description of the jewel and the signatures of appellant and Tone.)

After the said transaction, Tone did not see appellant until about Christmas, 1940, at appellant's jewelry shop in Beverly Hills. At that time appellant told him he had a prospective purchaser. Tone next saw appellant in March of 1941, when appellant told him that he had given the "stone" to a prospective purchaser on approval and that all that remained to be done was to work out the details of payment and he then asked Tone if he desired cash or if he would be willing to take notes in payment thereof. The next time Tone talked with appellant about the jewel was in June, 1941, when appellant told him that he was going to either get the jewel back or collect the money for it. The following week appellant went to Tone's home and agreed to get the jewel and deliver it to Tone's business manager so that he could put it in Tone's safety deposit box. Thereafter a week passed and Tone, not having heard from appellant, went to his residence and there appellant told him that he had borrowed $1,000 on the jewel from Mrs. Flatto, that he was paying the sum back and would then be able to recover the "stone." Tone testified that during their conversations up to June, 1941, he continued demanding either the return of the jewel or $14,000, but that in June, 1941, he demanded the return of the jewel. In July, 1941, Tone turned the matter over to his attorney who testified that he first talked with appellant, by telephone, early in July, 1941, and demanded that he return the jewel; that appellant told him he had already given his attorney $500, which was all that was needed to get the jewel and "clear up the transaction," and that it would be delivered to Tone's business manager the next day at 11:00 o'clock. The next day appellant said he had had some trouble with his attorney and would investigate and see why he had not obtained the jewel. A series of telephone calls ensued and Tone's attorney finally told appellant he didn't believe his story and wanted the truth; that appellant said the truth of the matter was that he borrowed $1,000 on the jewel, had paid back $500 and there was still $500 due which he hadn't been able to "raise." To this Tone's attorney replied that because the stone was of such great value and he didn't want anything to happen to it, he would give appellant $500 and go with him to get the jewel back. Appellant agreed to call Tone's attorney as soon as he completed arrangements but, hearing nothing more from appellant for a day or two and being unable to contact him in the usual manner, Tone's attorney sent appellant a telegram on July 28, 1941, in which he demanded return of the jewel. On this same day, these two parties had a telephone conversation in which appellant said that he had borrowed $5,000 from Mrs. Flatto, had paid back $4,000 and needed $1,000 to get the jewel back. Tone's attorney testified that he replied: "Immediately make arrangements to repay the $1000.00, and meet me, and I will give it to you so we can get the stone back." The next morning, July 31, 1941, appellant called him and stated that he was unable to communicate with Mrs. Flatto. Appellant then went to the office of Tone's attorney and said that the loan from Mrs. Flatto on the jewel was $11,000. While there, appellant wrote a letter to Mrs. Flatto in which he stated that the $11,000 was a loan by her on the jewel; that she was quite aware of the circumstances, "the saving of the business," and that he had promised her a bonus of $1,500 only because of the importance of the loan. He further stated that he thought she should help him straighten the matter up as she knew he was not the owner and "simply held it as a consignee for sale."

Appellant delivered the jewel to Mrs. Flatto in November, 1940, and in return received the sum of $11,000 from her. He also executed a bill of sale therefor to Mrs. Flatto, dated November 14, 1940, in which he stated, "I hereby certify that I have full and complete title to the—Star Sapphire Diamond Clip." Appellant testified that Mrs. Flatto agreed to return the jewel to him provided he paid her the sum of $12,500 on or before January 15, 1941, and that if he did not make such payment within that time, the jewel then "belonged to" Mrs. Flatto. Mrs. Flatto testified that the transaction was a sale to her; that there was something said about appellant repurchasing the jewel in January but that she "just bought it and that was the end of it" so far as she was concerned. No part of the money was repaid to Mrs. Flatto by appellant and Mrs. Flatto retained the jewel.

[1] Appellant contends that the document above set forth was a contract of sale or return; that title to the jewel vested in him upon delivery; and that the case presented is therefore one of a civil rather than a criminal nature. The respondent contends that the said document created an agency; that title to the jewel remained at all times in Tone; and that appellant by his act of delivering the jewel to one Mrs. Flatto in consideration of $11,000, whether under a contract of sale or a pledge, converted it to his own use.

Section 1739 of the Civil Code provides in part as follows: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. * * * Rule 3. * * * When goods are delivered to the buyer 'on sale or return,' or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, * * *." The agreement expressly provided, "The property described below is the *sole* property of Franchot Tone * * *" (italics added), and that the jewel was received by appellant, "* * * for inspection only with the understanding that title is to remain with Franchot Tone. * * *" These provisions are not in accord with a sale or return contract; that title was to remain in Tone seems to have been emphasized in the agreement, especially in the light of the next statement, "Before any sale can take place and title pass the sum of $14,000.00 must be paid to Franchot Tone. * * *" In other words, the payment of $14,000 to Tone was a condition precedent to the passing of title to the jewel. It should also be noted that the provision, "The agreement and memorandum is to be in effect for ninety days from above date and at the end of this period Franchot Tone *is to receive* $14,000.00 * * * or has the right to demand *his* above property from William Seymour. * * *" (italics added), did not say Tone was *entitled* to receive the $14,000 at the expiration of the ninety-day period, or that he had a right to demand it, but that he "is to receive" that amount or he had the right to demand *his* property back. The use of the word "his" in this connection is inconsistent with appellant's contention that title passed. On the contrary, it indicated that the parties intended that title should remain in Tone unless Tone received $14,000.

Furthermore, the provision that, "* * * all profits above the amount of $14,000.00 is to be divided between Franchot Tone and William Seymour equally," did not indicate that any present sale was contemplated at the time of entering into the transaction, but it did indicate an intention that the jewel was to remain the property of

Tone. The fact that Tone was to receive half of the profits is opposed to appellant's contention that Tone parted with title.

[2, 3] Under the terms of the agreement, appellant assumed the entire risk for damage or loss. Appellant urges that, "It is an almost invariable rule that ownership and the unconditional assumption of all risk for loss or injury go hand in hand." Intention of the parties controls as to the one upon whom risk shall be placed and, in the absence of an express agreement, risk generally follows ownership. Section 1742 of the Civil Code reads, "Unless otherwise agreed, * * * when the property therein is transferred to the buyer the goods are at the buyer's risk * * *." There was, however, a provision in the agreement that the risk should be on appellant and the fact that the risk was assumed expressly by appellant signified an intention that it should not follow the general rule.

In People v. Baker, 1923, 64 Cal.App. 336, at page 341, 221 P. 654, at page 656, it was stated: "One of the principal tests by which to determine whether any particular contract creates a mere bailment or is a sale on credit is this: Was there a binding promise on the part of the person to whom the possession was given to pay for the article? If there was such promise, then the contract is ordinarily held to be one of sale and not of bailment; and, conversely, if there was no such binding promise to purchase on terms agreed upon, then the transaction is ordinarily held not to be a sale." An analysis of the instrument which appellant claims was a sale or return agreement, reveals no binding promise on his part to pay for the jewel. It was agreed that Tone should receive $14,000 before title would pass but there was no binding promise that a sale would be made or that appellant would pay the $14,000.

[4, 5] Appellant further states that the first part of the agreement, providing that the jewel was the sole property of Tone and that appellant received it for inspection only with the understanding that title was to remain in Tone, merely described the "right of the parties as between each other" and that it is the "premise on which the transaction proper rests."; that the next two sentences (relating to title not passing until $14,000 was paid, sharing profits and the assumption of risk), taken in connection with the stipulation that the agreement should remain in effect for ninety days, make a sale on a condition subsequent in the form of a contract of sale or return. One of the most important rules in interpreting contracts is that the whole contract is to be taken together, so as to give effect to every part. Civ.Code, § 1641; Code Civ.Proc., § 1858. As was stated in Monroe v. Grolier Society, 1929, 208 Cal. 447, at page 451, 281 P. 604, at page 605, 65 A.L.R. 989: " 'A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument, and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part, as well as of the whole. Individual clauses and particular words must be considered in connection with the rest of the agreement, and all parts of the writing, and every word in it, will, if possible, be given effect.' " 13 C.J. 525, § 486; 17 C.J.S., Contracts, § 297. Considering the present contract as a whole, such contention that it was a sale on a condition subsequent cannot be sustained.

Appellant contends further that title passes in transactions of this kind according to custom and usage in the jewelry business. He testified, "The interpretation I have is that it is the same type of memorandum * * * that jewelers use. It is a universal memorandum all over the United States, whereby jewelers take merchandise from other jewelers, and if they do not demand it back in a specified time the jeweler then has possession * * *, and ownership, and owes the party who owned the piece at that time the amount of money for the piece. This is a regular jewelers memorandum."

[6, 7] A usage is operative upon parties to a transaction where and only where they manifest an assent to each other that it shall be operative, or where one of the parties knows or has reason to know that the other party intends to be governed by the usage, or where the usage exists in such transactions and is generally known by persons under similar circumstances. Rest., Contracts, § 247. It does not appear that either party manifested an intention to be governed by this alleged usage. No evidence was introduced to show that the alleged usage was so generally known that Tone would be charged with knowledge thereof and no evidence, except appellant's

testimony, was offered to prove that there was in fact such a usage. Tone is an actor and, while he testified that he had purchased jewelry on various occasions, it does not follow that he was familiar with the custom of dealers in the jewelry business. In Latta v. Da Roza, 1929, 100 Cal. App. 606, at page 609, 280 P. 711, at page 712, 281 P. 655, it was stated, 'To bind one who is not engaged in the trade or occupation which employs the usage relied upon, proof of his actual knowledge of the usage is necessary, unless it is so commonly accepted that the public is presumed to recognize its existence." The trial court may well have concluded that the evidence was insufficient, not only to establish knowledge on the part of Tone, but to establish such a custom.

Appellant asserts that the instrument was clear and unambiguous in its terms; that the respondent used admissions, made by appellant in the letter to Mrs. Flatto, to show that the written agreement was not what it purported to be and that the corpus delicti may not thus be established.

[8-11] It is well settled, as appellant contends, that the corpus delicti must be proved by evidence outside of the extrajudicial admissions of defendant. People v. Hudson, 1934, 139 Cal.App. 543, 544, 34 P.2d 741. It is also well settled that slight or prima facie proof of the corpus delicti is all that is necessary. People v. McWilliams, 1931, 117 Cal.App. 732, 736, 4 P.2d 601; People v. Bollinger, 1925, 196 Cal. 191, 200, 237 P. 25. It may be proved by circumstances shown in evidence or by inferences drawn from facts shown. People v. Vicunia, 1930, 105 Cal.App. 145, 147, 286 P. 1061. The rule requiring proof of the corpus delicti before the admission of extrajudicial confessions is thus stated in 8 Cal.Jur., section 303, page 235: "To authorize the reception and consideration * * * of evidence of an extrajudicial confession or admission of a defendant, the people need not establish the corpus delicti by proof of the clear and convincing character required to support a conviction. It is sufficient if there is some proof, or prima facie proof, or even slight proof of the corpus delicti. The uncorroborated testimony of a witness is sufficient to establish the corpus delicti for this purpose, * * *." It follows that Tone's testimony, having been introduced into evidence prior to the letter, sufficiently established the corpus delicti. Irrespective of this fact, there would have been no error since order of proof is discretionary with the court and. where corpus delicti is finally established, a mere variation in the order of proof cannot be said to result in any prejudice to the defendant's rights. People v. Clark, 1925, 70 Cal.App. 531, 546, 233 P. 980; 8 Cal.Jur., § 303, p. 235.

[12] Appellant contends that the respondent introduced extrinsic evidence in an attempt to prove that the contract was other than its language legally implied. There is no merit in this contention. An examination of the record fails to disclose that any evidence was either offered or received for the purpose of varying the terms of the contract. Under the circumstances here presented it was proper, in construing the contract, for the court to look to the language employed, the subject-matter, and the surrounding circumstances. Palma v. Leslie, 1935, 6 Cal.App. 2d 702, 707, 45 P.2d 391.

Appellant argues that one year and three months having elapsed between the date of the transaction and Tone's demand for the jewel, during which time appellant had given no notice of rejection, the sale became complete. Since, as above shown, the parties did not intend their agreement to be one of sale at the time of the transaction, the mere passage of time would not operate to transfer title.

[13] Appellant states as one of his grounds of appeal that the court was without jurisdiction of the offense charged; however, this point was not urged in his briefs and it is not clear in what particular he challenges its jurisdiction. His acts, allegedly constituting the crime of embezzlement, were committed in Los Angeles County; clearly, the superior court of such county would have jurisdiction.

[14] A further point urged by appellant is that under section 511 of the Penal Code it is a sufficient defense that property is appropriated openly and avowedly and under a claim of title preferred in good faith, even though such claim is untenable. In view of the evidence adduced at the trial and the construction placed upon the contract by the trial court, it appears that appellant did not act in good faith and, therefore, was not entitled to the benefits of that code provision. It was stated in Payne v. Pathe Studios, Inc., 1935, 6 Cal.App.2d 136, at page 140, 44 P.

2d 598, at page 600, "And if the construction placed upon it [the contract] by the trial court, * * * is reasonable and sustainable by the language of the instrument, and appears to be consistent with the true intent of the parties, an appellate court will not substitute another interpretation though it seem equally tenable."

[15] At the trial Tone and appellant disagreed as to what was intended by that portion of the agreement which provided that it was to remain in effect for ninety days and at the end of that time Tone was to receive $14,000 or had the right to demand his property from appellant. Tone testified that he understood it to mean that appellant had ninety days in which to sell the "stone" and that he (Tone) could not demand it back before ninety days but, upon the expiration of that time, he had the right to demand either the stone or $14,000. Appellant testified that he understood it to mean if Tone did not demand the jewel back within ninety days after the date of the agreement, the jewel became his property and he became indebted to Tone for $14,000. The conduct of appellant in making the several false statements to Tone and his attorney, regarding the prospective purchasers, the whereabouts of the jewel, the sale or pledge thereof to Mrs. Flatto, the amounts borrowed and the sums repaid thereon, is not at all in harmony with the actions of one who believed the contract had the meaning which appellant ascribed to it at the trial. If appellant did in good faith understand that he had title to the jewel under the terms of the contract, and believed that he acted innocently in delivering the jewel to Mrs. Flatto, it is hardly to be supposed that he would seek to conceal the transaction as defendant did by resorting to such extensive fiction when inquiries were directed to him concerning the jewel.

For the foregoing reasons, appellant's act in selling or pledging the jewel to Mrs. Flatto was sufficient to warrant the trial court in finding that he converted it to his own use in a manner and for a purpose inconsistent with the owner's rights and inconsistent with the nature and purposes of the contract, and, in so doing, he was guilty as charged.

[16] If the circumstances shown in evidence reasonably justify the finding of the trial court that defendant was guilty, a reviewing court is not warranted in disturbing the finding, even though those circumstances also might be reconciled reasonably with the innocence of defendant. People v. Newland, 1940, 15 Cal.2d 678, 681, 104 P.2d 778.

Defendant's motion for a new trial was denied by the trial court, probation was granted and imposition of sentence was suspended.

The order denying the motion for a new trial is affirmed.

SCHAUER, P. J., and BISHOP, J. pro tem., concur.

20 Cal.2d 720

WEST PUB. CO. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

S. F. 16692.

Supreme Court of California.

Aug. 19, 1942.

Rehearing Denied Sept. 14, 1942.

1. Corporations 🔑668(12)

Regardless of the form of statute authorizing service of process upon agent of foreign corporation which has not complied with the qualifying laws of state, the corporation must be doing business in the jurisdiction where the service is made to sustain its validity, since a foreign corporation is amenable to process, in the absence of consent, only if it is doing business within the state in such manner as to warrant the inference that it is present there.

2. Corporations 🔑642(6)

Isolated business transactions by foreign corporation, mere solicitation of business, advertising or demonstrating products, listing of name of corporation in telephone directory or having its name on door of an office or presence of a corporation official on personal business will not amount to "doing business" so as to make foreign corporation amenable to process in state.

See Words and Phrases, Permanent Edition, for all other definitions of "Doing Business".

3. Corporations 🔑642(1)

It is not any activity of a corporation in a state other than that of its residence which will justify the conclusion that it is "doing business" there, so as to make it amenable to process but it is the combination of local activities conducted by such corporation, their manner, extent and character, which becomes determinative of the jurisdictional question.

4. Corporations 🔑642(4½)
Licenses 🔑15(1)

Where foreign company had never qualified to do intrastate business, kept no bank account and no stock of books in the state, for filling of its California orders, and all shipments were made directly from its plant in Minnesota, and it rented no offices and made no allowances to any of its resident salesmen for such purpose, but company kept a substantial number of books in the state and permitted its salesmen to use them as a means of paying office rent, and as result of salesmen's activities from these locations, a systematic flow of books into the state occurred, the company was a "retailer" "maintaining places of business" in the state within the Use Tax Act and was "doing business" within the state so as to be amenable to service of process even though all its sales were in interstate commerce. St.1933, p. 2599, as amended by St.1935, pp. 1225, 1252, 1256; St.1937, pp. 1937, 1938, 1944, §§ 3, 6, 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Maintaining Place of Business" and "Retailer".

5. Commerce 🔑64
Constitutional law 🔑287
Licenses 🔑7(1)

The Use Tax Act requiring retailer, maintaining place of business in state and making sales of tangible personal property, to collect use tax from purchaser does not constitute a direct burden on "interstate commerce" and does not deny "due process of law" as applied to foreign corporation conducting interstate business but maintaining places of business and doing business within state. St.1933, p. 2599, as amended by St.1935, pp. 1225, 1252, 1256; St.1935, p. 1297, as amended by St.1937, pp. 1327, 1874, 1935; St.1937, pp. 1937, 1938, 1944, §§ 3, 6, 24; St.1939, pp. 2154, 2159, § 10; U.S.C.A. Const. art. 1, § 8; Amend. 14, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law" and "Interstate Commerce".

In Bank.

Prohibition proceeding by the West Publishing Company against the Superior Court of the City and County of San Francisco to restrain the court from proceeding further in an action against the petitioner.

Writ denied.

Rehearing denied; TRAYNOR, J., not participating.

John W. Preston, of San Francisco, and Orr, Stark & Kidder, of St. Paul, Minn., for petitioner.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and James E. Sabine and Valentine Brookes, Deputy Attys. Gen., for respondent.

CURTIS, Justice.

An action was commenced by the state against the West Publishing Company, a Minnesota corporation, whose business is the publication of law books and legal periodicals and their sale to persons in various parts of the country, for the recovery of taxes levied upon the company under the California Use Tax Act. Stats. 1935, ch. 361, p. 1297, as amended by Stats. 1937, ch. 401, 671, 683, pp. 1327, 1874, 1935; Stats.1939, ch. 677, p. 2154; Deering's Gen. Laws, Act 8495a. The state alleged that the company failed to file returns with reference to its California business for the period extending from July 1, 1935, to December 31, 1939; that thereupon, under authority of section 10 of the Use Tax Act, an estimate of $900,000 was made as the amount of total sales price of the tangible personal property sold by the company during this time "for storage, use or other consumption in the state of California"; and that upon this basis the company's liability was determined to aggregate $36,922.50—consisting of $27,000 for use taxes, interest amounting to $4,522.50 and penalties in the sum of $5,400. Personal service of process was made upon three of the company's salesmen operating in this state and a copy of the complaint and summons was sent by registered mail to the company's home office in St. Paul, Minnesota. The company appeared specially in the action and moved to quash the service of summons therein on the ground that it is a foreign corporation engaged exclusively in interstate commerce and is not doing business in this state so as to be amenable to its process. In this connection the company also challenged the constitutionality of the Use Tax Act as applied to its local activities claiming that its subjection to the requirements of the state tax would constitute a regulation and direct burden upon interstate commerce and would deprive it of its property without due process, in contravention of article 1, section 8, of the United States Constitution and section 1 of the Fourteenth Amendment to said Constitution. The motion was heard upon affidavits and oral testimony touching the conduct of the company's business affairs in this state, and was denied. The company now seeks a writ of prohibition to restrain the trial court from proceeding further in the action.

The petitioner's method of doing business with respect to California purchasers is substantially as follows:

Pursuant to a separate contract made with each, the exclusive right to solicit orders for its publications in California is granted by the petitioner to four salesmen, each of whom is allotted a separate section of the state and is of equal standing and authority. Under this contract the salesman must devote his entire time and attention to "the work of selling books and collecting and reporting upon accounts for" the petitioner, and as compensation for his services he is paid a salary and traveling expenses. All orders taken are subject to acceptance or rejection by the petitioner at its home office in St. Paul, Minnesota. The petitioner's instructions to its salesmen recommend that each order be accompanied by the customer's check for the initial payment specified in the governing price list. However, where the particular circumstances suggest a different procedure, the salesman, guided by his information as to the customer's credit rating as furnished by the petitioner or obtained from an independent source, may exercise his judgment in the matter of arranging the sale on terms of a sight draft, bill of lading attached, C. O. D. or cash basis. Such deviation from the routine type of time transaction, with "title of books to remain in West Publishing Co. until paid for," is submitted to the petitioner for confirmation when the order is transmitted. If the petitioner accepts the order, it ships the books from its plant at St. Paul, Minnesota, direct to the purchaser, charges prepaid; if it rejects the order, it returns the advance payment to the salesman with instructions that he rewrite the contract on different terms or refuse it altogether. As part of his duties in the solicitation and transmission of orders, the salesman is required to send to the petitioner a daily report of his activities, including information as to financial rating and credit standing of prospective purchasers. Also the salesman must return once a year to the petitioner's home office in St. Paul, Minnesota, to receive instructions in his work and to report on conditions in his district.

If the sale is made on the installment basis as is the usual case, the customer, in response to periodic statements sent to him by the petitioner, forwards all remittances to the Minnesota office. The salesman keeps no record of these subsequent payments or of the status of the particular account. However, when he is so requested by the petitioner's credit department, the salesman assists in the collection of delinquent amounts. In this connection he is expressly authorized, if unable to obtain payment, to "endeavor to line up the account with advance checks dated at thirty day intervals." If the overdue account is not so referred to the salesman for attention, it is handled by a local attorney employed by the petitioner for such purpose or by the petitioner's traveling collector sent from the home office. Other than the post-dated check arrangement specified to be within the authority of the salesman to negotiate, any compromise of claims or an adjustment involving the repossession of books is subject to the petitioner's approval. All routine complaints made to the petitioner relative to the prompt delivery of books and their condition upon arrival are referred to the salesman for settlement with the customer. With respect to such matters the salesman acts as "trouble shooter" for the petitioner in his assigned territory.

In addition to the orders obtained through the efforts of its salesmen—about 60 per cent of its total sales—the petitioner does a certain amount of business here in response to mail orders forwarded directly to the petitioner's home office from persons resident in this state. A further contributing factor to the petitioner's volume of sales in California is its practice of selecting a particular series of its law books supplementary to an earlier publication and sending it without previous order to all its established customers who are already owners of the prior edition. In so doing the petitioner anticipates that the customer will accept the later volumes thus forwarded to him and will pay for them in the course of direct negotiation with the petitioner at its home office. However, if the customer registers with the petitioner an objection to such method of sales promotion, it is the policy of the petitioner to refer the matter to the salesman operating in the district wherein the complaining customer is located. In such case the salesman attempts to adjust any misunderstanding which may have arisen and to persuade the customer to retain and pay for the later publication pursuant to the petitioner's statement of account.

The petitioner keeps here no bank account and no stock of books for the filling of its California orders; all shipments are made directly from the petitioner's plant at St. Paul, Minnesota, to the purchasers in this state, via a common carrier. The petitioner rents no office here and it makes no allowance to any of its resident salesmen for such purpose. However, each salesman has established headquarters with a law firm centrally situated in relation to his district: the focal points are Sacramento, San Francisco and Los Angeles—the law office in the latter city accommodates two salesmen while each of the other locations serves but one. The arrangement is substantially the same in each place. The salesman is allotted a section of the firm's library for shelving the books furnished him by the petitioner for use and display in the solicitation of orders, and certain desk space for the storage of his order blanks and writing materials. In the room assigned to him as his workshop he attends to all his business correspondence and prepares his daily reports for transmittal to the home office, receives his mail and telephone calls and makes appointments for interviewing customers there or elsewhere. He usually spends a part of each day at his city headquarters. In exchange for these office conveniences and services accorded to the salesman the members of the law firm involved enjoy practically unrestricted use of the petitioner's books so placed in their library. The various sets are kept up to date by the petitioner and constitute a sizeable and representative collection of law books—approximately 2,000 and 1,500 volumes being deposited in the San Francisco and Los Angeles offices, respectively. While the petitioner has not affirmatively undertaken to negotiate any office accommodations for its salesmen in this state, it has acquiesced in the arrangements made in the three localities mentioned for the display of its books and the centralization of its business operations. Moreover, the San Francisco and Los Angeles headquarters are listed in the respective telephone and building directories as addresses of the West Publishing Company. Such listings, while made at the instance of the lessee of the law suit concerned, are recognized by the petitioner in its extensive state advertising. For example, through various articles published in California legal journals and periodicals the petitioner for the past several years has advertised these locations as its "San Francisco office" and its "Los Angeles office," has invited prospective customers to inquire at these addresses "for full details," and has referred to its San Francisco and Los Angeles salesmen as its "local representatives." The petitioner has never qualified to do intrastate business in this state.

The single controversial issue to be decided in this proceeding is the question of jurisdiction of the respondent court to proceed with the trial of the action instituted by the state aaginst the petitioner for the recovery of the use taxes for the period above mentioned. In determining the validity of the service of process in that suit, the legal significance which should be given to the above-recited facts relative to the petitioner's local activities is of controlling importance.

Relevant to the consideration of the present factual situation are the following sections of the Use Tax Act:

Section 3 (Stats.1937, p. 1937) imposes an excise tax "on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property." (This exaction is complementary to the California Retail Sales Tax (Stats.1933, ch. 1020, p. 2599, as amended, Stats.1935, ch. 351, 355, 357, pp. 1225, 1252, 1256; Deering's Gen.Laws, 1937, Act 8493), which is a levy at the same rate upon the gross receipts of California retailers from sales of tangible personal property.)

Section 2, subdivision (b) (Stats.1939, p. 2154) defines the word "use" as including "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Subdivision (f) of the same section defines "retailer" as including "every person engaged in the business of making sales for storage, use or other consumption * * *."

Section 6 (Stats.1937, p. 1938) directs "every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use or other consumption in this State [not exempted under the law] * * *." to collect the tax imposed by the act from the purchaser, and specifies such tax "shall constitute a debt owed by the retailer to this State."

Section 24 (Stats.1937, p. 1944) provides that "In any action brought under the provisions of this act process may be served according to the provisions of the Code of Civil Procedure and the Civil Code of this State or may be served upon any agent or clerk in this State employed by any retailer in a place of business maintained by such retailer in this State, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office."

[1] Whatever the form of a particular statute authorizing service of process upon the agent of a foreign corporation which has not complied with the qualifying laws of a state, it is a fundamental requisite under the federal Constitution that the corporation shall be "doing business" in the jurisdiction where the service is made to sustain its validity. Riverside, etc., Mills v. Menefee, 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910; People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 S.Ct. 233, 62 L.Ed. 587, Ann.Cas.1918C, 537. Formerly the theory upon which the courts of a state assumed jurisdiction of a foreign corporation carrying on business within its borders was that of implied consent to such jurisdiction. Lafayette Ins. Co. v. French, 18 How. 404, 15 L.Ed. 451; St. Clair v. Cox, 106 U.S. 350, 1 S.Ct. 354, 27 L.Ed. 222. The abandonment of this "consent theory" in favor of the "corporate presence theory" was foreshadowed in St. Louis Southwestern R. Co. v. Alexander, 227 U.S. 218, 33 S.Ct. 245, 57 L.Ed. 486, Ann.Cas.1915B, 77. The latter doctrine was summarized by Mr. Justice Brandeis in Philadelphia & Reading R. Co. v. McKibbin, 243 U.S. 264, 37 S.Ct. 280, 61 L.Ed. 710, as follows: "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent." The determination of this jurisdictional question "is often a matter of great difficulty and extreme nicety. No all-embracing rule as to what is doing business has been laid down." Fletcher Cyclopedia Corporations, Permanent Edition, Vol. 18, § 8733. In Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915, 917, 918, the late Judge Cardozo commented upon the criterion of corporate presence in this connection as follows: "If in fact it [the corporation] is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its

business is interstate or local, it is within the jurisdiction of our courts," citing International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944, 58 L.Ed. 1479. "But there is no precise test of the nature or extent of the business that must be done. All that is requisite is that enough be done to enable us to say that the corporation is here." As was said in International Harvester Co. v. Kentucky, supra, each case must depend upon its own facts.

[2, 3] While it is clear from these general observations that the application of a practical test is necessary to determine the validity of the service of jurisdictional process upon a foreign corporation, certain fundamentals have been settled establishing that neither isolated business transactions (Hunter v. Mutual Reserve Life Ins. Co., 218 U.S. 573, 31 S.Ct. 127, 54 L.Ed. 1155, 30 L.R.A.,N.S., 686), nor the mere solicitation of business (Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 916), nor holding stock in subsidiary corporations (Peterson v. Chicago, Rock Island & Pac. Ry., 205 U.S. 364, 27 S.Ct. 513, 51 L.Ed. 841; People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 S.Ct. 233, 62 L.Ed. 587, Ann.Cas.1918C, 537), even to the point of complete control (Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed. 634), nor advertising or demonstrating products (Harrell v. Peters Cartridge Co., 36 Okl. 684, 129 P. 872, 44 L.R.A.,N.S., 1094), nor its listing in the telephone directory or having its name on the door of an office (Philadelphia & Reading R. Co. v. McKibbin, 243 U.S. 264, 37 S.Ct. 280, 61 L.Ed. 710), nor the presence of a corporation official on personal business (Riverside & Dan River Cotton Mills v. Menefee, 237 U.S. 189, 35 S.Ct. 579, 59 L.Ed. 910) will amount to the presence of the corporation. It is thus apparent that it is not *any* activity of a corporation in a state other than that of its residence which will justify the conclusion that it is "doing business" there, so as to make it amenable to process there, but it is the combination of local activities conducted by such foreign corporation—their manner, extent and character—which becomes determinative of the jurisdictional question. The term "doing business" within a state foreign to the one in which the corporation is organized and has its principal place of business is substantially defined by the Supreme Court of the United States as follows: "The general rule deducible from all our decisions is that the business must be of such a nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted." People's Tobacco Co. v. American Tobacco Co., supra [246 U.S. 79, 38 S.Ct. 235, 62 L.Ed. 587, Ann.Cas.1918C, 537]; see, also, Green v. Chicago, Burlington & Quincy Ry., supra; International Harvester Co. v. Kentucky, supra. A leading and oft-cited authority upon the question of the jurisdictional service of process is the case of International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944, 946, 58 L.Ed. 1479. In that case the State of Kentucky had instituted a criminal proceeding in its own courts against the Harvester Company for a violation of a Kentucky anti-trust law. The precise point involved was whether or not the state court had jurisdiction, and it was held that it had irrespective of the fact that the company's local business was purely of an interstate character. The opinion in that case discloses the following facts: The company had sales agents within the state, soliciting orders which were sent to the home office in another state for approval and in response to which the machines of the Harvester Company were delivered in Kentucky. There was a continuous course of shipment of machines into Kentucky. All deliveries were made f. o. b. at some point outside of Kentucky. The agents had authority to receive money, check or draft in payment of debts due the company and to take notes payable at local banks. They were not permitted to have any headquarters or place of business within the state, though they were allowed to reside there. They likewise were prohibited from making contracts or settlements and from engaging in other transactions not specifically authorized. The court expressly distinguished this factual situation as constituting "something more than mere solicitation" of patronage, which circumstance in the ticket agency case of Green v. Chicago, Burlington & Quincy Ry. Co., 205 U.S. 530, 27 S.Ct. 595, 51 L.Ed. 916, was deemed insufficient to bring the railroad corporation within the state for the service of process. The Supreme Court in the International Harvester Co. case said at p. 585 of 234 U.S., at page 946 of 34 S.Ct., 58 L.Ed. 1479: *"Here was a continuous*

course of business in the solicitation of orders which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state." (Italics ours.)

The adjudicated cases since the Harvester Company decision are not in complete agreement as to the precise factors additional to "mere solicitation" which motivated the court in that instance to sustain the jurisdiction of the Kentucky court. In the consideration of the question in People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 S.Ct. 233, 62 L.Ed. 587, Ann.Cas.1918C, 537, the authority of the agents in the Harvester Company case to receive payments in Kentucky was stressed as determinative of the amenability of the corporation to service there. Other leading authorities have viewed the *quantity* and *continuity* of the solicitation of business in Kentucky as the controlling feature of the decision, rather than the mere additional circumstance of collecting money. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915; American Asphalt Roof Corp. v. Shankland, 205 Iowa 862, 219 N.W. 28, 60 A.L.R. 986. In so holding, these last-mentioned cases emphasize the import of the italicized language in the above quotation from the Harvester Company opinion. In this connection the court in the Shankland case made the following observation at page 870 of 205 Iowa, at page 31 of 219 N.W.:

"* * * The continuous course of business referred to was the *solicitation of orders* which were sent to another state, and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. The court said, 'This was a course of business, not a single transaction.' It is true that the above language is followed by a reference to the fact that the agents were authorized to receive notes, drafts, checks, money, etc., and transmit the same to the Harvester Company. Such transactions were, however, merely formal acts and involved the exercise of no discretion on the part of the agent, and were always referable to transactions closed by the approval of the order, and, no doubt, generally by the delivery of the machines. These transactions are not given significance in what the court terms a continuous course of business.

"The present Chief Justice of the New York Court of Appeals [the late Judge Cardozo], in an able opinion in Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915, refers to and quotes the identical language from the opinion of Justice Day in the International Harvester Co. case. The writer of the opinion in the New York case points out the difference in the facts in the International Harvester Co. and Green cases, and distinguishes them by saying that in the latter case the orders taken did not result in a continuous course of shipments from Illinois to Pennsylvania, the states referred to in the opinion."

[4] These principles relative to observable presence of a corporation furnish a firm basis for holding that the petitioner under the facts presented by the record is "doing business" within this state in such manner and to such degree as to be amenable to the service of judicial process. A recapitulation of the salient features of the petitioner's local activities will illustrate the factual foundation for this conclusion—and irrespective of which interpretation of the Harvester Company case is followed. While the petitioner does not lease offices here, it has kept several thousand volumes of law books in this state continuously over a period of years and permitted its salesmen to use them as a means of paying office rent. As a result of this practice it enjoys the advantages attendant upon the establishment of a fixed and local habitation for the conduct of its business and the display of its publications. Through extensive advertising of these locations as its local addresses the petitioner indicates that it regards those places as its points of contact with the public here. At these headquarters the petitioner's salesmen receive necessary office accommodations for the effective prosecution of their work. For many years in response to the petitioner's continuous solicitation of orders there has been a sys-

tematic and regular flow of its law books into this state—with respect to the period of time here involved the petitioner concedes that its California sales amount to $160,000 annually, a "substantial" volume of business. The powers of the petitioner's salesmen are varied in nature and exceptionally broad in some instances, as will be noted. In addition to taking orders, they receive initial payments upon installment contracts and they make collections on delinquent accounts incident to the exercise of a limited discretion in negotiating a postdated check arrangement for the settlement of such matters. Of significance at this point of review is the activity of the salesmen in connection with the petitioner's practice of sending to its customers in this state as to whose credit rating it is satisfied, selected sets of books without prior order. Frequently sales of such unordered merchandise are in fact consummated by the salesmen here when they persuade these persons to retain these publications and to pay therefor in accordance with the petitioner's statements of account. This last-mentioned line of duty in particular emphasizes the responsibility of the salesmen for the conduct of the petitioner's local affairs.

Regarding the petitioner's method of doing business in California as an integrated whole and coordinated with the establishment of local headquarters in the manner above outlined as pivotal points of operation, it cannot be gainsaid that the petitioner "maintains" places of business and makes "sales of tangible personal property for storage, use or other consumption in this State." The petitioner's reference to numerous patent infringement cases (Weller v. Pennsylvania R. Co., C.C., 113 F. 502; General Electric Co. v. Best Electric Co., D.C., 220 F. 347; American Electric Welding Co. v. Lalance & Grosjean Mfg. Co., 1 Cir., 249 F. 968, 162 C.C.A. 166; Winterbottom v. Casey, D.C., 283 F. 518; Zimmers v. Dodge Brothers, D.C., 21 F.2d 152; Elevator Supplies Co. v. Wagner Mfg. Co., D.C., 54 F.2d 937; Wilson v. McKinney Mfg. Co., 9 Cir., 59 F.2d 332; New Wrinkle, Inc., v. Fritz, D.C., 30 F.Supp. 89) as a guide for interpretation of the term "place of business" is of no avail here, for the jurisdictional elements entering into the determination of the validity of service of process in such cases have a special and restricted meaning under the terms of section 48 of the Judicial Code, 28 U.S.C.A. § 109. That statute provides that suits for patent infringement may be brought "in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business." The requisite acts of infringement contemplate the defendant's "making, selling or using of the infringing product" (New Wrinkle, Inc., v. Fritz, supra) and, in addition, "the defendant in the suit must have a regular and established place of business,—probably with reference to the acts of infringement." Weller v. Pennsylvania R. Co., supra [113 F. 506]. That a great deal more than the maintenance of a "place of business" is encompassed by the phrase "a regular and established place of business," as defined in these patent infringement cases, is illustrated by the federal court's reference in Winterbottom v. Casey, supra [283 F. 521], to the jurisdictional words of section 48 as meaning "a place where the *same kind of business,* in kind, if not in degree, is carried on as is done at the home office or principal place of business of the person or company involved—a place where the manufacturing or selling or other acts constituting the activities of the business are made or done, respectively, in the usual course, and contracts or deliveries are made to the general public; where orders of customers are received and attended to continuously at a fixed, permanent, 'regular,' 'established' place; in short, a 'branch' of the business." These few references to the express statutory requirements determinative of the jurisdiction of the federal courts in patent infringement cases are sufficient to demonstrate the inapplicability of such cases to the consideration of a foreign corporation's liability to service of process within the state for the purposes of general suit.

[5] The petitioner's final challenge of the jurisdiction of the respondent court upon constitutional grounds is completely answered by the recent case of Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488, wherein the circumstances under which a foreign corporation engaged exclusively in interstate commerce manifests its presence in this state pursuant to the terms of the California Use Tax Act are discussed. In that case an Illinois corporation, while not

qualified to do local business in California, leased offices in its own name in California, itself paying the rent, for the use of two general agents upon whom it conferred the exclusive right to solicit orders within the state subject to acceptance by the home office. The agents were prohibited from making collections, and all payments for goods ordered were made directly to the corporation. All goods delivered in California were shipped from one of the corporation's distributing points outside the state, sometimes directly to the purchasers and sometimes to the general agents, to save freight, who, in turn, delivered them to the purchasers. The corporation contended that since it did no intrastate business in California, any requirements that it act as the state's collecting agent for the use tax or that it insure payment if it failed to make collections from the users, constituted a direct burden upon interstate commerce as well as a denial of due process of law. In sustaining the state's claim that it might constitutionally apply to such nonresident corporation the provisions of the challenged statute, the Supreme Court of the United States referred to its earlier decision in Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524, 81 L.Ed. 814, upholding the validity of similar Washington legislation as applied to goods of extra-state origin, and quoted therefrom as follows (306 U.S. 67, 59 S.Ct. 378, 83 L.Ed. 488): "The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end." Thus, it follows from this decision that the local activities of a foreign corporation may be purely interstate and yet sufficient in character to bring such corporation within the jurisdictional limits of this state and so render it liable to service of process in a suit instituted under the California Use Tax Act.

Nor is the force of the Felt & Tarrant Manufacturing decision weakened, as the petitioner urges, by the fact that the Supreme Court of the United States denied certiorari in the case of Brown v. J. B. Simpson, Inc., 314 U.S. 674, 62 S.Ct. 137, 86 L.Ed. 539 (J. B. Simpson, Inc., v. Gundry, 297 Mich. 403, 298 N.W. 81), thereby leaving unimpaired the decree of the Michigan Supreme Court that a foreign corporation qualified in Michigan and maintaining a branch office there cannot be compelled to collect the use tax on its exclusively interstate sales. Careful examination of the Michigan opinion reveals that the controlling factor was not lack of jurisdiction over the seller corporation, but the express language of the governing statute determining its non-applicability to an out-of-state corporation wholly engaged in the interstate business of selling in Michigan. Insofar as the distinction between these two cases is pertinent to the jurisdictional question raised in this proceeding, it is sufficient simply to note here the limited scope of section 5 of the Michigan Use Tax Act, Pub.Acts 1937, No. 94, applying only to "every seller of tangible personal property for storage, use or other consumption in this state, *engaged in the business of selling at retail in this state,*" in contrast to the broad terms of section 6 of the California Use Tax Act, requiring compliance by "Every *retailer maintaining a place of business in this State and making sales* of tanglible personal property for storage, use or other consumption in this State." (Italics ours.)

In line with our conclusion that the nature and range of the petitioner's local activities classify it as a retailer maintaining places of business and doing business within this state "in such manner and to such extent as to warrant the inference that it is present" here for purposes of suit, the binding force of the service of process upon the petitioner is not open to question. The provisions of section 24 of the California Use Tax Act were strictly followed by the personal service of summons and a copy of the complaint upon each of three of the petitioner's resident agents, and a copy of the summons and complaint was sent by registered mail to the petitioner's home office in St. Paul, Minnesota.

For the foregoing reasons the alternative writ of prohibition heretofore issued is discharged and the petition for a peremptory writ is denied.

GIBSON, C. J., and SHENK, EDMONDS, and CARTER, JJ., concurred.

TRAYNOR, J., did not participate herein.

54 Cal.App.2d 384

PEOPLE v. MILLER.

Cr. 3568.

District Court of Appeal, Second District,
Division 3, California.
Sept. 11, 1942.

1. Criminal law 🔑511(1)

In robbery prosecution, evidence was sufficient to corroborate testimony of defendant's accomplice and to sustain conviction.

2. Criminal law 🔑511(1)

The evidence necessary to corroborate the testimony of an accomplice need not tend to establish precise facts testified to by the accomplice.

3. Criminal law 🔑511(2)

Strong corroborative testimony is not necessary to support a conviction founded on an accomplice's testimony and even though circumstantial and slight, evidence is sufficient if it tends to connect accused with the crime.

4. Criminal law 🔑511(7)

The defendant's statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a conviction.

5. Criminal law 🔑511(1)

Corroborative evidence need not establish, without aid of testimony of accomplice, that defendant committed the offense charged.

6. Criminal law 🔑511(6)

The unexplained possession of stolen goods soon after a theft, burglary or robbery is sufficient "corroboration" of the testimony of an accomplice.

See Words and Phrases, Permanent Edition, for all other definitions of "Corroboration".

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Henry Miller was convicted of robbery, and he appeals.

Affirmed.

George Stahlman and Harry Duckett, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

BISHOP, Justice pro tem.

[1] We accept as a proper statement of the one problem presented by this appeal that which is expressed in defendant-appellant Miller's closing brief in these words: "The only question in this case as appellant sees it, is the question as to the sufficiency of the corroboration of the testimony of the accomplice Jacoby." The answer which we are giving to this question is that the corroboration is sufficient, amply so.

The appellant was charged with having committed the crime of robbery. The evidence that a robbery took place in which some $70,000 worth of furs were stolen, is complete and from witnesses who were not accomplices. According to their account one Jacoby was an active participant in the actual holdup. Jacoby testified that appellant's connection with the crime was that of the master mind, the one who planned the affair and took charge of the booty after his plans had been successfully carried out. According to appellant's own testimony he had known Jacoby some time before the robbery, having already received and sold a batch of stolen furs delivered to him by Jacoby. The defendant further testified before the jury which convicted him that some ten days before the event took place Jacoby told him to expect some more furs, and according to schedule the furs were delivered and by Jacoby and the appellant taken up to an unfurnished room which the appellant had rented before the robbery but after he had been told more furs were to be expected. Some of the furs were found in this room, others at another location to which the appellant directed the police, after first denying that he knew where any more could be located.

After his arrest appellant made a statement to an officer, in which, according to the officer and according to the appellant, he answered that he recalled September 25th, the date of the Gailland-Cohen robbery, the one of which he was found guilty; that he had no personal knowledge "as to who might have perpetrated it"; but that a few days before it was perpetrated he knew that it was going to be; that he had talked it over with Jacoby and another, who wanted to know if he (Miller) would be ready for them. "Were they to be paid for the furs taken?" "Yes." "How much?" "$5,000.00." There are further questions and answers from which it could be inferred that appellant did not know that the robbery which was to take place was this particular one, but appellant's statements also warranted the inference which the jury may well have drawn, that the appellant was getting ready to receive the spoils from a robbery of whose identity and size he was well aware, as Jacoby had witnessed.

[2-6] This evidence furnishes ample corroboration for Jacoby's testimony. "The law does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative testimony is not necessary to support a judgment of conviction founded on the testimony of an accomplice. Even though circumstantial and slight, the evidence is, nevertheless, sufficient if it tends to connect the accused with the commission of the offense. People v. Martin, 19 Cal.App. 295, 125 P. 919. The defendant's own statements and admissions, made in connection with other testimony, may afford corroboratory proof sufficient to sustain a verdict. People v. Armstrong, 114 Cal. 570, 46 P. 611; People v. Sullivan, 144 Cal. 471, 473, 77 P. 1000. It is not necessary that the corroborating evidence should go so far as to establish by itself, and without the aid of the testimony of an accomplice, that the defendant committed the offense charged. People v. Solomon, 6 Cal.Unrep. 305, 58 P. 55. It is not necessary to cite the great number of authorities which sustain these fundamental principles of law relating to the testimony of an accomplice." People v. Negra, 1929, 208 Cal. 64, 69, 70, 280 P. 354, 356, 357. The "unexplained" possession of stolen goods soon after a theft, burglary or robbery has many times been held to be sufficient corroboration of the testimony of an accomplice, and it is evident from the fact that in each of the following cases the defendant gave an explanation that by "unexplained" is meant the absence of an explanation sufficient to raise a reasonable doubt. People v. Haughey, 1926, 79 Cal.App. 541, 543, 250 P. 406, 407; People v. Melson, 1927, 84 Cal.App. 10, 16, 257 P. 555, 557. The principle applicable is also stated more generally as in this quotation from People v. Rice, 1938, 29 Cal.App.2d 614, 620, 85 P.2d 215, 218: "It is well established that possession of stolen property may be sufficient corroboration to warrant a conviction upon the testimony of an accomplice" (citing cases).

The judgment of conviction and order denying a new trial, from which the defendant appealed, are affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concur.

GRIFFITHS et al. v. DONOGHUE, Registrar of Voters, et al.

S. F. 16771.

Supreme Court of California.

Aug. 27, 1942.

Judgment ⚷715(1)

Where mandamus proceeding involved the same questions of law as were determined in a prior proceeding wherein writ of mandate was denied, the order of denial rendered questions raised in second proceeding "moot", and hence second proceeding must be dismissed.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

In Bank.

Original proceeding in mandamus by Jack Griffiths and others against M. J. Donoghue, as Registrar of Voters, etc., and others.

Proceeding dismissed.

Emery F. Mitchell, of Crescent City, for petitioners.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy City Atty., both of San Francisco, for respondents.

Hanna & Morton, of Los Angeles, Amici Curiae, for respondents.

PER CURIAM.

In this proceeding in mandamus the questions of law are the same as those involved in Youngman v. Peek (S.F. 16792)[1] in which a writ of mandate was denied on July 29, 1942. By the order in that proceeding the questions herein have become moot. This proceeding is therefore dismissed.

54 Cal.App.2d 318

PLANTE v. PLANTE et al.

Civ. 13502.

District Court of Appeal, Second District, Division 3, California.

Sept. 3, 1942.

Hearing Denied Oct. 29, 1942.

1. Appeal and error 🔑1010(1)

Trial court's finding, if it had evidentiary support, would not be disturbed.

2. Divorce 🔑327

In action to control the disposition of the remains of a deceased on ground that deceased's divorce from plaintiff in a foreign state was void and that plaintiff, and not defendant whom deceased subsequently married, was deceased's lawful widow, evidence sustained trial court's finding that deceased's residence in the foreign state in which he obtained his divorce was bona fide. St.1939, p. 673, § 7100.

3. Divorce 🔑326

Where husband, before going to foreign state to obtain divorce, had been living apart from wife because her treatment of him made cohabitation intolerable, and the husband was the innocent party, the husband was justified in acquiring a new domicile in the foreign state, and the wife would be deemed to have consented to have her interest in the marriage status determined in the foreign state where the husband became domiciled.

4. Divorce 🔑327

The fact that husband who had obtained a divorce in Nevada after coming to Nevada from California, gave California as his residence in affidavit for marriage license, did not preclude the finding that his residence in Nevada was bona fide.

5. Divorce 🔑326

Nevada divorce decree, which was regular on its face, was entitled to a presumption of validity in California.

6. Divorce 🔑329

In action to control the disposition of the remains of a deceased on ground that deceased's divorce from plaintiff in a foreign state was void and that plaintiff and not defendant whom deceased subsequently married was deceased's lawful widow, evidence sustained trial court's finding that deceased was not guilty of fraud in obtaining the divorce. St.1939, p. 673, § 7100.

7. Divorce 🔑327

A foreign divorce decree is subject to "collateral attack" on ground that it was procured on a fraudulent domicile or residence, that the laws of the state granting the decree were not complied with, or that the spouse who was domiciled in the foreign state, which was not the matrimonial domicile, and who procured the divorce, was the wrongdoer, whereas the other spouse who was neither personally served nor appeared in the foreign action was the innocent party.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Mary Elizabeth Plante against Pearl A. Plante and the Forest Lawn Memorial Park Association to control disposition of the remains of Joseph H. Plante, deceased, on the theory that his divorce from plaintiff was void and that she, and not the defendant whom he subsequently married, was his lawful widow. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

Ernest P. Morgan, of Los Angeles, and V. A. Morgan, of Alhambra, H. M. Lineman and Mab Copeland Lineman, both of Los Angeles, for appellant.

L. H. Phillips, of Los Angeles, for respondents.

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[1] No opinion filed.

SCHAUER, Presiding Justice.

This is one of a group of three actions brought by the plaintiff, the divorced wife of Joseph H. Plante, now deceased, against her successor as the consort of Mr. Plante. In such actions plaintiff has sought respectively, (1) to control disposition of the remains of Mr. Plante, on the theory that his divorce from her was void and that she, and not defendant Pearl A. Plante whom he subsequently married, is the lawful widow; (2) to set aside or to prevent probate of Mr. Plante's last will, on the theory that in executing it he acted under the duress and undue influence of defendant Pearl A. Plante; (3) for declaratory relief and specific performance, *according to plaintiff's construction,* of a contract executed by plaintiff and Mr. Plante at a time when they were living apart, but previous to their divorce. In the (this) action to control disposition of the decedent's remains the Forest Lawn Memorial Park Association is also made a party defendant and in the suit for declaratory relief and specific performance the special administrator of Mr. Plante's estate is joined as a defendant. The three actions were consolidated for trial and in all three judgment was rendered for defendants. It is conceded that there was a total failure of proof of any undue influence in the will contest phase of this litigation and no appeal is prosecuted in that respect, but in the suits seeking control of Mr. Plante's remains and specific performance of the property settlement contract according to plaintiff's interpretation of it, appeals are taken severally but on a single reporter's transcript. We are filing a separate opinion in each appeal but we do not repeat in the opinion in the specific performance case the facts which are set out here, which are brought up in the one transcript, and which are common to all the litigation instituted by plaintiff against the defendant Pearl A. Plante.

The material facts are that plaintiff and Joseph H. Plante intermarried in the year 1904, at San Francisco, California. They moved to Los Angeles in 1925 and in 1933 they separated and entered into the property settlement agreement which is the subject of plaintiff's action for declaration of rights and specific performance. They resumed matrimonial cohabitation for a period but in 1938 again separated and on or about October 9, 1939, Mr. Plante left California and took up his abode at Las Vegas, Nevada. There, on November 22, 1939, he filed suit for divorce and on December 28, 1939, he was awarded a decree from plaintiff on the ground of extreme cruelty. Later, on the same day, he and defendant Pearl A. Plante intermarried at Kingman, Arizona. They came to Los Angeles on January 1, 1940, and from that date until Mr. Plante's death on April 19, 1940, resided in a house in Los Angeles owned by the defendant wife. There was testimony showing that they had intended to sojourn but briefly in California and then proceed to Indianapolis, Indiana, where defendant wife owned other property and had maintained her domicile for many years. Their plans in this regard apparently were cut short by Mr. Plante's death.

Section 7100 of the Health and Safety Code, St.1939, p. 673, provides that "The right to control the disposition of the remains of a deceased person, unless other directions have been given by the decedent, vests in * * * the following in the order named: (a) The surviving spouse. * * *" It thus appears that this action for control of the remains of Mr. Plante provides a medium by which plaintiff seeks to have it decreed that Mr. Plante's Nevada divorce was void, that his marriage to defendant Pearl A. Plante was likewise void, and that she, the plaintiff, is the surviving spouse, with such burdens and rights as may be incident to such relationship.

The gravamen of plaintiff's charge in her complaint and of her argument upon this appeal is that Mr. Plante's residence in Nevada was but simulated and hence that the Nevada court had no jurisdiction over his matrimonial status. Plaintiff specifically alleged, "That in his verified complaint for divorce above-mentioned, Joseph H. Plante, deceased, alleges that for more than six weeks last past, immediately preceding the filing of this action for divorce, that he had been a bona fide resident of the County of Clark, State of Nevada, and had continuously resided and been physically present and domiciled during all of said period in said County of Clark. * * *" and also "that the said Joseph H. Plante, deceased, was seen by her [plaintiff] in the City of Los Angeles, State of California, upon three different and separate occasions, during the alleged six week residence in the State of Nevada; that the sole and only purpose for which he went to Nevada to procure a divorce was to circumvent and avoid the laws of the State of California; that said alleged residence in Nevada was never intended to be a bona fide residence." The answer of the defendant wife, for want of information and belief denied plaintiff's allegations relative to seeing Mr. Plante in California during the period alleged and upon the same ground denied that his purpose was to circumvent or avoid the laws of California and that his residence in Nevada was not bona fide. Among the findings of fact made by the trial court are the following:

"2. It is true that during the month of October, 1939, the said Joseph H. Plante, deceased, left the City of Los Angeles, California, and established his residence in Las Vegas, Nevada. It is not true that the said Joseph H. Plante, deceased, could not get a divorce from the plaintiff in California. * * *

"4. It is true that in said verified complaint for divorce the said Joseph H. Plante, deceased, alleged that for more than six (6) weeks last past immediately preceding the filing of his said action for divorce against the plaintiff Mary Elizabeth Plante, he had been a bona fide resident of the County of Clark, State of Nevada, and had continuously resided and had been physically present and domiciled during all of said period in said County of Clark. * * * It is true that the said decedent, Joseph A. Plante, *did* for more than six (6) weeks immediately preceding the filing of said divorce action against the plaintiff, Mary Elizabeth Plante, *was* a bona fide resident of the County of Clark, State of Nevada, and did continuously reside and was physically present and domiciled during all of said period in the County of Clark, State of Nevada.

"3. It is not true that the said Joseph H. Plante, deceased, was seen by the plaintiff in the City of Los Angeles, State of California, upon three (3) different occasions, or at any occasion, during the six (6) weeks' residence of said Joseph H. Plante, the deceased, in the State of Nevada. It is not true that the sole and only purpose for which the deceased, Joseph H. Plante, went to Nevada was to procure said divorce or to circumvent and/or avoid the laws of the State of California. It is not true that said alleged residence of Nevada was never intended to be a bona fide residence."

The fundamental question necessary for us to determine on this appeal is: Does the evidence support the foregoing quoted findings of fact? We are satisfied that it does.

Plaintiff, in her argument that the evidence fails to support the trial court's finding, places great emphasis upon the statements contained in Mr. Plante's "Affidavit for Marriage License," which was a form filled out by him or under his direction in the office of the clerk of the superior court of Mohave County, Arizona, on December 28, 1939, following the rendition of the divorce decree earlier that day in Clark County, Nevada. The affidavit, in material part, is as follows: "Joseph H. Plante, being first duly sworn upon his oath, does declare, depose and certify: That Joseph H. is his true
(First name in full)
name; that his age is 66 years ; that
(Last Birthday)
he is a resident of Los Angeles, Los Angeles,
(Town, County and
California that he is of the Caucasian
State) (Caucasian,
race; and that he
Mongolian, Negro, or Indians)
is not related Pearl A. Cook and that he
(Name of female)
has not been divorced by an Arizona court within the past year."

The reporter's transcript of Mr. Plante's testimony given earlier the same day in the Nevada court shows the following:

"Q. Where do you live, Mr. De La Plant? [The name De La Plant was apparently used interchangeably with Plante.] A. On Second Street in Las Vegas.

"Q. How long have you been a resident of Las Vegas, Clark County, Nevada? A. Since October, 1939.

"Q. What date? A. The 11th.

"Q. Have you been present in the City of Las Vegas, Clark County, Nevada every day from and including October 11th of this year to and including November 22nd of this year? A. Yes, sir.

"Q. When you came here, did you come with the intention of making Clark County, Nevada your permanent place of residence? A. Yes.

"Q. Have you retained that intention ever since? A. Yes.

"Q. And you have it now? A. Yes."

[1, 2] The statements above quoted from the affidavit submitted by Mr. Plan-

te in applying for his marriage license, which seemingly are inconsistent with his divorce suit testimony, likewise above quoted, coupled with the fact that his place of residence in Las Vegas was a rooming house and that he did not engage in business in that city or, so far as appears, make arrangements to stay there permanently, considered with his personal movements before, during, and after his stay in Nevada, obviously would have supported a finding that his residence there was not bona fide. But the trial court has found to the contrary and such finding is entitled to our support if it has evidentiary support. We are satisfied that it does.

[3] Before going to Nevada Mr. Plante had been living apart from plaintiff because her treatment of him made cohabitation intolerable. That Mr. Plante was the innocent party and that plaintiff here was the offending spouse was amply established. These facts justified Mr. Plante in acquiring a new domicile and constituted, in law, a consent by plaintiff to have her interest in the marriage status determined in the state where her non-offending spouse was domiciled. (Delanoy v. Delanoy, (1932) 216 Cal. 27, 38, 13 P.2d 719, 86 A.L.R. 1321.) It was established by overwhelming testimony that Mr. Plante was continuously present in Nevada from October 9 or 11 until November 25, 1939, and that plaintiff's assertion that she had seen him in Los Angeles on three occasions during that period was not true. The fact, commented on in plaintiff's brief, that Mr. Plante lived in a rooming house in Las Vegas loses its significance when it is observed that the evidence also shows that Mr. Plante lived in a rooming house in Los Angeles before he went to Las Vegas. Also the fact that he did not engage in business in Nevada is of little importance in view of the further fact that he was not engaged in business in any other state. The assertion is also made in plaintiff's brief that Mr. Plante went to Las Vegas as a "sojourner * * * for a mere forty-five (45) days, the time required to get his divorce started, and without any intention of making Nevada his permanent and fixed home, but only intent upon getting a quick divorce in order to marry again." But the fact is that upon the evidence Mr. Plante had not proposed marriage to defendant Pearl A. Plante at the time he went to Nevada and did not propose to her until subsequent to the establishment of his residence there.

Upon the evidence it is reasonable to infer that the trial court concluded that Mr. Plante told the truth when he testified in the Nevada court as to his intentions with respect to residence. The woman he subsequently married (defendant Pearl A. Plante) was a resident of Indianapolis, Indiana; she owned property there and also in Los Angeles, California; she made a practice of sojourning for a part of each year in California but she maintained her domicile in Indiana. Mr. Plante had an interest in real property in Los Angeles. It was not unnatural or necessarily inconsistent with domicile in Nevada for him to visit the situs of his property between December 3 and December 26, 1939. Likewise, when on December 28, 1939, he found himself to be a bridegroom, it was not unnatural that he should accompany his bride to her periodic dwelling house in Los Angeles, intending also to accompany her a few months later to her place of permanent domicile in Indianapolis. His intentions with respect to making Nevada a place of residence for himself may well have been altered after his marriage.

[4] The statement as to residence in the affidavit for marriage license may or may not have been true. Mr. Plante before going to Nevada had been a resident of California for many years. Perhaps the trial court concluded that Mr. Plante, on December 28, 1939, was an excited and somewhat confused prospective bridegroom, and that he inadvertently filled in the name of the place of his former, instead of that of his present, residence. Mr. Plante could not be present at the trial in this case to defend the woman whom he wed on December 28, 1939, and who apparently gave him the happiness during the latter months of his life which he had been denied previously, but from all the evidence in the record it is reasonable to believe that the trial court concluded that Mr. Plante was confused and mistaken when he gave Los Angeles as his residence in the affidavit for marriage license. Upon that record, and the facts as found by the court, it would seem that either Las Vegas, Nevada, or Indianapolis, Indiana, would have been a more consistent answer to the form question. But questions of consistency and weight of evidence were primarily for the trial court.

The statements in the marriage license application certainly do not preclude the finding which the trial court made.

[5, 6] It is to be remembered that the Nevada decree, which is regular on its face, is entitled to a presumption of validity (Delanoy v. Delanoy, supra, (1932) 216 Cal. 27, 37, 13 P.2d 719, 86 A.L.R. 1321; Cardinale v. Cardinale, (1937) 8 Cal.2d 762, 767, 68 P.2d 351). It is also not without significance that the plaintiff here was personally served in California with the summons and copy of complaint from the Nevada Court. She knew of the action Mr. Plante was taking; she made no contest to the proceedings; she had in fact informally consented to or approved of his obtaining a divorce. A letter written by her to Mr. Plante reads in part: "Harry, Got your letter, am glad you are away as I am happy without you bot*e*ring me and interfering with the property get your divorce will not contest if you get incom*p*tability and don't try to bring lot of scandal. * * *" The evidence shows that after the property settlement agreement was executed in 1933, by which plaintiff was given the primary right to manage the operation of income property belonging in part to her and in part to Mr. Plante (the interest of each being separate property) she deliberately mismanaged such property and withheld from Mr. Plante income belonging to him. The trial court, in this equitable suit, had a right to consider that all of the facts shown, taken together, tended to negative fraud and establish bona fides on the part of Mr. Plante.

[7] It is held in this state that "a foreign divorce decree is subject to collateral attack upon three recognized jurisdictional grounds, i. e., (1) that it was procured upon a fraudulent domicile or residence; (2) that the laws of the state granting the decree were not complied with, and (3) that the spouse, who was domiciled in the foreign state, which was not the matrimonial domicile, and who procured the divorce, was the wrongdoer, whereas the other spouse, a citizen of this state, who was neither personally served nor appeared in the foreign action, was the innocent party. If any one of these jurisdictional defects is established as a matter of fact, the foreign decree will not be recognized as valid in this state. However, the foreign decree, regular on its face, is entitled to a presumption of validity, and the burden is upon the party attacking it." (Cardinale v. Cardinale, supra, (1937) 8 Cal.2d 762, 766, 68 P.2d 351, 353.) Plaintiff here does not claim that she established either of the last two grounds. As to the first the preceding discussion and resume of evidence make apparent our view that the finding of the trial court is not without legal support.

The judgment is affirmed.

PARKER WOOD, J., and BISHOP, J. pro tem., concur.

54 Cal.App.2d 326

PLANTE v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 13501.

District Court of Appeal; Second District, Division 3, California.

Sept. 3, 1942.

1. Husband and wife ⇨279(1)

The court could not permit equitable considerations or possible apparent injustice to the widow of deceased to influence it to write into property settlement agreement entered into between deceased and former wife, provisions which are not there or to delete any which the parties placed there.

2. Husband and wife ⇨279(1)

A settlement agreement vesting in the parties an undivided one-half interest in the property of either or both, and providing that in event of the death of either, deceased's right in the property should vest in the survivor, and that parties agreed to keep in force a will containing necessary provisions to carry out the separation agreement, when considered with other instruments contemporaneously executed, showed that parties intended that survivor should be entitled to succeed to the ownership of whatever interest of deceased in what had been their community property, as was possessed by deceased at deceased's death.

3. Appeal and error ⇨1176(3)

Where there was substantial evidence in suit for specific performance of settlement

agreement of husband and wife that wife violated the terms of the agreement on various occasions, and also evidence that after execution of the agreement but prior to procurement of decree of divorce, husband and wife became reconciled and resumed cohabitation, District Court of Appeal in reversing a judgment adverse to the wife, would not direct judgment for the wife.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Mary Elizabeth Plante against the Bank of America National Trust & Savings Association, and Pearl A. Plante, also known as Pearl Abbott, for a declaratory judgment construing a property settlement agreement and for specific performance of the agreement according to plaintiff's interpretation of it. From a judgment in favor of the defendants, the plaintiff appeals.

Judgment reversed.

Ernest P. Morgan, of Los Angeles, V. A. Morgan, of Alhambra, and H. M. Lineman and Mab Copland Lineman, both of Los Angeles, for appellant.

L. H. Phillips, of Los Angeles, for respondents.

SCHAUER, Presiding Justice.

This appeal is taken upon the same reporter's transcript as that filed in Plante v. Plante, opinion in which has been this day filed and which is reported in 128 P.2d at page 787. Reference is made to that opinion for the facts showing the relationship of the parties and the basis of this litigation generally. In this case the appeal is taken from a judgment for defendants declaring a construction adverse to plaintiff of the property settlement agreement executed by plaintiff and her former husband, Joseph H. Plante, now deceased, and denying to plaintiff specific performance of the agreement according to her interpretation of it.

The agreement was executed May 12, 1933, by plaintiff and her then husband while they were living separate and apart. It provides, in part, as follows: "1. That all property of any kind or description now owned and possessed by the parties hereto, or either of them, is community property, and it is agreed that concurrently with the execution of this agreement the title thereto shall, by proper conveyance, be vested in the parties as their sole and separate property, respectively, each to receive and have an undivided one-half interest therein, except as is herein otherwise specifically provided.

"2. That First Party shall relinquish to Second Party all management and control over the community property herein set out as follows, to-wit:

"18-Unit Bungalow Court at 650-686 Echo Park Avenue, Los Angeles, California.

"2-Unit Property, located at 632 Echo Park Avenue, Los Angeles, California.

"4-Flat Building, located at 656-658 LaVita Terrace, Los Angeles, California.

"* * * Second Party shall manage said property to the best of her ability and with due regard to the careful and prudent control and direction thereof, and shall receive therefor the sum of Fifty Dollars ($50.00) per month. * * *

"4. That the income derived from said property shall be disbursed as follows, in the order herein set forth, to-wit:

"(a) A competent bookkeeper approved by both parties shall be employed, whose salary shall be paid therefrom.

"(b) Maintenance and other incidental upkeep necessary for the proper preservation and management of said property.

"(c) The sum of Fifty Dollars ($50.00) per month as salary to Second Party, or her successor, as aforesaid.

"(d) The sum of Seventy-five Dollars ($75.00) per month to First Party for his maintenance and support to be deposited to his credit in such place in Los Angeles as he may direct, said sum to be paid to First Party so long as he lives, or until said property is sold, or until such time as by mutual consent this Agreement is terminated.

"(e) The necessary premiums to keep in force that certain Life Insurance Policy now carried by First Party upon the life of his father. In this connection it is agreed that all sums derived from said insurance policy shall be deemed to be the community property of the parties hereto and shall be disposed of and distributed in like manner as is herein provided for disbursement of proceeds from the sale of real property.

"(f) Sinking fund necessary to pay all interest charges, taxes or assessments against said property in a total sum of not less than an average of not less than

Three Hundred Forty-one Dollars ($341.00) per month, provided such sum is available over and above the foregoing items.

"(g) The sum of Seventy-five Dollars ($75.00) per month to Second Party for her maintenance and support. If sufficient funds are not available for payment of this amount, then second party shall be credited with the difference between the amount actually received and the sum of Seventy-Five Dollars ($75.00) per month, the difference to be paid when sufficient funds are available, and in any event to be ultimately paid from the proceeds of the sale of said property.

"(h) The remaining income, if any, to be divided equally between the parties hereto. * * *

"7. It is agreed that in the event of the sale of any or all of the said real property above mentioned *is* herein contemplated, that then and in that event, the proceeds of said sale shall be disbursed and distributed as follows, and in the order herein named, to-wit:

"(a) All expenses of sale shall be first paid.

"(b) All deficits or sums due or owing to either of the parties under this agreement.

"(c) The sum of Two Thousand Dollars ($2,000.00) to William R. Marshall, brother of the Second Party, now due and owing to him on account of money loaned, and the sum of One Thousand Dollars ($1,000.00) to Matilda Horne, foster sister of the Second Party, now due and owing to her on account of money loaned.

"(d) All remaining sums to be divided equally between the parties hereto.

"8. It is hereby mutually agreed that in the event of the death of either party hereto, all of his or her right, title or interest in or to all of the community property of the parties shall vest in the survivor. In the event First Party survives Second Party, there shall be paid as soon as possible after the death of Second Party, the sum of Five Thousand Dollars ($5,000.00) in cash to William R. Marshall, the brother of the Second Party, and in the event Second Party should survive First Party, then she shall and hereby agrees to pay such sums as may be necessary for the maintenance, support and care of Moise Plante, father of First Party, during his lifetime. In order to make effective the provisions of this Agreement in this paragraph set forth, the parties and each of them agree to and shall make and keep in force and effect, a last Will and Testament, containing the necessary provisions to carry out the purpose hereof.

"9. First Party hereby agrees to quitclaim all of his right, title and interest in that certain real property situated at San Fernando, County of Los Angeles, State of California, now held in the name of the Second Party, to the Second Party, and the same shall become the sole and separate property of Second Party. * * *

"10. * * * nothing contained herein shall prejudice the rights of either party to proceed with an action for absolute divorce in the future. * * *

"13. Second party hereby transfers and assigns to First Party all of her interest in that certain automobile now possessed by the parties hereto. * * *

"14. This Agreement is complete in itself and embodies all agreements and understanding between the parties. * * *"

Apparently acting upon their understanding of the import of the agreement plaintiff and Mr. Plante contemporaneously with execution of the agreement executed deeds by which each quitclaimed to the other an undivided one-half interest in the real property described in paragraph 2 of the agreement. Such deeds contain the following clause: "This deed is given to carry out the mutual agreement of the parties hereto, that said property shall become vested in the Grantee as the grantee's sole and separate property, free from all interest, title or claim of the grantor now existing or which may hereafter exist by reason of the marital relation of said parties; and is so accepted by said grantee." There was furniture and furnishings in the buildings on the deeded premises but no bill of sale or separate conveyance thereof was made.

Likewise each of the parties to the settlement contract, under date of May 15, 1933, executed a will. The substance of plaintiff's will of that date is, "I give and beque*st* all my belongings & Real Estate I may possess to my husband Joseph H. Plante, except five thousand dollars ($5,000.00) out of my estate which I give to my brother William R. Marshall. * * *" The substance of Mr. Plante's will of the same date is, "I give and beque*st* all my belongings to my wife Mary Elizabeth

Plante, except $5,000.00 Five Thousand Dollars I give to William Marshall my brother-in-law * * *, also request my wife to give my father Moise Plante, if living, a fair sum of money * * * for his living expenses * * *."

Mr. Plante secured a divorce from plaintiff in 1939 and married the defendant Pearl A. Plante. He thereafter executed a will bequeathing all of his property to his wife Pearl, the defendant herein, and such will, over plaintiff's contest, has been admitted to probate. Plaintiff, however, through the medium of this action, seeks to have it declared that by virtue of the provisions of paragraph 8 of the property settlement contract above quoted she is entitled to succeed to all the estate of the decedent and to have the contract, as so construed, specifically enforced against the surviving spouse and the special administrator.

The trial court found that the provisions of paragraph 8 were applicable only to *community property of plaintiff and Mr. Plante* held to be possessed by them *in community interest at the time of his death.* It held that the real estate which had been the subject of the quitclaim deeds not only became the separate property of the parties in undivided one-half interests as provided in the deeds, but that it was not within the category of property intended to be subject to the obligations imposed by the paragraph under discussion (No. 8). It found that only the furniture and furnishings in the buildings on the premises, so far as still owned by plaintiff and decedent, were community property of such parties and were subject to the operation of the paragraph noted. We do not find the above-mentioned holdings tenable.

[1, 2] The reasons for our conclusions become apparent upon a closer scrutiny of the material provisions of the property settlement contract. Paragraph 8 of that agreement provides the principal basis for this law suit. It is upon that paragraph that plaintiff chiefly relies for enunciation and evidence of the obligation which she says bound Mr. Plante to leave all of his property to her and which she seeks here to impose upon his estate and against his personal representative and surviving spouse. In construing the contract we cannot permit equitable considerations or possible apparent injustice to the defendant widow to cause us to write into the agreement provisions which are not there or to delete any which the parties placed there. We find that the language used in that paragraph, when considered in connection with the remainder of the document, the other instruments contemporaneously executed, and the circumstances of the parties, leaves no doubt that plaintiff and Mr. Plante intended that the survivor of them should be entitled to succeed to ownership of whatever interest of the decedent, in that which had been their community property, was retained and possessed by him or her at the time of death.

They approached their property settlement contract as marriage partners who had found at least some of the incidents and elements of that relationship intolerable. They had been man and wife for about twenty-five years but were living separate and apart; one of them had on file an action seeking a divorce from the other; they had accumulated at least three parcels of income-producing property of substantial value but they also were faced with substantial obligations respecting the same and they had had difficulties regarding the management of such property. The plaintiff here was desirous of securing the payment of certain sums to her brother and to her foster sister and Mr. Plante was concerned that his father be supported. They started their effort for contractual adjustment with the declaration of the basis that all of the property possessed by them or either of them was held in community tenure. Their first concern, as expressed in paragraph 1 of their contract, was to entirely eliminate the community character of such tenure and make their respective interests sole and separate.

There has been some discussion in the briefs as to the meaning of the exception stated in the last clause of the paragraph above mentioned, the appellant contending, in effect, that such clause modifies the words "sole and separate property" and that the import of the paragraph is that the community property interests of the parties were to become separate interests "except as is herein otherwise specifically provided."

In our opinion the provision "except as is herein otherwise specifically provided" plainly modifies the phrase "each to receive and have an undivided one-half interest." Obviously the purport of paragraph 1 is a declaration that all property then possessed by the contracting parties or either of them was, for purposes of the settlement, to be deemed community in character; that the title to all such property was to be so conveyed and vested by appropriate instruments that there would no longer be any community estate but on the contrary each party would hold his or her interest, as stated in the quitclaim deeds, "as the grantee's sole and separate property, free from all interest, title or claim of the grantor now existing or which may hereafter exist by reason of the marital relation of said parties"; that in making such adjustment and disposition of all the property of the parties the titles would be so conveyed and vested that each party would "receive and have an undivided one-half interest" in each parcel or item of property "except as is herein otherwise specifically provided." Two exceptions are specifically provided for in the agreement; i.e., a certain parcel of land in San Fernando and an automobile. Paragraph 9 obligates Mr. Plante to quitclaim "all of his right, title and interest in that certain real property situated at San Fernando * * * now held in the name of Second Party, to the Second Party, and the same shall become the sole and separate property of Second Party," and in Paragraph 13 it is provided that "Second Party hereby transfers and assigns to First Party all of her interest in that certain automobile now possessed by the parties hereto. * * *" With those two exceptions the contract plainly contemplates that the parties shall become *tenants in common* (or joint tenants) of all other property, both real and personal, then possessed by them or either of them. It might seem that the creation of joint tenancies with the right of survivorship would have been more convenient and expedient to the ends sought by the contract but the fact that tenancies in common were created by the deeds which were executed does not alter the meaning of the language used in the disputed paragraph.

The contract obviously was drawn while the property of the parties was community in character. It was contemplated that on execution of that contract, together also with the deeds therein called for, the property interests of the parties should become separate, but until the execution of such documents *all* the property possessed by the parties, or either of them, was their community property and obviously it was known to and identified by them as their community property throughout the pages of their contract. They knew what property they referred to as community property in paragraph 1 of that contract; they particularly identified certain of that same community property in paragraph 2; the same property was referred to in paragraphs 4 and 7, and we have no doubt that likewise it was the same property which they were contemplating in paragraph 8. We do not in fact view the language of that paragraph as being inconsistent with the transition of tenure called for by paragraph 1. Paragraph 1 provides that *the community property* shall be so conveyed that its title shall be held (with the two exceptions previously noted) in separate but undivided one-half interests. Paragraph 8 (which of course became a part of the parties' contract at the same instant as did paragraph 1) has reference to that *same community property* but specifically deals with the *separate interests in that property* which were created by the transition contemplated. Paragraph 8 does not state that the *community interest* of a party in any property shall vest in the survivor; it does declare that "in the event of the death of either party * * *, *all of his or her right, title or interest* in or to all of the community property of the parties shall vest in the survivor." It is our opinion that the words "community property of the parties" are used in that sentence to designate exactly the same property which is declared in paragraph 1 to be community property and that the phrase "all of his or her right, title or interest" was used to designate the interest in such property which would be acquired by the respective parties by operation of the contract and upon execution of the deeds pursuant to its provisions. The execution by the parties of the wills of May 15, 1933, is consistent with the view above expressed.

[3] Appellant asks that we direct the trial court to enter judgment in her favor. There is substantial evidence tending to show that plaintiff violated the terms of the settlement contract on various occasions and in grave respects. There is also evidence that subsequent to execution of the agreement but prior to procurement of the decree of divorce, plaintiff and Mr. Plante became reconciled and resumed cohabitation for a period. Whether the contract was abrogated when the parties

became reconciled and resumed cohabitation (see 13 Cal.Jur. 848; Peters v. Peters, 1936, 16 Cal.App.2d 383, 387, 60 P.2d 313) and, if not, whether in equity plaintiff may or may not be entitled to specific performance in the light of all the evidence which may be adduced on another trial we cannot now determine. Although the construction which we place upon paragraph 8 of the contract necessitates a reversal of the judgment we find the record to be such as does not warrant a directed judgment.

The judgment is reversed.

PARKER WOOD, J., and BISHOP, J. pro tem., concur.

WEST KEY NUMBER SYSTEM

54 Cal.App.2d 221

MORAN v. MORAN.

Civ. 6710.

District Court of Appeal, Third District, California.

Aug. 29, 1942.

1. Marriage ⇨50(1)

Where there was evidence that plaintiff's former husband left her and nothing concerning him was heard by plaintiff until just before her marriage to defendant six years later, when she heard from her former husband's mother that he was dead, the marriage to defendant was deemed valid, in absence of an adjudication as to its nullity by a competent tribunal. Civ.Code, § 61.

2. Marriage ⇨40(6)

The mere proof of a prior marriage and continued life of both spouses is not sufficient to establish the invalidity of a second ceremonial marriage, but there must be a showing that the first marriage was not set aside by judicial decree. Civ.Code, § 61.

3. Appeal and error ⇨110, 870(6)

Prior to 1915, an appeal was allowed from an order refusing a new trial, but since that time, the ruling thereon is reviewed on appeal from the judgment.

4. Appeal and error ⇨933(1)

All presumptions are in favor of an order refusing to grant a new trial.

5. Appeal and error ⇨977(1)
New trial ⇨6

On motion for new trial, the trial court has a discretion which will not be disturbed, except on a manifest and unmistakable abuse.

6. New trial ⇨99

Trial court did not abuse its discretion in denying motion for new trial on ground of "newly discovered evidence", where there was no showing that witness who would allegedly testify to the newly discovered evidence would testify as desired, and the whereabouts of that witness were not known. Code Civ.Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Newly Discovered Evidence".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit for divorce by Irene E. Moran against Arthur R. Moran, wherein the defendant filed a cross complaint seeking to have the marriage of the parties annulled. From a judgment granting the plaintiff a divorce, the defendant appeals.

Judgment affirmed.

Johnson & Curtright, of Sacramento, for appellant.

McAllister & Johnson, of Sacramento, for respondent.

ALLEN, Justice pro tem.

This is an appeal from a judgment granting plaintiff an interlocutory decree of divorce. The record discloses the following situation:

On September 16, 1938, respondent filed an action for divorce from appellant on the ground of extreme cruelty, and alleged that she was married to appellant in Sacramento on February 11, 1918. Appellant filed an answer admitting the marriage. The action was tried on February 23, 1939, at which time respondent offered evidence duly corroborated in support of her complaint. Appellant offered no evidence and the court granted respondent an interlocutory decree of divorce on March 3, 1939. On July 17, 1939, appellant moved the court for an order vacating and setting aside said interlocutory decree of divorce, and for leave to file a cross-complaint, raising the issue that the plaintiff at the time of marriage to defendant, was the wife of Paul R. Hendricks (then living), and praying for an annulment of the marriage. This motion was granted and the cross-complaint filed. Plaintiff filed an answer thereto, and the action was again tried on the new issues and submitted on August 30, 1939. On September 8, 1939, the trial court, on its own motion, made an order setting aside its former order which had vacated the original interlocutory decree entered on March 3, 1939, and granted defendant leave to file a cross-complaint. This latter order was held by this court to be without jurisdiction (Moran v. Superior Court, 35 Cal.App.2d 629, 96 P.2d 193) and was annulled. On March 1, 1940, the court signed findings of fact and conclusions of law, and on the same date entered a second interlocutory decree granting plaintiff a divorce. On March 4, 1940, appellant filed notice of intention to move for a new trial on the statutory grounds set forth in subdivisions 4, 6, and 7 of section 657 of the Code of Civil Procedure, supported by an affidavit of P. H. Johnson, attorney for defendant. Defendant also served notice of intention to move the court for an order for the issuance of a commission to take the deposition of Paul R. Hendricks. This notice was dated February 28, 1940, and time fixed for hearing said motion was March 11, 1940. The motion was duly heard at that time and was denied by the court. On petition to this court a writ of mandamus was issued ordering the court to issue the commission to take the testimony prayed for. Moran v. Superior Court, 38 Cal.App.2d 328, 100 P.2d 1096. On April 2, 1940, a motion was made for a new trial on the grounds set forth above. At this hearing evidence was taken, and on May 3, 1940, the motion was denied. An appeal was taken from the judgment, and the record, including the proceedings on the motion and order denying a new trial, is before the court on a bill of exceptions.

This court is required to consider on this appeal the sufficiency of the evidence to support the judgment, and also whether or not the trial court erred in denying defendant's motion for a new trial.

The only evidence taken at the trial on which the interlocutory decree is based bearing on the point in issue as to the validity of the second marriage, is as follows: Plaintiff's testimony that she married defendant February 11, 1918, at Sacramento; that she had been married before to Paul R. Hendricks with whom she lived two weeks; that Paul Hendricks resided at Verona or Oakmont, Pennsylvania, when they were married; that she resided at Verona; that Paul Hendricks took her to Verona, Pennsylvania, and walked out and left her; that she did not procure a divorce from him, and that he did not secure a divorce to her knowledge; that he died in 1915, after she came out to California; that she learned of his death by a letter from his mother prior to her marriage to defendant; that she did not have the letter. In addition to this, the deposition of LeRoy C. Hendricks was introduced by defendant to the effect that he was the brother of Paul Hendricks, whose full name was Paul Raymond Hendricks; that his brother was born in Mifflinburg, Pennsylvania; that he had not seen his brother for five years and did not know whether he was dead or living; that he imagined he was living, because if he were dead, he probably would have heard of his death; that he knew he was married to Esther Carlysle between 30 and 35 years ago at Pittsburgh, Pennsylvania; that he could not say whether he was ever divorced; that he was a barber by trade, and that the last address he heard was Waukegan, Illinois.

On motion for a new trial additional evidence was adduced. The affidavit of attorney P. H. Johnson served with notice of motion, stated that Paul R. Hendricks, "who resides in Waukegan, Illinois," had knowledge of material facts as to whether or not he is the same person who was married to plaintiff, as to whether he had ever secured any divorce from her, or any decree of annulment; that the present address of said witness and the fact that he was still alive had been discovered since the trial and were unknown at the date of the trial and could not have been discovered in time to have produced him or his deposition at such trial, but that proceedings were pending to secure his deposition. Defendant also procured a certificate of the Clerk of the Court of Common Pleas of Alleghany County, Pennsylvania, to the effect that the records of such court showed no annulment or divorce of Paul R. Hendricks and plaintiff between January 1, 1900, and April 17, 1940; the affidavit and certificate of L. J. Wilmot, Clerk of the Circuit Court of the County of Lake, State of Illinois, that the records of that court showed no record of a decree of divorce or annulment of Paul R. Hendricks and the plaintiff; the marriage certificate showing the marriage of Paul Hendricks and Essie I. Carlisle, of Verona, Pennsylvania, in July, 1912; a letter from W. A. Bright, Chief of Police of Verona, Pennsylvania, stating that his information was that Paul Hendricks was in the state of Ohio; and a letter from the Adjutant General of the War Department to the effect that that office was unable to identify positively a record of the service of Paul Hendricks, a man from Ohio or Pennsylvania in the first World War; that the military records showed that a Paul R. Hendricks was inducted into the service from Rockford, Illinois, giving his place of birth as Mifflinburg, Pennsylvania; that he had last communicated with that office from Rockford, Illinois, in 1924, and that at the time of his entrance into service he stated that he was single. Counsel for defendant also offered in evidence their file of correspondence engaged in in endeavors to locate Paul R. Hendricks, for the purpose of showing diligence. Other than the foregoing there was no evidence of the residence of Paul R. Hendricks or that he was still living or had been at the time of the marriage of plaintiff and defendant.

[1, 2] Under section 61 of the Civil Code, as the evidence shows that the plaintiff's former husband left her in 1912 and was not heard from until just before her marriage in 1918, when she heard from his mother that he was dead, this second marriage is valid until its nullity is adjudged by a competent tribunal. Estate of Harrington, 140 Cal. 244, 73 P. 1000, 98 Am. St.Rep. 51; Immel v. Dowd, 6 Cal.App.2d 145, 44 P.2d 373; Marsh v. Marsh, 79 Cal. App. 560, 250 P. 411. It is also held that mere proof of a prior marriage and continued life of both spouses is not sufficient to make a case against a second ceremonial marriage; there must be a showing that the first marriage was not set aside by judicial decree. Immel v. Dowd, supra.

[3-6] Insofar as the sufficiency of the evidence to justify the granting of the divorce is concerned, there can be no question. The only question is: Did the court err in refusing to grant a new trial? Prior to 1915, an appeal was allowed from an order refusing a new trial; since that time, the ruling thereon is reviewed on an appeal from the judgment. All presumptions are in favor of the order. Connell v. Higgins, 170 Cal. 541, 150 P. 769. The trial court has a discretion which will not be disturbed, except upon a manifest and unmistakable abuse. Smith v. Royer, 181 Cal. 165, 183 P. 660. An examination of the so called newly discovered evidence upon which the motion was based shows that no one knew definitely where Hendricks was then located. The affidavit of P. H. Johnson stated that he was "informed as to the facts of the said matter." It made no direct or explicit assertion that said Hendricks resided in Waukegan, Illinois. It recited that "Paul R. Hendricks, who resided in Waukegan, Illinois" was a person competent to testify; and that his "whereabouts and present residence address" and the fact that he was alive had been discovered since the trial. The army records showed Paul R. Hendricks entered service from "Rockford, Illinois." The letter from W. R. Bright stated that Paul Hendricks was in the state of Ohio. There was no showing on the motion that Paul R. Hendricks, if produced, would testify that he was the Paul Hendricks who married plaintiff herein, or that the said marriage had never been dissolved. For all that appeared on the motion for a new trial defendant and his counsel knew no more about these matters then than they did at the time of the trial of the divorce action in August, 1939, or when defendant filed his cross-complaint in July, 1939. It may be noted that in said cross-complaint which was verified by the same counsel who made the affidavit on motion for a new trial it was alleged that plaintiff had another husband, to-wit: one Paul R. Hendricks, living at the time she married defendant herein and that the prior marriage was still in full force and effect, etc. This was not proven. Defendant asked for no continuance when the case came up for trial in August, 1939, but the case having gone against him, he now wants a new trial and states he has newly discovered evidence that will change the result. This so called "newly discovered evidence" shows that no one knows definitely where Paul R. Hendricks is now, or whether or not he ever was divorced from plaintiff. A trial must end some time. We can see no error in refusing to grant defendant's motion for a new trial.

The judgment is affirmed.

THOMPSON, J., and ADAMS, P. J., concurred.

WASHER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 11728.

District Court of Appeal, First District, Division 1, California.

Aug. 28, 1942.

As Modified Sept. 11, 1942.

Hearing Granted Oct. 26, 1942.

1. Appeal and error 🔑917(1)

In deciding correctness of ruling sustaining demurrer to complaint for libel and slander for statement of defendant's vice president that plaintiff "had admitted he had falsified his expense account", appellate court was required to assume that the word "falsified" meant an intentional falsification without intent to defraud and that the statement was in fact uttered.

> The word "falsify" may be defined as to tamper with, to alter; to make deceptive, endow with an appearance contrary to fact or truth. It is sometimes used to characterize a criminal act involving the perpetration of fraud. It is a word of double import in that it may be used to convey two distinct meanings, either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue. To say that an employee has falsified an account may mean that such falsification was with intent to defraud or that the falsified statement of account was mistakenly and therefore honestly made, and, if the account did not set forth the truth, it would in fact be false.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Falsify".

2. Libel and slander 🔑10(6)

Employer's statement, used with reference to Labor Board's decision ordering plaintiff's reinstatement, that plaintiff had admitted that he had falsified his expense account, was not "libelous per se" in view of its susceptibility to interpretation as an intentional falsification without intent to defraud.

> See Words and Phrases, Permanent Edition, for all other definitions of "Libelous Per Se".

3. Pleading 🔑310

In action for libel and slander for statement used in reference to Labor Board decision ordering defendant to reinstate plaintiff, where copy of decision was attached to the amended complaint as an exhibit and as part thereof and complaint alleged that statement made was a comment upon the decision, the decision became a part of the amended complaint and could be considered in determining whether it stated a cause of action.

4. Libel and slander 🔑87

Complaint for libel and slander for statement that plaintiff had admitted he had falsified his expense account, allegedly used with reference to Labor Board decision requiring plaintiff's reinstatement by defendant, when considered with board's decision that plaintiff was not dishonest, the board making no finding that plaintiff had not filed a false expense claim, established the truth of the admission and truth of the alleged falsification so that demurrer to complaint was properly sustained.

5. Pleading 🔑310

Where complaint for libel and slander alleged the statement that plaintiff had admitted that he had falsified his expense account was used with reference to Labor Board's decision ordering plaintiff's reinstatement by defendant, and the board's decision was an exhibit to the complaint, truth of the admission of the alleged falsification was required to be determined from the language used in the exhibit.

6. Libel and slander 🔑55

It is sufficient if the gist of an alleged libelous charge is justified.

7. Libel and slander 🔑83

In action for libel and slander for statement that plaintiff had admitted that he had falsified his expense account used with reference to Labor Board's decision ordering plaintiff's reinstatement by defendant, allegation of malice could be considered in determining privilege, but was not to be considered if the complaint showed the truth of the alleged libelous statements, since allegations of malice will not avail the pleader if the character of the publication complained of is inconsistent with such allegations.

8. Libel and slander 🔑15, 34, 54

Under statute defining "libel" as a false and unprivileged publication, the publication must be both false and unprivileged to constitute actionable "libel" and allegation and proof that a publication is true in the sense intended or that it is privileged upon any of the statutory grounds constitute a defense which does not depend on truth of the charges, but a publication may be privileged although untrue, and proof of truth is a complete defense without proof of any other facts and without proving absence of actual malice. Civ.Code, § 45; § 47, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Libel".

9. Libel and slander ⚿87

Where complaint for libel and slander for alleged statement declaring impossibility of reinstating one "who had been guilty of flagrant insubordination", allegedly made concerning Labor Board's decision ordering plaintiff's reinstatement by defendant, disclosed such insubordination in plaintiff's refusal to accept directions to report to branch offices from those for whom plaintiff had contracted to work and disclosed that language used was justified by the facts, trial court properly sustained demurrer to the complaint.

10. Appeal and error ⚿195

Where action for libel and slander was filed after the effective date of statute providing that the question whether trial court abused its discretion in sustaining a demurrer without leave to amend would be open on appeal though no request to amend was made, question whether court abused its discretion in not granting leave to amend after sustaining demurrer to complaint was open on appeal. Code Civ.Proc. § 472c.

11. Libel and slander ⚿98

Where plaintiff did not suggest amendment to complaint for libel and slander after trial court had sustained demurrer thereto and it appeared impossible to amend, trial court did not abuse discretion in not granting leave to amend. Code Civ.Proc. § 472c.

PETERS, P. J., dissenting.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Edward C. Washer against Bank of America National Trust & Savings Association and others for libel and slander. From a judgment for defendants, plaintiff appeals.

Affirmed.

For prior opinion, see 123 P.2d 575.

William H. Mackay, of San Francisco, for appellant.

Louis Ferrari, G. D. Schilling, and Kenneth M. Johnson, all of San Francisco, for respondents.

WARD, Justice.

Plaintiff appeals from a judgment for defendants entered after an order sustaining their general and special demurrers to the second amended complaint without leave to amend. The sole question involved is the correctness of this ruling.

The complaint consists of two counts, the first for slander and the second for libel. The first cause of action is based upon the following oral statement alleged to have been made to several newspaper reporters by a vice-president and personnel director of the respondent bank in commenting upon a decision of the National Labor Relations Board which ordered the bank to reinstate plaintiff, he having been theretofore discharged according to the bank's answer before the board so set forth in the decision, on grounds including alleged insubordination and falsification of an expense account: "We cannot see how this institution could possibly reinstate anybody who had admitted he had falsified his expense account, who has been guilty of flagrant insubordination." The second cause of action is based upon the same statement allegedly given the press in written form, with the request that it be printed. Attached to the complaint, and by reference made a part thereof is the decision of the National Labor Relations Board. The relief sought is the payment to plaintiff of $125,000 as special damages, $100,000 as general damages and $250,000 as exemplary damages.

Appellant's statement of the question involved is whether the complaint shows certain alleged defamatory statements, uttered and published by respondents, to be false and unprivileged.

In support of the action of the trial court in sustaining the demurrers to the second amended complaint, the respondents urge that the complaint, taken as a whole, and including the Labor Board's decision incorporated as part thereof, shows the truth of the alleged defamatory language, or at least its substantial truth, which is all that need be shown; that it was privileged, making falsity and malice immaterial, or, at least, it was qualifiedly privileged and that malice in fact has not been pleaded. Finally, respondents contend the existence of malice is negatived by the complaint itself when considered in connection with the National Labor Board's decision.

Turning to the language charged to be slanderous and libelous, the word "falsify" may be defined as "to tamper with, to alter" (Webster's New International Dictionary (2nd Ed.)); "to make deceptive, endow with an appearance contrary to fact or truth" (Funk & Wagnall's New Standard Dictionary). The word is sometimes used to characterize a criminal act involving the perpetration of fraud. It has been said that it is a word of double import (Moulor v. American Life Ins. Co., 111 U.S. 335, 4 S.Ct. 466, 28 L.Ed. 447) in that it may be used to convey two distinct meanings—either that of being intentionally or knowingly untrue, made with intent to defraud, or mistakenly and accidentally untrue. Fouts v. State, 113 Ohio St. 450, 149 N.E. 551; North American Acc. Ins. Co. v. Tebbs, 10 Cir., 107 F.2d 853. To say that an employee has falsified an account may mean that such falsification was with intent to defraud or that the falsified statement of account was mistakenly and therefore honestly made. If the account did not set forth the truth, it would in fact be false. The complaint read in conjunction with the exhibit demonstrates a third distinct meaning, namely, not an accidental but an intentional act of falsification, without, however, an intent to defraud.

[1, 2] It should be noted that the alleged slanderous and libelous language is not a direct accusation that plaintiff was guilty of falsification, but is a statement that an employee "had admitted he had falsified his expense account." Whatever definition may be given to the word "falsified" as used under other circumstances, in view of the fact that it was used in reference to the Labor Board's decision, we must assume for the purpose of this case, that it meant an intentional falsification without intent to defraud. The language does not in fact even indirectly make an accusation, but charges only the *admission* of a falsification. Under such circumstances, assuming the denial by answer of the alleged slanderous and libelous language, the primary issue to determine would not be actual, intentional falsification without intent to defraud, but whether plaintiff *admitted* such fact. Assuming, as we must on demurrer to the complaint, that a statement in the language alleged was in fact uttered, such language may not be construed as libelous *per se* in view of its susceptibility to an innocent interpretation.

[3] It is of course the contention of appellant that by charging an admission of falsification as one of the grounds for his discharge, defendant in effect charged the actual falsification of the expense account to the extent of being "guilty of the crime of embezzlement." A copy of the decision of the National Labor Relations Board, as we have seen, is attached to the amended complaint as an exhibit "and made a part hereof." That complaint alleged that the statement made was a comment upon the decision. The decision by its incorporation became a part of the amended complaint and may be considered in determining whether the complaint states a cause of action. Georges v. Kessler, 131 Cal. 183, 63 P. 466; 1 Bancroft on Code Pleading, § 218; People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435; Holly Sugar Corp. v Johnson, 18 Cal.2d 218, 115 P.2d 8; Bashford v. A. Levy & J. Zentner Co., 123 Cal. App. 204, 11 P.2d 51; National Pavements Corp. v. Hutchinson Co., 132 Cal.App. 235, 22 P.2d 534.

[4] In setting forth the issues to be passed upon, the National Labor Relations Board noted as one of the reasons assigned by the bank for the discharge of Washer "his making a false expense claim against the respondent." Thereafter the Board found that Washer was not dishonest, but noted "that the filing of a false expense claim was not assigned * * * as a reason for Washer's discharge." The Board found, as stated, that Washer was not dishonest, but did not find that he had not filed a false expense claim. The truth of the "admission," and the truth of the alleged "falsification" may be reasonably and definitely inferred (Gallagher v. California Pac. T. & T. Co., 13 Cal.App.2d 482, 57 P.2d 195) from the contents of the exhibit. "This is not a case where the plaintiff has pleaded too little, but where he has pleaded too much" and by pleading the exhibit has refuted his own allegations. Simmons v. Peavy-Welsh Lumber Co., 5 Cir., 113 F.2d 812, 813.

The National Labor Relations Board found that upon plaintiff's presenting to the bank, his employer, an expense account in the amount of $15.12, of which $6.12 was represented to be railroad fare and $9 meals and lodgings, he was requested to itemize it. Thereupon plaintiff wrote the bank that he was "writing off as a loss the $15.12 I considered nominal." The bank in reply wrote plaintiff that there was no complaint as to the "amount" involved and requested the return of the statement. A check for the $15.12 was then sent plaintiff, together with a new statement containing a purported itemization of the expenses, which plaintiff was requested to sign and return. Plaintiff then wrote his employer stating that his failure to itemize the expenses in the first instance was due to the fact that he had stayed with friends and as a result had not incurred a hotel bill; that, however, he had thus become obligated to his friends and had reciprocated by entertaining them. He returned the bank's check with the following communication: "* * * if after reading this letter you are convinced of the fairness of the account as rendered. * * * If you do not consider the accounting satisfactory you may forget the entire matter." The account was approved by the bank and the check returned to plaintiff.

[5] From the above recital of the facts as they appear in the decision of the Board, it may be reasonably and definitely determined that by his silence in the "first instance," plaintiff attempted to deceive the bank to the extent of setting forth "meals and lodgings" instead of "entertainment." In this action for slander and libel, the truth of the admission of the alleged falsification appears in plaintiff's pleadings and must be determined from the language used in the exhibit. Mortensen v. Los Angeles Examiner, 112 Cal.App. 194, 296 P. 927; Grand v. Dreyfus, 122 Cal. 58, 54 P. 389; Noral v. Hearst Publications, Inc., 40 Cal.App.2d 348, 104 P.2d 860; Western Broadcast Co. v. Times-Mirror Co., 14 Cal.App.2d 120, 57 P.2d 977; Hearne v. De Young, 119 Cal. 670, 52 P. 150, 499.

The statement alleged in the complaint as false is in fact true as appears in the exhibit.

In Chavez v. Times-Mirror Co., 185 Cal. 20, 21, 195 P. 666, 667, the court said: "As the truth of the charge is a complete defense in a civil action for damages for libel, it is plain that, if the complaint itself shows the truth of the charge, the demurrer was properly sustained." "In determining whether the publication is libelous, resort is first had to the publication itself. If it is not libelous, the fact that it is unpleasant is of no moment, and the question of libel or no libel is primarily for the court to determine. If the publication is not libelous, neither inducement nor innuendo can make it so. * * * Again, if the article published is substantially true and is inaccurate only as to details which it relates, it is not libelous." Mortensen v. Los Angeles Examiner, supra, 112 Cal.App. 202, 203, 296 P. 931. In Newby v. Times-Mirror Co., 173 Cal. 387, 160 P. 233, Ann.Cas.1917E, 186, the complaint contained six counts. The appeal was from the judgment for defendant and from the order denying plaintiff a new trial. The judgment was reversed upon the theory that certain counts set forth libelous matter, but in reference to the first count, the facts—upon which there was no substantial conflict—were that the plaintiff, an attorney, had directed the judgment-book clerk in the county clerk's office to alter a public record. The commission of such an act is a felony. Penal Code, §§ 113, 114. Plaintiff in that case was "equally responsible therefor with said deputy." Pages 392, 393 of 173 Cal., page 236 of 160 P., Ann.Cas.1917E, 186. We quote further from the case (page 393 of 173 Cal., page 236 of 160 P., Ann.Cas.1917E, 186): "It was but an irregular method of effecting a righteous result. * * * The intent is immaterial. The act itself, without intent other than that of doing it, constitutes the offense, regardless of the object. * * * Therefore, although the plaintiff was guilty of no moral wrong or bad intent in the matter, it was technically true that he was accused of the commission of a felony. * * * In so far as the publications assert that the plaintiff was accused of the commission of a felony, confined as they all are to the act of crossing out the entry of satisfaction of the judgment * * * the defense of truth is established by the evidence, although the offense was entirely technical, was without moral guilt * * *. The truth of this part of the matter complained of, however, does not establish a defense to the other libelous publications concerning plaintiff" "* * * the truth, whenever discovered, is a complete defense to the defendant." Davis v. Hearst, 160 Cal. 143, 195, 116 P. 530, 552.

[6-8] It has been held that it is sufficient if the gist of the alleged libelous charge is justified. Heuer v. Kee, 15 Cal.App.2d 710, 59 P.2d 1063; Hearne v. De Young, supra; Skrocki v. Stahl, 14 Cal.App. 1, 110 P. 957. The complaint herein alleges: "Said statement was made by Fenton [an officer of the bank and a defendant in this

action] with malice, for the purpose of injuring, disgracing and defaming plaintiff, and interfering with his ability to obtain employment. It was false and known by Fenton to be false at the time it was made and Fenton did not have probable cause or any cause for believing it to be true." In so far as the truth is concerned, this allegation does not strengthen appellant's position. The allegations of malice may be considered in determination of the question of privilege, but that phase of the complaint and the demurrer thereto need not be considered if the complaint upon its face shows the truth of the alleged libelous statement. "* * * allegations of malice will not avail the pleader, if the character of the publication complained of is inconsistent with such allegations." Morcom v. San Francisco Shopping News, 4 Cal.App. 2d 284, 290, 40 P.2d 940, 942. "Since a libel is 'a false and unprivileged publication' (section 45), it follows that the publication must be both false *and* unprivileged in order that it shall constitute an actionable libel. The allegation and proof that it is true in the sense intended constitute one defense. Allegations and proof that it was privileged upon any of the grounds set forth in section 47 also constitute a defense. The defense of privilege under subdivision 3 of section 47 does not depend at all on the truth of the defamatory charge. With respect to that form of qualified privilege the Code does not require that the publication shall be true in order to bring it within the protection of the privilege. The language of the Code clearly implies that the publication may be privileged, although it is untrue. To hold that it is necessary to allege and prove the truth of the charge in order to establish the defense that it was privileged under this subdivision would destroy the distinction between the defense of truth and the defense of privilege, and would render the defense of privilege entirely useless, since *the proof that it was true would be a complete defense without proof of any other facts, and without proving the absence of actual malice.*" (Second italics added.) Snively v. Record Publishing Co., 185 Cal. 565, 574, 198 P. 1, 4; see, also, Maher v. Devlin, 203 Cal. 270, 263 P. 812; Draper v. Hellman Com. T. & S. Bank, 203 Cal. 26, 263 P. 240.

The second part of the alleged slanderous and libelous statement declares the impossibility of the bank reinstating one "who has been guilty of flagrant insubordination." It is alleged that the statement was made "in commenting upon a decision of the National Labor Relations Board." We turn therefore to the decision. It appears therefrom that it was the intention of the bank to give plaintiff experience in branch banking. After a consideration of various of its branches, that of Chico was finally decided upon. The decision sets forth the following: "Prior to that time Washer *had refused* (italics added) to be transferred to branches as he did not wish to live in a small town." "Washer protested and did not conceal his dislike for his transfer to Chico, describing it as 'Siberia.' Washer told Kieferdorf [senior trust officer and executive vice-president of respondent bank] that he did not want to go there because he did not want to become a 'yokel.' Kieferdorf stated that the assignment there was only temporary and gave Washer the impression that he would be transferred to the San Francisco office before the end of the year. At Chico, Washer remained dissatisfied with his transfer. He wrote to Bardt [vice-president and trust officer of the Los Angeles main branch] that he hated 'this hell-hole' and asking for the position of assistant comptroller in the Los Angeles main office."

In company with others, plaintiff caused to be mailed to approximately 5,000 employees of respondent bank, a circular letter as to which the decision of the National Labor Relations Board states: "The latter cast aspersions upon the respondent as a bank." The decision holds: "It is true that in writing letters from which we have quoted Washer did not observe the usual business amenity." As an example, the following was addressed to a vice-president and senior trust officer of the bank: "Your letter appears to me to be one of a series of petty annoyances I expect to be subjected to because of my failure to accept your advice to resign because of my Union activity. I can see no other reason for correspondence regarding such a petty detail by the Vice President and Senior Trust Officer of one of America's largest banks. 'Kind regards' to you too."

[9] We are not concerned here in determining fair or unfair labor practices, or whether the conduct was mere or gross insubordination, or excusable conduct. In this action for damages for libel and slander, the question is, does the complaint show the truth of the alleged libel, namely, "flag-

rant insubordination." The perusal of the complaint and its annexed exhibit discloses insolence and flagrant insubordination in refusal to accept directions to report to designated branch offices, from those for whom plaintiff contracted to work. A careful reading of the language used by the personnel officer of the bank in each particular, and charged to be slanderous and libelous, shows that it was justified by the facts.

[10, 11] This action was brought after the effective date of section 472c, Code of Civil Procedure, and hence the question whether the court abused its discretion in not granting leave to amend is open on appeal. Appellant has not suggested any amendment, and in view of the allegations of the complaint, including the exhibit, it appears impossible to amend.

The judgment is affirmed.

KNIGHT, Justice (concurring).

It is well settled that to be actionable an alleged defamatory statement must be false, and that a showing of the truth of the alleged defamatory words is a complete defense. In the present case it definitely appears from the facts set forth in the second amended complaint that the alleged defamatory statement, upon which plaintiff bases his causes of action, was not false; and that being so the defendants were clearly entitled to have their demurrer to said complaint sustained without leave to amend. According to the allegations of the complaint the circumstances out of which the action arose were these: The plaintiff was dismissed from his employment with the defendant bank and he took the matter before the National Labor Relations Board. The proceedings before the board involved a large number of issues which are entirely foreign to the present case; and after a lengthy hearing the board ordered plaintiff reinstated in his employment. A full and comprehensive report and decision was filed by the board containing a discussion of the matters with which the board had been dealing, and its conclusions and findings. The complaint alleges on information and belief that the defendant Fenton in commenting on the report and decision of the board made the following statement, upon which the causes of action of libel and slander are based: "We cannot see how this institution could possibly reinstate anybody who had admitted he has falsified his expense account, who had been guilty of flagrant insubordination." Attached to the complaint and made part thereof is a copy of the report, decision and order of said board. It covers some 32 typewritten pages of the transcript, and it definitely appears therefrom that plaintiff admitted he had filed with the bank an expense account containing a false item. By said item he represented that he had expended a certain amount of money for meals and lodgings, and when the bank questioned the form of the expense account he admitted that he had not paid out anything for lodgings—that he had stayed at the home of friends; and he withdrew the item. It is true that the National Labor Relations Board in determining the issue before it gave it as its conclusion that plaintiff had not intended to defraud the bank, and it stated that the filing of the expense account containing the false item was not one of the reasons for plaintiff's dismissal from his employment. However, we are not here concerned with the question of whether plaintiff intended to defraud the bank or the reasons for his dismissal. The precise and only question here presented is whether it appears from the face of the complaint that the alleged defamatory words were true, and as will be seen, it does so appear.

Certain innuendoes are pleaded in the complaint concerning the meaning of the word "falsified"; but it is well established that the office of the innuendoes is merely to explain; and the authorities agree that they cannot be used to aver a fact, introduce new matter, or alter, extend or restrict the import of the language theretofore set out; and that if the words complained of are not in fact actionable, no innuendoes can make them so. Mellen v. Times-Mirror Co., 167 Cal. 587, 140 P. 277, Ann.Cas.1915C, 766; 33 Am.Jur. 220. It follows, therefore, in the present case that since it appears from the face of the complaint that the words claimed to be defamatory were true, they are not actionable and the innuendoes pleaded by plaintiff cannot have the effect of making them so.

As to the truth of the remaining portion of the alleged defamatory statement, I have nothing to add to the views expressed in the main opinion.

PETERS, Presiding Justice (dissenting).

I dissent.

The complaint in this case charges that defendant Fenton, while acting in the course and scope of his employment as personnel director and vice-president of defendant bank, in commenting on a decision of the National Labor Relations Board ordering plaintiff reinstated in defendant bank's employ, made the following statement, both orally and in writing, of and concerning the plaintiff: "We cannot see how this institution could possibly reinstate anybody who had admitted he had falsified his expense account, who has been guilty of flagrant insubordination." The trial court sustained a demurrer without leave to amend. The main and concurring opinions hold that the complaint, as a matter of law, alleges the truth of the charges contained in the alleged slanderous and libelous statement. So far as the charge that plaintiff admitted he had falsified his expense account is concerned, the main and concurring opinions hold that the decision of the labor board, attached as an exhibit to the complaint, as a matter of law, shows that plaintiff had made such an admission. This conclusion is reached by giving the word "falsified," which admittedly has several meanings, one of which involves the intent to defraud, an interpretation most favorable to defendants, and by completely disregarding other interpretations of the term. This astonishing and erroneous rule of construction is applied although the complaint expressly charges that the defendants used the term intending to convey, and did convey, to their listeners the meaning that plaintiff had admitted committing a criminal act. This rule of construction is applied to the complaint although the opinion of the labor board demonstrates to a certainty that the bank used the term "falsified" in connection with the expense account charge in the proceedings before the board to mean that plaintiff had committed a dishonest act. The opinion of the labor board shows indisputably that the board found as a fact that plaintiff had committed no criminal or wrongful act.

As to the balance of the charge—that plaintiff, as an employee, had been guilty of flagrant insubordination—the main opinion holds that the decision of the labor board demonstrates, as a matter of law, that plaintiff had been guilty of flagrant insubordination. This conclusion is reached in spite of the fact that the labor board expressly determined on the evidence recited, as a matter of fact, that plaintiff had not been guilty of insubordination. The concurring opinion is discreetly silent on this phase of the case. Under such circumstances, there is no legal justification for the conclusions reached by the majority. In my opinion, there can be no reasonable doubt but that plaintiff has stated good causes of action.

The complaint, after setting forth the allegedly libelous and slanderous statement, alleges that the statement was made to newspaper reporters and others solely for the purpose of having it printed, and Fenton requested that it be printed; that in making such statement he "intended to convey to his listeners and all who should read the statement the idea that plaintiff was a dishonest, unsatisfactory, inefficient and insubordinate worker in his profession and trade as a bank employee, and as a lawyer, and to further convey the impression that he was guilty of the crime of embezzlement, and was dishonest, and had misappropriated and failed to properly account for funds entrusted to him. Plaintiff is informed and believes that said ideas actually were conveyed to said listeners and readers by said statement as intended by Fenton, and such ideas were reasonable conclusions to be drawn from said words"; that the "statement was made by Fenton with malice, for the purpose of injuring, disgracing and defaming plaintiff, and interfering with his ability to obtain employment. It was false and known by Fenton to be false at the time it was made"; that "Immediately prior to the making of said statement by Fenton, plaintiff had an excellent reputation in the banking business as a man of integrity, honesty and efficiency as a bank employee and as an attorney.

"Proximately because of the making of said statement, plaintiff's reputation was materially damaged, and particularly was damaged among bank and trust companies. On or about September, 1939, plaintiff applied for employment at various banks in the State of California and was refused said employment. Plaintiff is informed and believes and therefore alleges that said refusals of employment were solely caused by and were the proximate result of the making of the said statement, and solely by reason of the making of said statement he will be unable to secure employment at his trade or profession in any bank in California or the United States, and therefore he will continue to suffer loss of earnings until an indefinite time in the future solely by reason of the making of said statement."

As already pointed out, the decision of the labor board is pleaded as an exhibit.

It shows that plaintiff was employed by the bank and then discharged by the bank because of his union activities; that plaintiff instituted an action before the labor board to secure his reinstatement; that the bank's main defense was that as a national bank it was not subject to the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., and was not engaged in interstate commerce. These contentions are found by the board, at some length, to be unsound. Then the opinion of the board states that the bank also claimed, in justification for its discharge of plaintiff, that his services were unsatisfactory and that he was not qualified for the position in question. It is held that this defense "is unsupported by the evidence," and the evidence is recited that refutes it. It is then stated that another defense of the bank was that Washer made "a false expense claim against" the bank. This defense, the board holds, "is not borne out by the evidence." The board recites the evidence, part of which is set forth in the main opinion, and states that the *bank claims that this incident shows that Washer was "dishonest."* The board's opinion continues: "We find no merit in this contention." It is expressly held that the evidence shows that Washer was *not* "dishonest." The board's opinion also states that the bank charged that Washer was guilty of "insubordination and insolence toward his superior officers," and finds that this defense "is not supported by the evidence." The opinion sets forth in detail the correspondence between Washer and Kieferdorf, some of which is summarized in the majority opinion, and also points out that the evidence shows a close friendship between the two men and holds that, properly interpreted, the letters merely showed that Washer was being familiar with Kieferdorf, in a friendly way. After a review of all the evidence, the board holds that none of the charges against Washer is supported by the evidence; that the bank unjustly and improperly discharged Washer because of his union activities and the order is that Washer should be reinstated.

It is this pleading, with its exhibit, that the main and concurring opinions hold alleges that the charges made by the bank were truthful, as a matter of law. Stated another way, the main and concurring opinions hold that the complaint and its exhibit plead, as a matter of law, that Washer had admitted that he had falsified his expense account, and the main opinion holds that the complaint shows on its face that Washer was guilty of flagrant insubordination. These conclusions are arrived at in spite of the fact that the complaint alleges that the charge that he had admitted that he had falsified his expense account was untrue, and was known by the bank to be untrue; in spite of the fact that the complaint alleges that the charge that he was guilty of flagrant insubordination was untrue and known to the bank to be untrue; and in spite of the fact that the very charges had been passed upon by the labor board and found by it to be unsupported and untrue!

The reasoning by which the main opinion arrives at its conclusion is clearly unsound. It points out that the word "falsify" has several possible meanings; that it is sometimes used 'to characterize a criminal act involving the perpetration of fraud," and sometimes used to convey the thought of being "mistakenly and accidently untrue"; that it is a word of "double import" and may convey the meaning "of being intentionally or knowingly untrue."

The opinion then creates what purports to be a third meaning—"intentional act of falsification, without, however, an intent to defraud," and holds that for the purposes of this case, this court, as a matter of law, must conclusively presume the term was so used by the bank in making the charge here involved. In this connection the main opinion states: "Whatever definition may be given to the word 'falsified' as used under other circumstances, in view of the fact that it was used in reference to the Labor Board's decision, we must assume for the purpose of this case, that it meant an intentional falsification without intent to defraud." No authority is or can be cited for such a definition. To say that a person had admitted falsifying his accounts, either means he admitted that he attempted to defraud his employer or that he accidentally or mistakenly, without intent to defraud, admitted filing an incorrect account. The evidence recited in the Labor Board's opinion demonstrates, and that court found, that, at most, Washer made an innocent mistake. That opinion clearly holds that Washer committed no dishonest act in connection with his expense account. Yet the main opinion holds that from "the above recital of the facts as they appear in the decision of the Board, it may be reasonably and definitely determined that by his silence in the 'first instance,' plaintiff attempted to deceive the bank * * *." This inference is indulged in as a matter of law in passing on the sufficiency of a pleading, although other inferences are possible, and a court—the Labor Board—has determined that such inference is not possible under the facts. The Labor Board expressly held that no dishonest intent existed.

If the main opinion is to be interpreted as meaning that Washer admitted before the Labor Board that he was guilty of a dishonest act, then the main opinion misstates the facts. The complaint and its exhibit demonstrate that he made no such admission. On the other hand, if the main opinion is to be interpreted as holding that Washer admitted before the board that he was guilty of an innocent mistake, and that the bank intended to convey that thought when they used the term "falsified" in the allegedly libelous and slanderous statement, the answer is that the board's opinion, which the main opinion holds must be read as part of the complaint (and therefore must not only be read against plaintiff but also, where proper, in his favor), holds unequivocally that before the board the bank used the word in the sense of dishonest. The board holds that Washer was not dishonest. That this holding is supported by the evidence is amply demonstrated by the facts recited in the board's opinion. Moreover, the complaint alleges that in using the term the bank intended to mean, and did convey the thought, that Washer had admitted doing a dishonest act. Under such circumstances, to hold that the bank, as a matter of law, intended to convey the thought that Washer had admitted he had been guilty of an innocent act, is not only to do violence to the obvious meaning of the term, to do violence to the board's opinion where it is disclosed how the bank used the term, to contradict directly the allegations of the complaint, but also to state a principle of law that finds no support in any decided case. Such a construction of the statement would mean that in the case of ambiguous words, as a matter of law they are not libelous if capable of an innocent meaning. That is not the law. Words are to be construed according to the meaning that they would normally convey to those to whom they are published. See cases collected 16 Cal.Jur., p. 57, § 29. The rule that, in libel or slander cases, when words have two meanings, they are to be taken in their milder sense has never been adopted by the courts of this country. See cases collected 33 Am.Jur., p. 97, § 84. A forced construction is not to be placed on words in order to relieve the defendant of liability. The effect and tendency of the language used are the criteria by which to determine the actionable quality of words. 36 Corpus Juris, p. 1153, et seq. In each case the intent with which words are used and understood are questions of fact and not questions of law

It is apparent that the main opinion must be construed to hold either of two things, both of which are wrong. If it holds that, as a matter of law, the bank used the word "falsified" to indicate that Washer had admitted that he had been guilty of an innocent mistake in filing an expense account, the holding is correct only insofar as it holds that Washer admitted such innocent mistake. It is clearly incorrect insofar as it holds that the bank, as a matter of law, used the term in its innocent sense. Such holding is contrary to the proper rule to be applied in interpreting allegedly slanderous and libelous words, contrary to the obvious meaning intended to be conveyed, contrary to the positive allegations of the complaint, and contrary to the sense in which the bank used the term in the proceedings before the board. If the main opinion is to be interpreted as meaning that the complaint shows, on its face, that Washer admitted before the board that he had been guilty of a dishonest act in filing his account, then the opinion not only is contrary to the holding of the board, but misinterprets the facts set forth in the board's opinion. In either event, the main opinion is predicated on incorrect premises and reaches an incorrect result.

So far as the second charge is concerned —that the bank could not possibly reinstate a person "who had been guilty of flagrant insubordination"—there is no justification at all for the holding in the main opinion that the pleading discloses the truth of that charge. The main opinion holds that the evidence recited in the board's decision, as a matter of law, demonstrates that Washer was guilty of flagrant insubordination, even though the board held that such evidence showed no such thing. The majority opinion necessarily holds that, as a matter of law, the board's decision was wrong. While it is true that the board's opinion is not res judicata in this proceeding, and that on the trial, if one be had, the superior court could come to a conclusion contrary to that reached by the board, the effect of the main opinion is to hold, in passing on the sufficiency of a pleading, that such pleading, as a matter of law, demonstrates the truthfulness of a charge which another court, as a matter of fact, found to be unsupported. What the main opinion has done is to take the evidence recited in the board's opinion most damaging to plaintiff and accept it as true, to disregard completely evidence favorable to plaintiff, to disregard completely reasonable inferences from that evidence favorable to plaintiff, and to indulge in unwarranted and unfavorable inferences, and to disregard completely the holding of the board. The main opinion treats the whole controversy as if it were an appeal by plaintiff from a judgment for defendant after a trial on the merits, instead of from a judgment entered after the sustaining of a demurrer without leave to amend.

There are other points urged by the appellant for a reversal. I have considered each of such points and find them to be without merit. No useful purpose would be served by discussing them in this dissent.

It is my view that the judgment appealed from should be reversed.

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HOLMAN v. TOTEN.

Civ. 13463.

District Court of Appeal, Second District, Division 3, California.
Sept. 3, 1942.

1. **Appeal and error** 🔑731(5)

In the absence of specifications of particulars of insufficiency of the evidence in a bill of exceptions, its sufficiency cannot be considered on appeal.

2. **Appeal and error** 🔑907(4)

Where bill of exceptions contained only documentary evidence which failed to reveal facts necessary to support plaintiff's judgment, District Court of Appeal would presume that evidence not before it showed the existence of all such facts so far as they were embraced within findings.

3. **Escrows** 🔑12

Generally, title to property does not pass merely by reason of deposit of the deed in escrow where the conditions fixed for its delivery were not such as were certain to happen. Civ.Code, § 1057.

4. **Escrows** 🔑12

A deed deposited in escrow becomes effective to pass title as soon as the conditions of delivery were so far performed that the grantee was entitled to possession of the deed although it was not then actually delivered. Civ.Code, § 1057.

5. **Appeal and error** 🔑907(2)

In action to quiet title as against purchaser under mechanics' lien foreclosure, trial court's finding that plaintiff had performed all conditions of escrow so as to become entitled to possession of the deed to premises prior to time defendant brought foreclosure action must be presumed by District Court of Appeal to be supported by the evidence, where defendant's bill of exception failed to set out the evidence. Civ.Code, § 1057.

6. **Judgment** 🔑681

One who acquired his interest in the matters in litigation from a party before commencement of suit is not a successor in interest within meaning of rule that a judgment concludes not only the adverse party but also all those claiming under the title which he represents. Code Civ.Proc. § 1908, subd. 2.

7. **Judgment** 🔑682(1)

A purchaser of realty under escrow agreement whose title vested before suit was commenced for foreclosure of a mechanic's lien thereon, and who was not made a party to the suit, was not bound by judgment of foreclosure or sale thereunder. Code Civ.Proc. § 1908, subd. 2.

8. **Mechanics' liens** 🔑298

The provisions of Civil Code giving effect to a deed which is subsequent in execution but prior in recording, are limited to purchasers for a valuable consideration and in good faith but were not available to a purchaser of realty at mechanic's lien foreclosure sale who had both actual and constructive notice of plaintiff's deed thereto. Civ.Code, §§ 1107, 1214.

9. **Mechanics' liens** 🔑263(1)

The statutory provision that no person holding a conveyance from mortgagor which does not appear of record at the time of commencement of foreclosure action need be made a party to such action, applies only to foreclosure of mortgages and has no application to foreclosure of mechanics' liens. Code Civ.Proc. § 726.

10. Mechanics' liens ⚿263(1)

The Civil Code provision that no person holding a conveyance from mortgagor which does not appear of record at the time of commencement of foreclosure action need be made a party to such action, is not made applicable to foreclosure of mechanic's liens by the provision that the provisions of Part II of the Code of Civil Procedure are applicable to and constitute the rules of practice in proceedings for enforcement of mechanics' liens. Code Civ.Proc. §§ 726, 1198.

11. Mechanics' liens ⚿291(7)

The provisions of Civil Code that a conveyance of real property shall be void as against any judgment affecting the title unless recorded prior to record of notice of action apply only where notice of action is recorded, and where notice of defendant's suit to foreclose mechanic's lien on property purchased by plaintiff under escrow agreement was not recorded and defendant had actual notice of plaintiff's unrecorded deed, plaintiff's deed took precedence over defendant's foreclosure judgment. Code Civ.Proc. § 726.

12. Quieting title ⚿44(2)

In action to quiet title to land purchased by defendant under mechanics' lien foreclosure sale, where plaintiff was not bound by the foreclosure judgment, because lienholder had actual knowledge of plaintiff's rights under an unrecorded deed and plaintiff had not been made a party to the foreclosure, it was not error to permit plaintiff to produce evidence in contravention of judgment to show that in fact defendant had no lien on the property. Code Civ.Proc. § 726.

13. Appeal and error ⚿907(2)

In action to quiet title to land purchased by defendant under mechanic's lien foreclosure sale, where foreclosure judgment was not binding on plaintiff because defendant had actual knowledge of plaintiff's rights under an unrecorded deed and did not make plaintiff a party to foreclosure, on appeal the District Court of Appeal must presume that the trial court's finding that defendant had no lien on land was adequately supported by the evidence, where the evidence was not in the record. Code Civ.Proc. § 726.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Quiet title action by Chester Holman against Flora Toten. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hubert W. Swender and Emanuel & Klein, all of Los Angeles, for appellant.

Herman G. Dobrott, of Santa Monica, for respondent.

SHAW, Justice pro tem.

The defendant appeals from a judgment declaring plaintiff to be the owner of a described parcel of land and quieting plaintiff's title thereto against all claims of defendant.

[1, 2] The points made by defendant on this appeal require a consideration of the evidence for their determination. Such consideration is much limited by the form of the record on appeal. The evidence is presented by a bill of exceptions, which contains only certain documentary evidence introduced by the respective parties. The bill, after stating the plaintiff's documentary evidence, declares that over defendant's objection the court received testimony—not contained in the bill—which "purported to bear on the question of the validity and sufficiency of a claim of lien filed for record by the defendant" and also recites that there was "further testimony on behalf of the plaintiff." The bill then states defendant's documentary evidence and follows it with a recital that there was "further testimony on behalf of the defendant." In neither case is the nature or purport of the "further testimony" stated. The bill contains but three specifications of insufficiency of the evidence, each of which points to a specified finding; the first two then state that "the documentary evidence adduced at the trial and attached hereto as exhibits does not support or warrant said finding," and the third declares "that the last sentence of said finding is not warranted or supported by the documentary evidence referred to herein and attached hereto as exhibits." Such specifications, being limited to the effect of the documentary evidence, while the bill shows that there was other evidence, the nature of which does not appear, are little better than no specifications at all. In the absence of specifications of particulars of insufficiency of the evidence in a bill of exceptions, its sufficiency cannot be con-

sidered on appeal. Loewenberg v. Schneider, 1939, 14 Cal.2d 305, 307, 93 P.2d 1014. Here we can consider the insufficiency of the evidence only to the extent that the documents in evidence may affirmatively show its insufficiency. Several facts which are necessary to support plaintiff's judgment do not appear from these documents, but are not negatived in them. We must presume that the evidence not before us showed the existence of all such facts, so far as they are embraced within the findings.

On November 4, 1940, plaintiff and Perry J. Holliday made an agreement, in the form of escrow instructions signed by them respectively and deposited with Bay District Bonded Escrows, for the exchange of the land here in question by Holliday for other land of plaintiff. The instructions of each party stated that such party would deposit his deed in escrow "on or before December 4th, 1940." Holliday deposited such a deed dated and acknowledged on November 4, 1940. The date of its deposit in escrow does not appear, but we presume in plaintiff's favor that it was made on November 4, and we also presume the non-appearing fact that in due time plaintiff complied with the escrow instructions.

On November 14, 1940, defendant recorded a notice of mechanic's lien against the property to be conveyed to plaintiff by Holliday, and on December 4, 1940, she began, in the Municipal Court of the City of Los Angeles, an action to foreclose that lien, making Holliday, but not plaintiff, a party to the action. At this time, according to a finding not objected to, defendant "had both actual and constructive knowledge that the plaintiff herein was the owner of said premises." Holliday defaulted in this action and thereupon a judgment foreclosing the mechanic's lien was entered on December 27, 1940, by which a commissioner was appointed and ordered to sell the property to satisfy the lien. Pursuant to this judgment the commissioner sold the property to defendant on February 4, 1941, delivered to the purchaser a certificate of sale, and deposited a duplicate thereof in the recorder's office. The dates of the delivery and recording of the certificate do not appear, but these acts must have occurred on or before February 7, 1941, the date of verification of the commissioner's report of sale, which recites them.

In the meantime the plaintiff, on November 26, 1940, filed in the Los Angeles County Superior Court an action against Holliday and Doe One for specific performance of the agreement of sale made by the escrow instructions above mentioned. Later plaintiff amended his complaint in that action by alleging that he had sued Doe One by a fictitious name and had discovered said defendant to be two persons doing business as "Bay District Bonded Escrows," and substituting their names for the fictitious name. The defendants all made default and on April 14, 1941, a judgment was rendered directing the defendants doing business as Bay District Bonded Escrow to deliver to plaintiff and to Holliday the deeds deposited, to each the deed deposited by the other. The plaintiff later offered Holliday's deed in evidence, so we presume it was delivered to him in accordance with this judgment.

[3-5] The trial court in this action made findings that "on the 4th day of Nov., 1940, Perry J. Holliday made, executed and delivered to the plaintiff his deed" of the property involved herein, and that "prior to said time [the date of defendant's judgment against Holliday, foreclosing her mechanic's lien] said Perry J. Holliday had conveyed away all of his right, title and interest." Both of these findings are attacked as unsupported by the evidence, the specifications of their insufficiency being the first and third of those above discussed. These findings must be upheld against this attack. It is true, Holliday's deed to plaintiff appears not to have been delivered to plaintiff from the escrow until April 14, 1941. The conditions fixed for its delivery were not such as were certain to happen, and hence title to the property did not pass to the plaintiff merely by reason of the deposit of the deed in escrow. Civ.Code, § 1057; Promis v. Duke, 1929, 208 Cal. 420, 425, 281 P. 613; Whitney v. Sherman, 1918, 178 Cal. 435, 438, 173 P. 931; Los Angeles High School Dist. v. Quinn, 1925, 195 Cal. 377, 383, 234 P. 313; In re Reed, 1928, 204 Cal. 119, 123, 266 P. 948; Feisthamel v. Campbell, 1921, 55 Cal.App. 774, 781, 205 P. 25; Brown v. Wilson, 1928, 89 Cal.App. 764, 766, 265 P. 351. But the deed did become effective to pass the title as soon as the conditions were so far performed that plaintiff was entitled to possession of the deed, although it was

not then actually delivered to him. Whitney v. Sherman, supra; Cannon v. Handley, 1887, 72 Cal. 133, 140, 13 P. 315; Newport Bay Dredging Co. v. Helm, 1932, 120 Cal.App. 127, 135, 7 P.2d 1039; Law v. Title Guarantee & Trust Co., 1928, 91 Cal.App. 621, 628, 267 P. 565; Feisthamel v. Campbell, supra; 10 Cal.Jur. 592; 30 C.J.S., Escrows, §§ 10, 13, pp. 1209, 1216. While the time when the plaintiff had performed all the conditions of the escrow so as to become entitled to possession of Holliday's deed does not appear in the record, we must, for the reasons above stated, presume that this occurred on November 4, 1940, the day stated in the finding, which was before defendant began her lien foreclosure action. On this view of the facts and on the law just stated, both of the findings objected to are correct.

[6, 7] Defendant contends that the plaintiff is bound by the judgment foreclosing defendant's mechanic's lien. As already noted, plaintiff was not made a party to the action in which that judgment was rendered, although defendant knew of plaintiff's rights when the action was begun. The California rule is that a judgment "concludes not only the adverse party but also all those claiming under the title which he represented." Estate of Clark, 1923, 190 Cal. 354, 360, 212 P. 622, 625. But, "one who acquired his interest in the matters in litigation from a party before the commencement of the suit * * * is not a successor in interest within the meaning of the rule and is not bound by a subsequent judgment, unless, * * * a statute provides otherwise where the transfer has not been recorded as prescribed." 15 Cal.Jur. 194; see, also, to the same effect, Code Civ.Proc. § 1908, subd. 2; 34 Corpus Juris 1010–1012, 1014, 1015; Lee v. Silva, 1925, 197 Cal. 364, 373, 240 P. 1015; People's Home Sav. Bank v. Rickard, 1903, 139 Cal. 285, 296, 73 P. 858; Warnock v. Harlow, 1892, 96 Cal. 298, 307, 31 P. 166, 31 Am.St.Rep. 209; Chester v. Bakersfield T. H. Ass'n, 1883, 64 Cal. 42, 43, 27 P. 1104. This rule, although not stated in the same words, was applied to an action to foreclose a mechanic's lien in Whitney v. Higgins, 1858, 10 Cal. 547, 552, 70 Am.Dec. 748; Corbett v. Chambers, 1895, 109 Cal. 178, 184, 41 P. 873, and Fly v. Cline, 1920, 49 Cal.App. 414, 424, 193 P. 615. Here, according to the finding which must be accepted as true, plaintiff's title to the property vested before defendant's suit was commenced and he is therefore not bound by the judgment, under the general rule above quoted from California Jurisprudence.

[8] Defendant has no superior right by reason of the fact that her purchase of the property at the sale under her judgment was made and the certificate thereof was recorded before plaintiff's deed was recorded—a fact which appears only on the perhaps well founded assumption that plaintiff's deed was not recorded before the rendition of the judgment requiring its delivery to him. The provisions of sections 1107 and 1214 of the Civil Code giving effect to a deed which is subsequent in execution but prior in recording are limited to purchasers for a valuable consideration and in good faith, that is, without notice of the prior, but unrecorded, deed. March v. Pantaleo, 1935, 4 Cal.2d 242, 243, 48 P.2d 29; Whitney v. Sherman, 1918, 178 Cal. 435, 439, 173 P. 931. Here the undisputed finding above mentioned shows that at the time of her purchase defendant had both actual and constructive notice of plaintiff's deed.

[9, 10] Defendant contends, however, that there is a statute which makes the plaintiff subject to the judgment, thus attempting to bring the case within the qualification of the rule from 15 Cal.Jur. 194. The statutory provision thus invoked is the part of section 726 of the Code of Civil Procedure reading as follows: "No person holding a conveyance from or under the mortgagor of the property mortgaged, or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action need be made a party to such action, and the judgment therein rendered, and the proceedings therein had, are as conclusive against the party holding such unrecorded conveyance or lien as if he had been a party to the action." Obviously this provision is not by its own terms applicable to the foreclosure of a mechanic's lien, for the subject matter of section 726 is the foreclosure of mortgages, only, and the provision quoted speaks only of such foreclosures. But, says defendant, it is made applicable to the foreclosure of mechanic's liens by section 1198 of the Code of Civil Procedure, which is part of a special chapter providing for the enforcement of mechanic's liens and reads as follows: "Except as otherwise

provided in this chapter, the provisions of part two of this code are applicable to, and constitute the rules of practice in, the proceedings mentioned in this chapter." Looking at "part two of this code," we find that it includes section 726; hence, argues defendant, section 1198 makes the quoted provision of section 726 applicable to the foreclosure of mechanic's liens. We think the cross reference of section 1198 cannot be so broadly interpreted.

The Code of Civil Procedure is divided into four parts, of which Part II is entitled "Civil Actions." Part II is now divided into twelve "titles," of which the first nine and the last two relate to civil actions generally and have headings so indicating, except the last, which is headed "Miscellaneous Provisions." Title X of Part II is headed "Actions in Particular Cases" and consists of six chapters, entitled as follows: Chapter I. "Actions for Foreclosure of [Trust Deeds and] Mortgages." Chapter II. "Actions for Nuisance, Waste, and Willful Trespass, in Certain Cases, on Real Property." Chapter III. "Actions to Determine Conflicting Claims to Real Property, and Other Provisions Relating to Actions Concerning Real Estate." Chapter IV. "Actions for Partition of Real [and Personal] Property." Chapter V. "Actions for Usurpation of an Office or a Franchise." Chapter VI. "Actions Against Steamers, Vessels, and Boats." Section 726, which defendant claims as applicable here, is in Chapter I of Title X of Part II. Section 1198, on which defendant relies to adopt section 726, is part of a title denominated "Enforcement of Liens," and this whole title is in Part III of the Code, which is headed "Special Proceedings of a Civil Nature" and contains a variety of provisions, relating, with other matters, to writs of mandate, review and prohibition, to forcible entry and unlawful detainer proceedings, and to eminent domain. In the provisions covering the proceedings just enumerated there are sections identical with section 1198. §§ 1109, 1177, 1256. Evidently a common purpose was to be carried out by all of these sections. That purpose was to make the "rules of practice" in all of these special proceedings identical, so far as not otherwise specially provided, with those prevailing in civil actions generally. That purpose would not be furthered by applying to such special proceedings the special rules of practice found in Title X of Part II for "Actions in Particular Cases." Those rules are applicable in detail to a heterogeneous group of actions, and among them are many rules which, like section 726, could be applied to some special proceeding by merely ignoring or changing some of their words for that purpose. The general rules contained in Part II of the code need no such tailoring to fit them to any particular special proceeding and they constitute the "rules of practice" which are intended by section 1198 and its counterparts. Section 726 is not among those so adopted. The framers of the code apparently held the same view of the matter, for in the original code of 1872 section 1195 (one of the sections specially relating to the enforcement of mechanic's liens) contained a provision for the docketing of a deficiency judgment in mechanic's lien foreclosure actions "as in actions for foreclosure of mortgages." This specific reference was made although section 726, then as now, contained provision for deficiency judgments in mortgage foreclosure cases, and section 1198 read then as it does now. This special provision for deficiency judgments in mechanic's lien cases is still in the code, but by amendment made in 1874, it was moved from section 1195 to section 1194, where it now is. Code Amendments 1873–74, p. 412. We have assumed, for the purpose of this discussion, that plaintiff's deed from Holliday was not recorded before defendant's foreclosure action was begun. There is no direct evidence on the subject, but from the fact that plaintiff sought and obtained, long after the foreclosure suit was begun, a judgment for the delivery of the deed to him, the inference seems strong that up to the time of that judgment the deed had not been delivered or recorded.

[11] The provision of section 1214 of the Civil Code making a conveyance of real property void "as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action" is not operative here. It is limited by its terms to cases where a notice of action is recorded (see Moore v. Schneider, 1925, 196 Cal. 380, 392, 238 P. 81; Taylor v. Chapman, 1936, 17 Cal.App.2d 31, 61 P.2d 476) and the record here does not show the recording of such a notice by defendant. Hence the case remains subject to the rule that "an unrecorded deed takes precedence over a

subsequent judgment against the grantor." Davis v. Perry, 1932, 120 Cal.App. 670, 676, 8 P.2d 514, 517.

[12, 13] Since plaintiff was not bound by defendant's foreclosure judgment, the court did not err in permitting plaintiff to produce evidence in contravention of the judgment to show that in fact defendant had no lien on the property. Fly v. Cline, supra, 1920, 49 Cal.App. 414, 424, 193 P. 615. That evidence is not in the record and we must therefore presume that the finding showing that she had no lien was adequately supported thereby.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concur.

54 Cal.App.2d 178

HEAPS v. TOY.

Civ. 11960.

District Court of Appeal, First District,
Division 1, California.
Aug. 28, 1942

1. Contracts 🔑111

An agreement between a divorced woman and a married man whereby the woman agreed to forego marrying any other person, and to accept employment as a companion to the man, and to maintain a home for him and at which she would remain, that he would purchase a home for her, furnish it and pay taxes and insurance on it, and support her for the remainder of her life and provide in his will for her lifelong care, was void as contrary to the statute prohibiting "contracts in restraint of marriage". Civ. Code, § 1676.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract in Restraint of Marriage"

2. Contracts 🔑137(3)

Under an agreement between a divorced woman and a married man whereby the woman agreed to forego marrying any other person, to give up her business career and accept employment as a companion to the man, etc., condition that plaintiff refrain from marriage was not "severable" so as to relieve the agreement from the taint of illegality, where the condition was the real basis of the entire agreement. Civ.Code, § 1676.

See Words and Phrases, Permanent Edition, for all other definitions of "Severable".

3. Contracts 🔑143

Courts may not, under the guise of judicial construction, rewrite a contract for the parties.

4. Contracts 🔑111

The statute declaring void every "contract in restraint of marriage" applies in cases of divorcees and widows. Civ.Code, § 1676.

5. Contracts 🔑111

The statute declaring void every contract in restraint of the marriage of any person other than a minor is part of the law of contracts of the state of California, since it is placed among other code sections under the sub-title "unlawful contracts". Civ. Code, § 1667, et seq.

6. Contracts 🔑112

A life-long contract between a divorced woman and a married man whereby she agreed to refrain from marrying and to be his companion during the remainder of her life, as long as he lived, to keep and maintain a permanent home to be supplied by him, was, when considered in connection with the personal relationship carried on for sixteen years after the contract was made, contrary to "good morals", and hence in violation of statutes requiring that the consideration must be lawful and enumerating what considerations are not lawful. Civ. Code, §§ 1607, 1667.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Morals".

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Edna Heaps against Harvey M. Toy to recover damages for the alleged breach of an oral agreement. Defendant's demurrer to the complaint, on general and special grounds, was sustained without leave to amend. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Vincent W. Hallinan and James A. Himmel, both of San Francisco, for appellant.

Fabius T. Finch and Paul F. Fratessa, both of San Francisco, for respondent.

KNIGHT, Justice.

Plaintiff sued for damages for the alleged breach of an oral agreement she claimed defendant had entered into with her some seventeen years prior to the commencement of the action, concerning their future personal relations with each other. Defendant demurred to the complaint on general and special grounds, and the demurrer was sustained without leave to amend. Judgment of dismissal followed, and plaintiff appeals. Accepting as true the allegations of the complaint, it is apparent that the trial court was justified in holding that the agreement sued upon was void for two reasons: that it was in restraint of marriage, and was founded on a consideration contrary to good morals.

In said complaint plaintiff alleges that she was divorced in Seattle, Washington, in 1921, at the age of 25, and that there were two children (girls) aged 5 and 3 respectively; that shortly after the divorce was granted she left the children in Seattle and moved to San Francisco where she obtained employment in a candy concession in a hotel owned and operated by the defendant; that while so employed she became acquainted with the defendant; that he was about 38 years of age and married, and that "a strong friendship grew up" between them; that her purpose in moving to San Francisco was to gain a business education, establish herself in business and then bring her children to San Francisco to live with her; furthermore, that she "expected and hoped to re-marry with some suitable and desirable person and to rebuild her family upon such re-marriage"; that in accordance with such plan she attended a business school and afterward procured a notary public commission, and engaged in the business of public stenographer and notary in San Francisco; that meanwhile she became "friendly with certain desirable unmarried men who wished to marry her and with one of whom she could have contracted marriage." She then goes on to allege that in that situation and about the year 1924 defendant represented to her that he was not living with his wife, that they had been separated for a long time and occupied separate homes, but that he had no grounds for a divorce and his wife would not procure one from him; that thereupon he made the following proposal to plaintiff: "that if plaintiff would forego marrying any other person and would give up her business career and would accept employment as a companion to defendant and would accept no other employment and would keep and maintain for defendant a home where he could live when he desired and where he could entertain his friends, and at which plaintiff would remain, that defendant would procure the removal of plaintiff's children to San Francisco and would maintain and support them here"; that he would purchase for and have granted to plaintiff a home, furnish and equip the same, and pay all taxes and insurance thereon; that he would support plaintiff "for the remainder of her life" and maintain and support her two children until they should become self-supporting or marry; furthermore that he would provide in his will for her care "as long as plaintiff should live"; and that he would cause a contract to that effect to be reduced to writing "as a guarantee of the permanency thereof." Continuing, she alleges that she "accepted said proposal of defendant" and "agreed to be thereafter and during the remainder of her life a companion of defendant to be with him at any time that he should desire, and to go with him to any and all places which he should choose, to keep and maintain for him a permanent home in which he could live at any time and to which he could bring any person for entertainment whenever it should please him"; that forthwith they "entered into said agreed relationship; that plaintiff moved to such places as defendant designated and maintained for him such facilities for living and entertaining as he desired and indicated and became his constant companion and accompanied him whenever he desired and forewent any opportunity to marry any other person and abandoned her said business and accompanied defendant on three trips to Europe and one to South America and in general devoted her entire time and efforts to the service of defendant in accordance with her agreement * * *"; also that in pursuance of said agreement defendant brought plaintiff's children to San Francisco and thereafter maintained them, and in the year 1928 purchased for and had conveyed to plaintiff residential property in San Francisco. It is then alleged that about the month of September, 1940, defendant repudiated said agreement and thereafter refused to pay for her maintenance and support, or the unpaid balance of $4,200 on the purchase price of the residential property. By reason of the foregoing plaintiff asked damages in the total sum of $164,200, which was made up of the following items: $60,000 for her future support and maintenance, computed on her expectancy of life, $4,200 to liquidate the unpaid balance on the residential property, and $100,000 as exemplary damages.

[1] Section 1676 of the Civil Code declares: "Every contract in restraint of the marriage of any person, other than a minor, is void." Here under the terms of the agreement as pleaded it was agreed that in consideration of the promises made by defendant to plaintiff she would not marry during the remainder of her life, or at least at any time prior to the termination of the agreement by the death of the defendant; and that "during the remainder of her life" she would be a companion to defendant. Obviously such an agreement falls squarely within the inhibition of the code section above quoted.

[2, 3] Plaintiff contends that the condition that plaintiff refrain from marriage was no part of the contract itself; or if so that it is "a severable part" and consequently does not invalidate the entire contract. It clearly appears, however, from the allegations of the complaint that such condition was not only made part of the contract itself but was the real basis of the entire agreement. That being so it is not within the power of the courts to disregard it; in other words, courts may not, under the guise of judicial construction, rewrite a contract for the parties.

[4, 5] Plaintiff contends that in any event the code section above quoted has no application to "second" marriages; that is, that it does not apply in cases of divorcees or widows. But as will be observed, said section in broad terms is made to apply to "the marriage of *any person*, other than a minor." (Italics ours.) If the Legislature had intended to exempt also from the operation of the section divorcees and widows, it doubtless would have inserted therein qualifying language to that effect. The several cases cited by plaintiff from outside jurisdictions as supporting her contention are not in point. They involved devises and bequests, whereas here we are dealing with a contract, and of course fundamentally there is a vast difference between the law governing the right of a person to make a voluntary gift, testamentary or *inter vivos*, and the law governing the rights of two or more persons to enter into a contract. Said section 1676 is made part of the law of contracts of this state. It is placed among other code sections under the sub-title "Unlawful Contracts". Title IV, div. 3, pt. 2, Civ.Code. It is therefore here controlling. Nor are we concerned with the law governing property settlements or agreements for maintenance and support entered into between husband and wife, for the reason that no such relationship existed between these contracting parties.

[6] Regarding the second ground of invalidity of the contract, section 1607 of the Civil Code provides that "The consideration of a contract must be lawful within the meaning of section sixteen hundred and sixty-seven" of said code; and the latter section declares: "That is not lawful which is: 1. Contrary to an express provision of law; 2. Contrary to the policy of express law, though not expressly prohibited; *or,* 3. *Otherwise contrary to good morals.*" (Italics ours.) Here, assuming that the allegations of the complaint are true, it would appear that plaintiff entered into a life-long contract with a married man, whereby she agreed not only to refrain from marrying, but "to be thereafter and during the remainder of her life a companion of defendant" as long as he lived, to keep and maintain for him a "permanent" home to be supplied by him, and that she would "be with him at any time that he should desire, and * * * go with him to any and all places which he should choose * * *." Therefore, taking into consideration in connection therewith the allegations of the complaint concerning the personal relationship carried on between the parties during the sixteen or more years following the making of the contract, it would seem clear that the trial court was warranted in holding as a matter of law that the contract pleaded fell within the unlawful class contemplated by subdivision 3 of said section 1667.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

54 Cal.App.2d 192

BALESTRA et al. v. BUTTON.

Civ. 6407.

District Court of Appeal, Third District, California.

Aug. 29, 1942.

1. Easements 🔑3(1)

Property 🔑4

An "easement in gross" is a personal right or a right attached to the person of another and is an interest in the real property of another but is not personal property, the principal distinction between an "easement appurtenant" and an "easement in gross" being that in the first there is a dominant tenement and in the second there is not.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement Appurtenant" and "Easement in Gross".

2. Execution 🔑27

Property 🔑4

The right to use and maintain a telephone line, acquired by son of deceased farm owner as tenant, was "real property" and an "easement appurtenant" to the farm and was not "personal property" of the son which could be taken under execution by son's creditors.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Property" and "Real Property".

3. Easements 🔑3(1)

Generally an easement is not presumed to attach to the person of the grantee when it can fairly be construed to be appurtenant to some other estate and whenever the right is in its nature an appropriate and useful adjunct of the land owned by the grantee of the easement and there is nothing to show that the parties intended it to be a mere personal right, it will be held to be an "easement appurtenant" and not an "easement in gross".

4. Adverse possession 🔑71(2)

Although an oral agreement alone is ineffective to convey an interest in real property, a right initiated in parol may become perfect by prescription.

5. Easements 🔑3(1), 9(1)

Where son of deceased farm owner, as tenant, acquired right to use of telephone line by parol agreement and thereafter paid all expenses of making improvements and for a period of ten years the phone was used for the benefit of farm and its tenants, title by prescription to the easement in use of telephone was acquired, became appurtenant to the land and ran with it.

6. Easements 🔑61(2)

Where the right to use of telephone line maintained by defendant acquired by deceased farm owner's son as tenant was real property and an easement appurtenant to the farm, defendant failed to acquire such easement by execution sale under judgment against son, and plaintiffs, as the only heirs at law entitled to any interest in decedent's estate, were entitled to mandatory injunction compelling defendant to restore connection with line.

◆

Appeal from Superior Court, Yolo County; J. O. Moncur, Judge.

Action by Anastasia Balestra and others against R. L. Button for a mandatory injunction requiring defendant to restore the connection of a telephone line. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

A. G. Bailey, of Woodland, for appellant.

Huston, Huston & Huston, of Woodland, for respondents.

ALLEN, Justice pro tem.

This is an action for a mandatory injunction commanding and requiring defendant to restore the connection of a certain telephone line to a line known as the "Button and Griffin Line" connecting with the town of Winters' telephone exchange. From a judgment in favor of plaintiffs, defendant has appealed.

In 1920, Joseph Balestra purchased the land now owned by plaintiffs. At the time of the purchase and for some time prior thereto, defendant R. L. Button, Nancy Button and John Griffin owned and maintained a telephone line, known as the "Button and Griffin Line," extending from their respective farms to the town of Winters. An integral portion of this line was strung along poles attached to the fence on the south and east sides of the premises acquired by Balestra, Sr., at the time he acquired the same, and remained on said fence until 1926 or 1927, when that part of the line on the south fence was placed on Pacific Gas & Electric Company's poles on or about the same route as when the line was on the fence. The line continued this way until the death of Balestra, Sr., in February, 1928. Button and Griffin had, prior thereto, obtained consent in writing from Pacific Gas & Electric Company to put this line on the company's poles. Joseph K. Balestra had been living upon and was in possession of his father's land as a tenant at the time of, and for some time prior to his father's death. He continued to hold over as a tenant until February, 1930.

Joseph Balestra, Sr., had no telephone connections with the "Button and Griffin Line," nor did Joseph K. Balestra until May or June, 1928, after his father's death. Balestra, Jr., was in occupation of the dwelling and buildings on the lands and desired to establish telephone connections with the town of Winters to use same in connection with his business of operating the farm. In May or June of 1928, he applied to both Button and Griffin, and they agreed orally for the consideration of one hundred dollars ($100) to give him the right to connect with the "Button and Griffin Line" and use the same for transmission of messages to and from the Balestra premises, he to pay his portion of the upkeep. He paid the consideration, connected with said line and used it until February, 1930, paying his part of the maintenance thereof.

After his father's death, although Balestra, Jr., continued to hold over as a tenant until February, 1930, the lands went into his father's estate for administration. The descent of title from Balestra, Sr., was as follows: Antonia Balestra, his wife, took a life estate with remainder over to the children of decedent. Antonia Balestra was still living at the time of the trial of this action. Anastasia Balestra and Antonia Balestra are one and the same person. The original complaint filed named her erroneously as "Anastasia," but after judgment and appeal, the error was discovered, and the cause was sent back to the trial court for correction, which correction was made by proper amendment.

In February, 1930, Balestra, Jr., was found to be heavily indebted to the estate. Such indebtedness was caused by non-payment of rent and two notes amounting in all to approximately twenty thousand dollars. He was called to Salinas and made a written assignment of all his right, title and interest of every kind and nature in the estate of Joseph Balestra, Sr. The assignment was made to plaintiffs subject to the life estate of Antonia Balestra, and the consideration for the assignment was the cancellation of his indebtedness to the estate. The rights in the telephone line were not mentioned in the written assignment.

At the trial of this action, over the objection of defendant, evidence was admitted attempting to show an independent, contemporaneous, oral agreement whereby the telephone line and all improvements mentioned were "turned over" to the plaintiffs by Balestra, Jr.; the consideration therefor was also the cancellation of all debts of Joseph K. Balestra to the estate.

Joseph K. Balestra then surrendered possession of the premises, and Antonia Balestra, the life tenant, in March, 1930, entered into a written lease with one Wylie, who now holds possession of the premises as a tenant of Antonia Balestra. Joseph K. Balestra, however, occupies a dwelling on the premises under some arrangement with Wylie, either as an employee or otherwise. This point is not clear from the record.

In 1937 the portion of the Button and Griffin telephone line along the east line of the Balestra property was also placed on the Pacific Gas and Electric Company's line along the same route as the east fence. Wylie, the tenant in possession, paid his part of the cost of removal. In March, 1930, the estate of Joseph Balestra, Sr., was distributed to plaintiffs subject to the life estate of Antonia Balestra.

In May, 1937, defendant and appellant Button, being the owner of a judgment against Joseph K. Balestra, levied an execution upon, and caused to be sold thereunder, all the rights of Joseph Balestra, Jr., in and to the "Button and Griffin Line," as personal property. He purchased the same at such sale and received a bill of sale therefor and now claims title thereto under this bill of sale. Acting on this claim he disconnected the Balestra telephone from the "Button and Griffin Line," precipitating this action.

It is appellant's claim that the right acquired by Joseph K. Balestra to connect with, and in, and to the Button and Griffin telephone line was the personal property of Joseph K. Balestra, and that it was not transferred to plaintiffs by the assignment of his interest in the Joseph Balestra estate, because it never was part of that estate; also that it did not pass by the purported contemporaneous, oral assignment because the evidence was insufficient to show such an assignment; furthermore, that no possession was taken as required by section 3440 of the Civil Code; therefore, that the title remained in Joseph K. Balestra, and passed to defendant by virtue of said execution sale.

Plaintiffs alleged in their complaint that they were the owners of the right to attach the telephone line to the Button and Griffin line, and asserted that for more than ten years prior to the filing of the action they used and operated their said telephone line by connecting it with the Button and Griffin line, and that the use of the telephone was and is necessary for the operation of said lands, and for their accommodation and that of their tenants. Button denied any interest in plaintiffs, and in a cross-complaint asserted that plaintiffs had attached their wires to the Button and Griffin line without any right, license or title so to do. The trial court rendered judgment for plaintiffs, finding them to be the owners of the right claimed in their complaint, and enjoining defendant from interfering with same.

On this appeal the first question for consideration is the nature and character of the right claimed by plaintiffs to attach their telephone to the Button and Griffin line. It seems to be conceded by the parties that such right is an easement; but appellant contends that it is an easement in gross and therefore personal property; that it was the personal property of Joseph K. Balestra, Jr., and that as such it was subject to sale on execution.

Respondents contend that it is an easement appurtenant, that when acquired by Joseph K. Balestra as tenant of the Balestra farm, it attached to the Balestra property, and passed to them with the estate of Joseph Balestra, Sr.

We are of the opinion that the right to maintain such a line or to own an interest therein, does not necessarily depend upon the ownership of any lands. The owner of such right may or may not own lands. The right to cross over the lands of another is an easement, but no dominant tenement is necessary to support it, and it may be an easement in gross; but if this right is enjoyed with and used for the benefit of certain premises in such a manner as to be an appurtenance thereto, it may be an easement appurtenant; but whether it is an easement in gross or an easement appurtenant it is not personal property.

[1] An "easement in gross" is defined in volume 14 of Words and Phrases, Perm. Ed. pp. 66, 67, as: "A mere personal interest in the real estate of another." The principal distinction between an easement appurtenant and an easement in gross is that in the first there is a dominant tenement and in the second there is not. Chase v. Cram, 39 R.I. 83, 97 A. 481, L.R.A. 1918F, 444; Weigold v. Bates, 144 Misc. 395, 258 N.Y.S. 695; Wagner v. Hanna, 38 Cal. 111, 99 Am.Dec. 354. An easement in gross is a personal right, or a right attached to the person; it is an interest in the real property of another; but it is not personal property. This has been definitely decided in this state. In Callahan v. Martin, 3 Cal.2d 110, 121, 122, 43 P.2d 788, 794, 101 A.L.R. 871, it is stated: "Incorporeal hereditaments in gross have been recognized as a species of estate in real property in many decisions in this state, of which we cite a few." (Then follows a long line of California cases holding that an easement in gross is real property.) The opinion continues: "In view of the decisions and the provisions of section 14, subd. 2, §§ 802, 1044 Civil Code, it cannot be held that the provisions of sections 658 and 662, Civil Code, limit incorporeal hereditaments in this state to those only which are appurtenant to a dominant tenement. Section 658 lists land as a species of real property, but it does not attempt to enumerate the various estates which may exist in land, of which an incorporeal hereditament in gross is one."

[2] The easement in gross or appurtenant in the instant case is not only the right to cross the land of another with poles and lines and to maintain the same and to transmit messages thereover, but also the wires, poles, insulators, etc., in place and part of the system partake of the nature of the principal and permanent thing—the easement. The poles and wires wear out, and must be replaced, but the easement, whether in gross or appurtenant, continues on. The poles, wires, etc., of an electric company are real property.

Keating Implement & Machine Co. v. Marshall Electric Light and Power Company, 74 Tex. 605, 12 S.W. 489; Ward County Irr. Dist. v. Western Union Tel. Co., Tex.Civ.App., 254 S.W. 1114; Stearns Lighting & Power Co. v. Central Trust Co., 6 Cir., 223 F. 962, 967, 139 C.C.A. 442; Reynolds v. McLemore, infra. Pipe lines in place on a right of way are real property. Copeland v. Fairview Land, etc., Co., 165 Cal. 148, 131 P. 119; Robinson v. City of Glendale, 182 Cal. 211, 187 P. 741. Therefore we conclude that the right to maintain the telephone line in controversy was real property. We are also of the opinion that it was an easement appurtenant to the Balestra farm.

[3] It is said in Eastman v. Piper, 68 Cal.App. 554, 568, 229 P. 1002, 1007, that "Whether an easement in a given case is appurtenant or in gross is determined mainly by the nature of the right and the intention of the parties creating it. It may be said to be a general rule that an easement is never presumed to attach to the person of the grantee when it can fairly be construed to be appurtenant to some other estate. Whenever the right in question is in its nature an appropriate and useful adjunct of the land owned by the grantee of the easement, having in view his intention as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant and not in gross. 9 Cal.Jur., p. 946, tit. 'Easements,' par. 3."

See, also, Hopper v. Barnes, 113 Cal. 636, 45 P. 874; Wagner v. Hanna, 38 Cal. 111, 99 Am.Dec. 354; Nay v. Bernard, 40 Cal.App. 364, 180 P. 827; Gardner v. San Gabriel Valley Bank, 7 Cal.App. 106, 93 P. 900; Jones v. Deardorff, 4 Cal.App. 18, 87 P. 213. Also, see 9 R.C.L. 741; Jones v. Stevens, 276 Mass. 318, 177 N.E. 91, 76 A.L.R. 591; Lindenmuth v. Safe Harbor W., etc., Corp., 309 Pa. 58, 163 A. 159, 89 A.L.R. 1180; Chase v. Cram, supra.

Here the right to maintain the connection with the Button and Griffin telephone was for the benefit of the property upon which it was used; it is in its nature an appropriate and useful adjunct to the land, and the presumption is that it attached thereto as an easement appurtenant. There is nothing indicating a contrary intention of the parties.

In what has been said hereinbefore, the acquisition of the easement has been assumed. Appellants contend, however, that if an easement in gross is real property then no rights were ever acquired by Joseph K. Balestra or by plaintiffs for the reason that there was no conveyance of said easement in writing, the agreement between Balestra and Button and Griffin resting only in parol.

[4] While it is true that an oral agreement alone is ineffective to convey an interest in real property, a right initiated in parol may become perfect by prescription. Barbour v. Pierce, 42 Cal. 657; Alper v. Tormey, 7 Cal.App. 8, 93 P. 402; Crawford v. Lambert, 136 Cal.App. 617, 29 P.2d 428; Reynolds v. McLemore, Tex.Civ.App., 241 S.W. 606; 1 Cal.Jur. 600, § 72; 2 C.J.S. 646, Adverse Possession, § 90-c and d.

[5] Here the evidence shows that the parol agreement was executed, that a consideration of $100 was paid on execution of the agreement, and expenses of maintenance and improvement were thereafter paid; and that for a period of nearly ten years the Balestra telephone was used on and for the benefit of the Balestra farm and its tenants under claim of right. This evidence is sufficient to support a title by prescription (which can be acquired by a tenant for his landlord [1 Cal.Jur. 546]), which, as above stated, became appurtenant to the land and runs with it.

[6] Such being the case it is of no importance whether there was any assignment, either written or oral, made by Joseph K. Balestra to plaintiffs, for the right acquired was real property, and being an easement appurtenant it followed the land without necessity for any conveyance by him, and if he had any interest in it by his written assignment of his interest in his father's estate he divested himself of it. At any event, being an interest in real property Button acquired no interest in or right thereto by his bill of sale.

We therefore conclude that there was sufficient evidence to support the judgment of the trial court, and it is affirmed accordingly.

THOMPSON, J., and ADAMS, P. J., concurred.

54 Cal.App.2d 254

GRIFFIN v. PORTER et al.

Civ. 13435.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1942.

As Modified on Denial of Rehearing Sept. 25, 1942.

Hearing Denied Oct. 29, 1942.

1. Trover and conversion ⚷40(6)

In action to recover for conversion of furnishings, evidence that at the time of conversion many of the items of furnishings, which originally cost $5,000, were no longer on the premises, the property left was in poor condition and some of it unusable, and it all sold for $300, supported trial court's finding that $800 was value of property converted.

2. Mortgages ⚷330

Where trust deed was dated November 5, 1931, and foreclosure sale thereunder was had February 14, 1936, sections 580a–580c of the Code of Civil Procedure relating to deficiency judgments were inapplicable. Code Civ.Proc. §§ 580a–580c.

3. Limitation of actions ⚷41

In action to recover for conversion of personal property, trial court's allowance of a deficiency, arising out of sale under deed of trust executed by plaintiff, as an offset against damages, was error where claim for deficiency was barred by limitations in that no action for deficiency judgment was brought within three months from date of sale as required by statute. Code Civ.Proc. § 337.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by Frances Salas Griffin against C. L. Porter and others for conversion of personal property. From an order denying plaintiff's motion to set aside and vacate the judgment rendered and to substitute another different judgment, plaintiff appeals.

Reversed and remanded, with directions.

James Donovan, of Los Angeles, for appellant.

Leo B. George, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

In this action for conversion of personal property, the trial court found the defendant had converted the property without lawful right so to do, and fixed plaintiff's damages at $800. The court then found $732.34 due defendant from plaintiff as an offset growing out of a sale under a deed of trust. Judgment was rendered for the plaintiff for $67.66, with costs for defendant. Plaintiff appeals from an order of the trial court denying motion under section 663 of the Code of Civil Procedure to set aside and vacate the judgment above referred to and to substitute another and different judgment.

Plaintiff contends that the market value of the personal property was $4,000, which should have been the amount of the judgment, and that the court was in error in finding the offset due from plaintiff to defendant. The personal property involved consisted of furniture and furnishings of a one-story bungalow court.

In a duly settled bill of exceptions appears the following epitome of testimony before the court in respect of the value of the furnishings: November 5, 1935, the plaintiff paid $3,500 for the furnishings and shortly thereafter expended $1,500 in improving the same and in furnishing a new apartment; at the time of the conversion many of the items were no longer on the premises; all of the personal property was in poor condition and some of it unusable; and all of it was sold for $300. The furnishings were under constant and hard usage by subtenants of the court units, and were used up and wore out rapidly. In the opinion of one witness who bought them, they were worth not more than $200.

[1] There is, therefore, substantial evidence in the record to support the finding by the trial court as to value of the property converted. Landegren v. Quilici, 52 Cal.App.2d 213, 126 P.2d 141, and cases therein cited.

We are unable to agree with that portion of the judgment which permitted the defendant to offset $732.34 against the value of the personal property. The offset thus claimed grows out of the following circumstances: When the action was commenced there were two defendants, one a lady, who was the owner of a promissory note secured by a trust deed upon the premises where the furnishings in question were located; the other, her attorney. During the pendency of the action the first defendant named died, and her executors have been substituted in her place. As to the attorney defendant the court found in his favor, and we are not inclined to disturb that finding.

[2] Subsequently to the conversion of the personal property, the real estate was sold under a power of sale in a trust deed, and the offset of $732.34 claimed to have been due to the deceased defendant arose under the terms thereof. If the trust deed had been executed subsequent to the enactment of sections 580a, 580b and 580c of the Code of Civil Procedure, it would have been necessary for the holder to have followed the procedure and secured judgment as required by those sections. The trust deed is dated November 5, 1931. Therefore, none of the sections mentioned are applicable. Birkhofer v. Krumm, 27 Cal.App.2d 513, 81 P.2d 609; Kirkpatrick v. Stelling, 36 Cal.App.2d 658, 98 P.2d 566.

[3] In 1933, section 337 of the Code of Civil Procedure was amended limiting the time to bring action for a deficiency judgment upon a sale under a trust deed to not more than three months after the date of the sale. In the case at bar the sale was February 14, 1936; no action for the deficiency was brought within the three months' period of limitations; and therefore the claim is barred. Bank of America, etc., Ass'n v. Dennison, 8 Cal. App.2d 173, 47 P.2d 296.

The findings recite that there never was any act done to attempt to foreclose a chattel mortgage placed on the personal property at the same time the trust deed on the real estate was made. The offset was claimed for a deficiency arising out of a sale under the trust deed on the real estate and not on the chattel mortgage. There is nothing in the record which would support a judgment for an offset based upon any claim growing out of the chattel mortgage. Argument and authorities cited in support of such contention are not in point.

Judgment is reversed and cause remanded to the trial court with instructions to enter judgment for the plaintiff in the sum of $800.

DORAN, Acting P. J., and WHITE, J., concurred.

McDANIEL et al. v. CLAVIN.

Civ. 13610.

District Court of Appeal, Second District.
Division 2, California.
Aug. 28, 1942.
Hearing Granted Oct. 26, 1942.

1. Appeal and error 🔑846(5)

Where findings were waived by parties District Court of Appeal would assume that there was sufficient evidence to support the implied findings and judgment.

2. Commerce 🔑16

"Commerce" is not confined to transportation only from one state to another but comprehends all commercial intercourse between different states and all the component parts of that intercourse, and commerce does not end with the transportation but embraces also the sale of goods after they reach their destination and while they are in the original packages.

See Words and Phrases, Permanent Edition, for all other definitions of "Commerce".

3. Commerce 🔑16

What is "interstate commerce" is to be determined upon a broad consideration of substance of the whole transaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

4. Commerce 🔑31

When merchandise has been imported into California from other states by a merchant to meet anticipated demands of his customers without specific orders therefor from such customers, and comes to rest in a warehouse in California, the merchandise is no longer in "interstate commerce" after coming to rest.

5. Commerce 🔑40(1)

That in the 17 months of plaintiff's employment by defendant, who was engaged in poultry business, after the Fair Labor Standards Act became effective defendant made but three shipments of poultry to New York and three to Arizona could not characterize defendant as being engaged in "interstate commerce" for purposes of determining plaintiff's right to recover overtime wages claimed under the act. Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq.

6. Commerce ⚷**40(1)**

The reshipment of poultry received by interstate transportation would not defeat the intrastate character of such reshipment within California, even though it had been in the same cars.

7. Commerce ⚷**40(1)**

Sporadic or isolated shipments into other states will not in and of themselves constitute a merchant's business totally "interstate" in character or subject him to requirements and penalties of the Fair Labor Standards Act. Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate".

8. Commerce ⚷**40(1)**

Where employer engaged in poultry business imported poultry into California from other states to meet anticipated demands of customers, and poultry was delivered to a cold storage warehouse for employer's account and was thereafter transported to employer's place of business by employee who repacked poultry for delivery to local retailers, and employer made only six shipments of poultry to other states during 17 months, the doctrine of "de minimis non curat lex" applied and employer was not engaged in, nor was employee employed in, the "production of goods for interstate commerce", and hence employee could not recover overtime wages under Fair Labor Standards Act. Fair Labor Standards Act of 1938, §§ 3(b), 7(a), 29 U.S.C.A. §§ 203(b), 207(a).

See Words and Phrases, Permanent Edition, for all other definitions of "De Minimis Non Curat Lex" and "Production of Goods for Interstate Commerce".

9. Commerce ⚷**16**

While the federal constitution vests Congress with power to regulate interstate commerce in any amounts, the language of the Fair Labor Standards Act requires conclusion that Congress by implication intended to exclude commerce of inconsequential volume from its regulatory measures, especially where evidence discloses that the shipper is primarily engaged in an intrastate business. Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq.

10. Master and servant ⚷**80(½)**

In absence of finding or proof that employee claiming overtime wages under Fair Labor Standards Act for services rendered while employed by employer engaged in poultry business was engaged for 14 weeks in the aggregate in any calendar year of his employment in assisting in preparation of poultry to be shipped by interstate commerce, employee was not entitled to recover for overtime. Fair Labor Standards Act of 1938, § 7(a, c), 29 U.S.C.A. § 207(a, c).

11. Master and servant ⚷**69**

If a truck driver hired by employer engaged in poultry business had been engaged in interstate commerce, driver could not recover overtime wages under the Fair Labor Standards Act in view of provisions of the act excluding therefrom employees with respect to whom the Interstate Commerce Commission has power to establish maximum hours under the Motor Carriers Act. Fair Labor Standards Act of 1938, §§ 3(b), 7(a), 13(b), 29 U.S.C.A. §§ 203(b), 207(a), 213(b); Interstate Commerce Act § 204(a) (3), 49 U.S.C.A. § 304(a) (3).

12. Master and servant ⚷**69**

That the Interstate Commerce Commission had not promulgated regulations concerning maximum hours for employees of the class of a truck driver did not render inapplicable to such driver provisions of the Fair Labor Standards Act excluding therefrom employees with respect to whom the commission has power to establish maximum hours under the Motor Carriers Act. Fair Labor Standards Act of 1938, §§ 3(b), 7(a), 13(b), 29 U.S.C.A. §§ 203(b), 207(a), 213(b); Interstate Commerce Act § 204(a) (3), 49 U.S.C.A. § 304(a) (3).

13. Master and servant ⚷**69**

By virtue of provisions of the Fair Labor Standards Act excluding therefrom employees with respect to whom the Interstate Commerce Commission has power to establish maximum hours under the Motor Carriers Act, the provisions of the former act for maximum hours do not apply to employees with respect to whom the commission has power to establish maximum hours. Fair Labor Standards Act of 1938, §§ 3(b), 7(a), 13(b), 29 U.S.C.A. §§ 203(b), 207(a), 213(b); Interstate Commerce Act § 204(a) (3), 49 U.S.C.A. § 304(a) (3).

◆

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Louis McDaniel and others against Carl Clavin to recover overtime wages claimed to be due plaintiffs under provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq. From an adverse judgment, plaintiff Bernard Silver appeals.

Affirmed.

Phillip W. Silver, of Los Angeles, for appellant.

Henry Haves, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Plaintiff commenced this action to recover overtime wages claimed to be due him by virtue of the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq., on the theory that his erstwhile employer, the defendant, was engaged in interstate commerce during the period of plaintiff's employment, and that, therefore, he was employed in interstate commerce. From an unfavorable judgment plaintiff brings this appeal.

[1] Findings were waived by the parties. It will therefore be assumed that there was sufficient evidence to support the implied findings and the judgment.

Plaintiff first entered the employ of defendant in November, 1937, as a truck driver. In that capacity he continued until January 20, 1940. The act in question (29 U.S.C.A. § 201 et seq.) became effective October 25, 1938. Section 207(a) thereof provides as follows:

"No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce —(1) for a workweek longer than forty-four hours during the first year from the effective date of this section, (2) for a workweek longer than forty-two hours during the second year from such date, or (3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

During the period of plaintiff's employment his duties consisted of driving defendant's trucks, delivering merchandise, cleaning chickens, cleaning the premises, opening cases of frozen poultry taken from the vaults of the Terminal Refrigerating Company and driving into the country in order to collect, transport and deliver such merchandise to the plant of defendant. Following the effective date of the act plaintiff worked long hours for defendant, his days ranging in length from ten to fourteen hours; but inasmuch as our decision is derived from a consideration of whether plaintiff was engaged in interstate commerce during his employment we shall indulge in no further comment upon the value of his services and the long, wearisome hours he worked in the execution of his tasks.

The basis of plaintiff's contention that he was employed in interstate commerce is the fact that defendant received by shipment through interstate commerce during the period from November 14, 1938, to March 12, 1940, slightly less than 81 tons of poultry, shipped to him from Iowa, Nebraska, Missouri, Texas, New Mexico and Utah, and that during the same period he shipped from California to New York three separate shipments of cold storage poultry aggregating eight and one-third tons, and to Arizona three separate shipments aggregating 1,347 pounds. Because of these shipments plaintiff contends that he was engaged in interstate commerce, although he could not remember having worked on more than one shipment that went to New York and one to Arizona. The merchandise imported by defendant from distant states was taken from the railway terminals and delivered to a cold storage warehouse for the account of defendant. Such refrigerated poultry was later transported by plaintiff from the refrigerating plant to defendant's place of business. He there opened the original packages, thawed them out, made them up into orders and delivered them to local retailers.

This, in brief, describes the nature of plaintiff's employment, from which he asks us to determine that his activities were in interstate commerce in contemplation of the Fair Labor Standards Act of 1938 and that he is entitled to compensation for overtime as provided by that act.

[2, 3] Commerce is defined by section 203(b) of the act to be "trade, commerce, transportation * * * among the several States or from any State to any place outside thereof." From the authorities we learn that "commerce" is not confined to transportation only from one state to another, but it "comprehends all commercial intercourse between different states and all the component parts of that inter-

course. * * * The commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages." Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 290, 42 S.Ct. 106, 108, 66 L.Ed. 239. On another occasion the same court said: "And what is or is not interstate commerce is to be determined upon a broad consideration of the substance of the whole transaction." Federal Trade Commission v. Pacific States Paper Trade Ass'n, 273 U.S. 52, 47 S.Ct. 255, 258, 71 L.Ed. 534.

For the purpose of persuading us that his employment was interstate in character, plaintiff has reviewed a number of pertinent authorities dealing with the subject and earnestly urges that they are controlling in the instant case.

Where the manufacturer and distributor of motion picture films shipped its output from New York to Omaha, at which place the distributors in turn placed the films with exhibitors in Nebraska for display, the films were at all times in interstate commerce because "The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination." Binderup v. Pathe Exchange, Inc., 263 U.S. 291, 44 S.Ct. 96, 99, 68 L.Ed. 308. In that case the rule was announced that where transportation has acquired an interstate character it continues at least until the load reaches the point where the parties originally intended that the movement should finally end. On the same principle it was held that the buying and selling of cattle in local stockyards, and the practices of the dealers and commission men who negotiate the purchase and sales of such livestock constitute a part of the interstate transportation and are indispensable to its continuity. "Such transactions cannot be separated from the movement to which they contribute and necessarily take on its character. * * * The sales are not in this aspect merely local transactions. They * * * do not stop the flow * * * being indispensable to, its continuity." Stafford v. Wallace, 258 U.S. 495, 42 S.Ct. 397, 402, 66 L.Ed. 735, 23 A.L.R. 229.

It is also held that temporary stoppage of merchandise does not destroy the interstate character of the commerce. An importer of cocoanut oil from the Philippines, having its principal place of business in the state of New York, found it to be more economical to import large cargoes in steamer tanks. It thereupon established storage facilities at Point San Pablo, where it stored huge shipments purchased to fill its orders and not for indiscriminate sale. Under these circumstances the oil continued to be in interstate commerce during such storage. Philippine Ref. Corp. v. Contra Costa County, 24 Cal.App.2d 665, 76 P.2d 163. Where milk, having been purchased for transportation to distant markets, is stopped for the purpose of pasteurization and bottling, the temporary stoppage does not terminate the continuous flow of the stream or destroy the interstate quality of the commerce. Pennsylvania Co. v. Cincinnati & L. E. R. Co., D.C., 43 F.Supp. 5.

Plaintiff presents the foregoing and kindred authorities (Fleming v. Alterman, D. C., 38 F.Supp. 94; Drake v. Hirsch, D.C., 40 F.Supp. 290; Thompson v. Daugherty, 40 F.Supp. 279; Pickett v. Union Terminal Co., D.C., 33 F.Supp. 244; Pipal v. Grand Trunk R. R. Co., 341 Ill. 320, 173 N.E. 372) in support of his contention that he was engaged in interstate commerce during the period of his employment by defendant. But while these authorities clearly define the rule that governs in the situations described in the several cases, they do not apply to the facts at hand. All of such cases exemplify the principle that any object shipped by interstate transportation continues to be in interstate commerce until it comes to final rest at its ultimate destination. Also, they establish that merchandise on its way, stopped temporarily for processing or other purpose, continues during stoppage in interstate commerce, and any handling of it there is a labor in interstate commerce.

[4] But the situation presented by the instant case does not come within any of the authorities relied upon by plaintiff. The rule applicable here may be stated as follows: When merchandise has been imported into California from other states by a merchant to meet the anticipated demands of his customers without specific orders therefor from such customers, and comes to rest in a warehouse in this state, it is no longer in interstate commerce after coming to rest. This statement of the rule is supported by many decisions that resound with finality. When chickens shipped from the Middle West to commission

men in New York City were sold to a slaughter house operator who in turn trucked his poultry to his slaughtering house in Brooklyn to be there dressed and sold to retail merchants, the interstate character of the commerce, created by the acts of transporting the poultry from western states to the depots of "receivers" in New York, ended with the delivery of the poultry at the slaughter house in Brooklyn. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. It was there held that the decisions which deal with a stream of interstate commerce and with the regulations of shipments which are continuous do not apply in such transactions as that of the Schechter corporation, in whose custody the merchandise came finally to rest.

Where an oil company was engaged in the retail distribution of its products in Florida and imported its oil from other states and foreign markets by tankers and stored it in the reservoirs of the company for distribution to its various service stations as the demands of its business arose, it passed out of foreign and interstate commerce upon its delivery into such storage reservoirs. Atlantic Coastline Railroad Co. v. Standard Oil Co., 275 U.S. 257, 48 S.Ct. 107, 72 L.Ed. 270. Where a wholesale merchant imported eggs in quantity, uncrated them, candled and classified them according to grade in other boxes and sold them to the retail trade, they then ceased to be in the stream of interstate commerce and were subject to local taxation and other domestic regulation. Gerdert v. Certified Poultry & Egg Co., Inc., D.C., 38 F.Supp. 964. Where a lumberman made an occasional trip outside of Tennessee to bring in materials by truck, such trips were not sufficient to establish that he was engaged in interstate commerce. Whitson v. Wexler, (Chancery Ct. of Tenn.) 3 Labor Cases 60,859, par. 60,283. See, also, Gerdert v. Certified Poultry & Egg Co., Inc., supra. Where goods are uncrated by a wholesaler and the contents placed upon his shelves and commingled with the rest of his stock, they pass out of the stream of interstate commerce that instant. Serio v. Dee Cigar & Candy Co., (Circuit Ct. of Alabama) 4 Labor Cases 62,170, par. 60,734.

[5-7] From the testimony of plaintiff herein it is clear that the poultry shipped from distant states to defendant was not resold by him in the original packages. We have been pointed to no instance of such a sale, neither have we been able to find one. On the contrary, the testimony of the plaintiff is that the frozen poultry was stored in refrigerators for the account of defendant and was thereafter taken to defendant's plant, opened, thawed and made into new packages for sale to the local trade. Each shipment of poultry made to defendant came to rest in his own plant or was stored for his account in a local refrigerator. The fact that in the seventeen months of plaintiff's employment after the act became effective defendant made but three shipments of poultry to New York and three to Arizona cannot characterize defendant as being engaged in interstate commerce. The reshipment of the poultry received by interstate transportation would not defeat the intrastate character of such reshipment within this state, even though it had been in the same cars. Atlantic Coastline Railroad v. Standard Oil Co., supra. Neither will sporadic or isolated shipments into other states in and of themselves constitute a merchant's business totally interstate in character or subject him to the requirements and penalties of the Fair Labor Standards Act.

[8, 9] Under the facts established defendant was not engaged in, nor did he have plaintiff employed in, the production of goods for interstate commerce. The doctrine of de minimis non curat lex applies. Gerdert v. Certified Poultry & Egg Co., Inc., supra. The amount of commerce involved is important. While the federal Constitution definitely vests Congress with the power to regulate interstate commerce in any amounts whatsoever, yet the rule of reason applied to the language of the act requires us to hold that Congress by fair implication intended to exclude commerce of inconsequential volume from its regulatory measures. Goldberg v. Worman, D.C., 37 F.Supp. 778. This must be so where the evidence discloses that the shipper was primarily engaged in an intrastate business. Whitson v. Wexler, supra.

[10] But if the foregoing considerations were not sufficient to demonstrate that plaintiff is entitled to no benefit under section 207(a) of the act, still he appears to be definitely excluded therefrom by the language of section 207(c), which provides: "In the case of an employer engaged * * * in handling, slaughtering,

or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged." By no system of computation can it be determined that plaintiff worked fourteen weeks in the aggregate in any calendar year of his employment in slaughtering poultry, or in preparing it, for shipment to other states. Neither did he drive, convey merchandise in or unload it from, his truck nor do other work at his "place of employment" in making such preparations. In the absence of finding or proof that he was engaged for such fourteen weeks in the aggregate in any calendar year in assisting in the preparation of the poultry to be shipped by interstate commerce, he is not entitled to recover for any overtime.

[11] Moreover, if plaintiff had been engaged in interstate commerce by the activities described he could not recover by reason of the inhibition contained in section 213(b), which reads as follows: "The provisions of section 207 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 [of the Motor Carriers Act, 1935]." By section 304(a) (3), 49 U.S.C.A., § 204(a) (3) of the Motor Carriers Act of 1935 it is made the duty of the Interstate Commerce Commission: "To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment." If plaintiff's hauling of merchandise from the railway depot to defendant's warehouse, thence to his wholesale plant and thence to his customers, places his labors in the category of interstate commerce employment, the quoted language of section 213(b) makes the provisions of section 207(a) inapplicable to plaintiff's case.

[12, 13] Plaintiff denies that section 213(b) applies because the Interstate Commerce Commission has not taken jurisdiction; that it has neither prescribed nor promulgated regulations and maximum hours for the employees of plaintiff's class. But section 213(b) contains no provision that the Commission must have established requirements or prescribed qualifications or maximum hours of service of employees in order to make it applicable. It declares merely that section 207(a) does not apply in the case of any employee with respect to whom the Interstate Commerce Commission has power to establish maximum hours of service. The provisions of the Fair Labor Standards Act for maximum working hours of employees does not, by virtue of the provisions of section 213(b), apply to those employees with respect to whom the Interstate Commerce Commission has power to establish maximum hours of service. Rozmus v. Jesse T. Davis & Sons, Inc., Sup., 23 N.Y.S.2d 821, 822; Gibson v. Glasgow, Tenn. Sup., 157 S.W.2d 814. In the Gibson case it was held that what is interstate commerce in contemplation of the Fair Labor Standards Act is likewise interstate commerce for purposes of the Motor Carriers Act. The truck driver, having made only deliveries from his employer's warehouse to points within Shelby county, was not engaged in interstate commerce and could not be exempted by section 213(b). It followed, necessarily, therefore, that he could not be entitled to the benefits of section 207(a) of the act. Likewise, the intrastate nature of Mr. Silver's employment excludes him from the jurisdiction of the Interstate Commerce Commission and at the same time deprives him of the benefits of the Fair Labor Standards Act.

Judgment affirmed.

McCOMB, J., and GOULD, J., pro tem., concurred.

54 Cal.App.2d 227

HACK v. GRIDLEY et al.

Civ. 6760.

District Court of Appeal, Third District, California.

Aug. 29, 1942.

1. Automobiles ⇨244(50)

Order of trial court granting a new trial on the ground of insufficiency of the evidence will not be disturbed on appeal in the absence of a clear showing of abuse of discretion or such prejudice as would interfere with a fair and impartial balance of the evidence.

2. New trial ⇨163(1)

In granting new trial for insufficiency of the evidence, to sustain the verdict, trial court is required by statute to specify in the order that the new trial is granted on the ground of insufficiency of the evidence, but is not required to specify wherein it considers the evidence insufficient. Code Civ.Proc. § 657.

3. Appeal and error ⇨933(4)

Prior to the 1939 amendment to statute relating to the granting of new trials, if order granting new trial did not state that it was on the ground of insufficiency of the evidence it was presumed not to have been based on that ground, whereas after the amendment it is conclusively presumed not to have been based on the ground of the insufficiency of the evidence unless it is so stated in the order. Code Civ.Proc. § 657.

4. Automobiles ⇨172(12)

Truck driver would be guilty of negligence in attempting to pass an automobile after the driver thereof, when approximately 100 yards ahead of the following truck, had signaled her intention to make a left turn into private driveway.

5. New trial ⇨71

In action for injuries suffered by automobile driver when a truck attempting to pass struck the rear of automobile as it was about to make a left turn into private driveway, trial court did not abuse its discretion in setting aside verdict for truck driver and owner and granting a new trial, where the only evidence of contributory negligence of automobile driver related to her alleged failure to signal intention to make a left turn and the evidence with respect thereto was in conflict. Code Civ.Proc. § 657.

◆

Appeal from Superior Court, Glenn County; Harry Deirup, Judge Assigned.

Action by Elizabeth Hack against Sam Gridley, Jr., and others for injuries sustained when a semi truck and trailer belonging to named defendant struck the rear of a pick-up automobile owned and operated by plaintiff. Verdict for defendants, and, from an order granting a new trial on the ground of insufficiency of the evidence to justify the verdict, defendants appeal.

Order affirmed.

Butler, Van Dyke & Harris and Jack Montgomery, all of Sacramento, for appellants.

George R. Freeman and Elmer Laine, both of Willows, for respondent.

ALLEN, Justice pro tem.

This is an appeal from an order granting a new trial on the ground of the insufficiency of the evidence to justify the verdict.

The action arose out of a rear collision between a Dodge pick-up automobile belonging to plaintiff and driven by her, and a GMC semi-truck and trailer owned by defendant Gridley and driven by his employee, defendant Edgar (Ted) Hepworth. The accident took place on Highway 99 W about 2½ miles south of the town of Orland in Glenn County about 7 a.m. May 20, 1940. At that time both vehicles were proceeding south on the highway. Plaintiff's vehicle was ahead of defendant's and was traveling at about 20 miles per hour. The GMC truck and trailer was traveling at the rate of about 45 miles per hour. Defendant was overtaking plaintiff and when about one hundred feet behind her, defendant veered to the left to prepare to pass the plaintiff. Plaintiff was approaching a private driveway which was located on the east side of the highway to her left and at this point the GMC semi-truck and trailer struck the rear end of the pick-up, causing the injury that resulted in this action.

There is no dispute in regard to the above facts. The jury found for the defendants apparently on the issue of contributory negligence. On motion of plaintiff a new trial was granted on the ground of insufficiency of the evidence. The main questions are:

1. Whether or not plaintiff failed to give a signal when she was about to make a left-hand turn. If she did fail, she was guilty of contributory negligence.

2. Was there other evidence of contributory negligence on her part?

3. Does the evidence sufficiently show defendant guilty of any negligence?

[1] It is a salutary rule in this state, supported by a long line of decisions, that the order of a trial court granting a new trial will not be disturbed on appeal upon the ground of insufficiency of the evidence, in the absence of a clear showing of abuse of discretion or prejudice as would interfere with a fair and impartial balance of the evidence. Kehlor v. Satterlee, 37 Cal.App.2d 116, 98 P.2d 759; Shortt v. Los Angeles Gas & Electric Corp., 30 Cal.App.2d 511, 86 P.2d 854; Kelley v. Corcoran, 16 Cal.App.2d 593, 61 P.2d 344, 345.

In the case last cited the defendant appealed from an order granting a new trial on the ground of insufficiency of the evidence to sustain the verdict and judgment. On appeal the order was sustained. The circumstances were similar to those in the present case, except that the plaintiff in the Kelley case attempted to pass the defendant's car as it was driven across the highway to enter a lane on the left-hand side. The chief question in that case was whether the defendant indicated his intention of crossing the highway by giving an arm signal. There was a conflict of evidence in that regard. The court said: "It does not appear that the court abused its discretion in granting a new trial under the circumstances of this case. There is a substantial conflict of evidence regarding the material facts of the case. The trial judge is in so much better position to judge of the weight and sufficiency of the evidence and the credibility of the witnesses than is the court of appeal that an order granting or refusing a new trial will not be disturbed unless it appears very clear that he abused his discretion in that regard. That is the invariable rule which is followed on appeal." (Citing several California authorities.)

In this case, the plaintiff, Elizabeth Hack, testified that she saw, through her mirror, the defendant's machine when it was about one hundred yards to the rear of her car, traveling on its proper side of the highway; that she gave the arm signal to indicate her intention to turn to her left, and had just reached the middle white line when her automobile was struck. She testified that "I never got across the white line." The driver of defendant's car, according to his own testimony, apparently did not sound a warning horn until immediately before the collision occurred.

[2, 3] Section 657 of the Code of Civil Procedure does not require the trial court, in granting a new trial upon the insufficiency of the evidence, to specify wherein it considers the evidence insufficient as contended for by appellant, but does require the trial court when a new trial is granted on the insufficiency of the evidence to sustain the verdict, to specify in the order that the new trial is granted on the ground of insufficiency of the evidence to justify the verdict. The purpose of the 1939 amendment to this section is well set forth in Thomas v. Driscoll, 42 Cal.App.2d 23, 108 P.2d 43. Prior to the amendment if the order granting a new trial did not state that it was on the grounds of the insufficiency of the evidence, it was presumed not to have been based on that ground, while after the amendment it was conclusively presumed not to have been based on that ground unless it was so stated in the order. The opinion in that case also sets forth what is required to be set forth in the order. In this case the judge properly specified that the order for a new trial was granted for insufficiency of the evidence.

[4] The evidence does not show that plaintiff could have been guilty of contributory negligence in any other way than by failing to give a proper signal when she made the left-hand turn. There is a conflict of evidence on this point. If she gave such signal, defendant was guilty of negligence in attempting to pass.

[5] In view of the wide discretion vested in a trial court in granting a new trial, it does not seem, in view of the record, that the order of the trial judge in this case granting a new trial should be disturbed.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concurred.

54 Cal.App.2d 183

REED v. STROH et al.

Civ. 13695.

District Court of Appeal, Second District, Division 2, California.

Aug. 28, 1942.

1. Automobiles ⚷244(50)

In action by pedestrian for injuries sustained when struck by the truck while crossing city street, wherein pedestrian contended that he was crossing on cross-walk in accordance with traffic lights, and wherein truck driver and owners contended that pedestrian was attempting to cross street at a point about 25 feet from cross-walk, evidence justified jury's finding that pedestrian was guilty of contributory negligence.

2. Appeal and error ⚷1002

In case of conflict, the evidence favoring a verdict must be substantial.

3. Appeal and error ⚷1064(1)
Trial ⚷228(1)

Instructions should conform with California Jury Instructions, civil, sometimes referred to as BAJI, prepared by the superior court of Los Angeles County, but the failure to use those forms is not within itself a sufficient ground for reversing a judgment, so long as the instructions given state the law.

4. Trial ⚷219

Instruction that jury was required to find that truck driver was under duty to exercise only reasonable care in keeping a lookout ahead and in keeping truck under control, was not erroneous because it did not define reasonable care or did not reflect the true relationship between a pedestrian and a motorist, since the word "reasonable" is an ordinary word and in common use, and is familiar to the average person.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable".

5. Automobiles ⚷146

The term "reasonable care" means the amount of care exacted of motorist under the circumstances detailed by the evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Care".

6. Trial ⚷252(8)

Instruction that it was not necessary to establish contributory negligence beyond all reasonable doubt was not erroneous because of its failure to define reasonable doubt, where the reasonable doubt rule was not applicable.

7. Negligence ⚷139(1)

Instruction that plaintiff could not recover if it should be determined that plaintiff was guilty of want of ordinary care contributing in any degree to the injuries sustained, was not erroneous because of the failure to define want of ordinary care.

8. Automobiles ⚷245(72)

In action for injuries sustained by pedestrian when struck by the truck, while crossing city street, whether pedestrian had the right of way or exercised a sufficient amount of ordinary care which the circumstances required of a prudent person, was for jury.

9. Automobiles ⚷246(58)

If pedestrian at time he was struck by truck was crossing street at a point about 25 feet from cross-walk, as testified to by a witness, pedestrian was under positive duty to yield the right of way to truck, and hence trial court properly gave instruction that use of public highways is a privilege to which all citizens are equally entitled and that doctrine of contributory negligence is to control if any negligence of pedestrian contributed to his injuries. Vehicle Code, §§ 560, 562, St. 1935, p. 188.

10. Trial ⚷260(8)

In action by pedestrian for injuries sustained when struck by a truck while crossing city street, instruction which consisted of an abstract statement of the doctrine of imminent peril and an application of that doctrine to the evidence presented, was not erroneous because it failed to define ordinary care, where that term was thrice defined elsewhere in the instructions as that degree of care which an ordinarily prudent person would exercise under all the surrounding circumstances.

11. Automobiles ⚷147

The statutory rules for the guidance of pedestrians using a public street on which automobiles are being operated prescribe only the minimum measure of care to be exercised. Vehicle Code, §§ 560, 562, St.1935, p. 188.

12. Automobiles 🔑245(72)

Whether a pedestrian crossing a street used sufficient care under the circumstances is to be determined by the jury in pedestrian's action to recover for injuries when struck by an automobile. Vehicle Code, §§ 560, 562, St.1935, p. 188.

13. Automobiles 🔑160(1), 217(1)

As circumstances vary, the amount of ordinary care required of a motorist or of a pedestrian crossing street will vary, since there is no such thing as absolute rules for the conduct of men in their civil relations. Vehicle Code, §§ 560, 562, St.1935, p. 188.

14. Automobiles 🔑217(1)

A pedestrian crossing a street on which automobiles are being operated may not proceed blindly and in reckless disregard of obvious danger.

15. Automobiles 🔑217(1)

A pedestrian crossing a street on which automobiles are being operated must at all times be reasonably on the alert.

16. Automobiles 🔑160(4), 217(2, 3)

When a pedestrian is within a crosswalk a motorist must yield and let the pedestrian cross over, and when the pedestrian crosses the street outside of the marked cross-walk, he must yield and let the motorist continue on his way, but in any event neither is ever relieved of his duty to exercise reasonable care. Vehicle Code, §§ 560, 562, St.1935, p. 188.

17. Automobiles 🔑217(5)

A pedestrian crossing a street on which automobiles are being operated has a duty to look in the direction of anticipated dangers and to continue to be alert to safeguard against injuries.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Action by Lewis Reed against William F. Stroh and others, to recover for injuries allegedly suffered by plaintiff when struck by a truck driven by the named defendant and owned by the other defendants. From an unfavorable judgment, the plaintiff appeals.

Judgment affirmed.

Fred N. Howser, of Long Beach, for appellant.

Joseph A. Ball, of Long Beach, for respondents.

MOORE, Presiding Justice.

This action is for damages resulting from personal injuries alleged to have been suffered by plaintiff when struck by a truck belonging to Price Brothers and driven by defendant Stroh. Defendants pleaded a general denial and contributory negligence. On his appeal from an unfavorable judgment plaintiff contends (1) that the evidence does not support the verdict and (2) that certain instructions to the jury materially prejudiced his cause.

The accident occurred on July 26, 1941, at about 10:30 a. m., while plaintiff was walking across Long Beach Boulevard at Plymouth Street in a business district of Long Beach. He received severe bodily injuries. Long Beach Boulevard, 78 feet in width, runs north and south; Plymouth Street, 36 feet in width, running east and west, intersects it. On the south side of Plymouth is a marked crosswalk 10 feet wide over Long Beach Boulevard. Within the crosswalk and at the center of the boulevard was a sign: "Stop for Pedestrians." Long Beach Boulevard has four traffic lanes. At the trial the lanes were numbered from one to four, commencing on the west.

(1) Besides himself, plaintiff presented five witnesses the substance of whose testimony was that plaintiff stepped from the west curbing of Long Beach Boulevard within the marked crosswalk and started toward the east side; that while thus proceeding the truck, 20 feet in length, driven by defendant Stroh, struck plaintiff and hurtled him through the air; that as the truck approached plaintiff it was traveling at about 35 miles per hour. The witnesses who observed the actual impact placed the point of his fall to the pavement at about 20 feet south of the crosswalk. Officer Day of the police force found a pool of blood on the street 28 feet south of Plymouth Street, and the truck was standing 43 feet and 2 inches south of Plymouth and 20 feet east of the west curb of Long Beach Boulevard. Plaintiff testified that after leaving the barber shop at the southwest corner of the intersection he walked to the corner, stopped and waited for the red light at the intersection one block to the north and for the oncoming traffic to pass before he started across the boule-

vard; that he continued within the crosswalk in an easterly direction, and that his collision with the truck occurred between the west curb and the center of the street.

Before reciting the evidence received on behalf of defendants it is pertinent here to observe that the foregoing testimony may have been discounted by the jury by reason of the following: At the instant of the impact, witnesses Cash and Bentley were 200 feet north of the locus of the collision, and the accuracy of their observations might have been impaired by reason of such distance as well as by the fact of their attention to the matter of their crossing the boulevard; that the witness Mrs. Murray had stopped in the center of Plymouth for an instant only before entering Long Beach Boulevard in order to make a left-hand turn and to avoid peril to herself; that while she corroborated the other witnesses for plaintiff, yet she placed plaintiff at the time of the impact at about 20 feet south of the crosswalk; that the attention of the witness Vermillion was attracted by the collision when he "looked up" and saw plaintiff's body going through the air. As to plaintiff's own testimony, he intended to cross Long Beach Boulevard for the purpose of visiting a store in about the middle of the block south of Plymouth; that he stopped to let some cars pass before starting; that on stepping from the curb he did not look to the north, he never did see the truck and he never stopped at any time or looked out for oncoming traffic.

As against the testimony of plaintiff and his witnesses, defendant Stroh testified that he approached Plymouth Street at about 25 miles per hour; that no one was in the crosswalk or at the corner; that he did not see plaintiff or any other pedestrian; that at the time of the collision plaintiff was about 25 feet south of the crosswalk, going eastward, and that about three-fourths of the truck had already passed over the south line of the crosswalk; that he swerved the truck in an attempt to avoid the collision and brought it to a stop in about 20 feet; that on alighting Stroh found plaintiff lying flush with the rear end of the truck. In addition to the foregoing, defendants called Harold Roach and his wife, who were strangers to all parties. The substance of their testimony is that they were driving south on Long Beach Boulevard with the intention of stopping at a photo laboratory the second door south of Plymouth on the west side of the boulevard; that as they crossed the intersection they saw no one in the crosswalk or standing at the southwest corner; that after passing Plymouth they stopped parallel to the second car parked at the curbing, preparatory to visiting the photo laboratory, and then pulled forward to a point between the second and third cars in order to open the door of their car; that they then observed plaintiff for the first time, opposite their car; that Mrs. Roach observed plaintiff steady himself with his right hand on the rear of the second car and step off the curb into the street; that as he did so he obstructed her view so that she could not see the sign on the window; that in a moment Mr. Roach observed plaintiff opposite him in the street, then heard the impact and saw the truck come to a standstill about 35 feet south of the crosswalk; that Mrs. Roach then saw plaintiff lying in the street opposite the front door of their automobile.

[1,2] There is nothing inherently improbable in the testimony of either Mr. Stroh or of Mr. and Mrs. Roach. The testimony detailed by the latter two alone was sufficient to justify the finding of the jury. Plaintiff's unheralded attempt suddenly to emerge from the rear of the second car parked at the curbing and to step into and proceed across the boulevard at a point some 25 feet south of the crosswalk was proof of such negligence as might materially contribute to the collision and to his injuries. We agree that in case of conflict the evidence favoring a verdict must be substantial (Chase v. Jonkey, 12 Cal.App.2d 365, 55 P.2d 1229), but we are satisfied that the evidence presented on behalf of defendants abundantly fulfills that requirement.

[3] (2) Plaintiff has assigned a number of instructions proposed by defendants as constituting prejudicial error. We have carefully reviewed all of them along with the criticisms of plaintiff. While a number of those criticised should have been omitted because they are formula instructions, and others of them might have been improved by omitting argumentative forms, words and phrases, yet we cannot say that any one of them prejudiced plaintiff's case. Each states the law as applied to some phase of the testimony. Each of such instructions was predicated upon the two diverse trends of the evidence: (1) as to whether plaintiff cautiously stepped out in-

to Long Beach Boulevard and continued within the crosswalk to pass over the boulevard, and (2) as to whether he stepped from behind a parked vehicle at a point some distance south of the crosswalk and proceeded across without looking to the north, from which traffic was coming. We again suggest the advisability of conforming instructions with the California Jury Instructions, civil, sometimes referred to as BAJI, prepared by the superior court of Los Angeles county. A more generous use of such forms and a more consistent adoption of the system of stating the law free from unnecessary verbiage, as indicated by such forms, is calculated to diminish the causes for appeals and at the same time will serve as insurance against the confusion of justice. But solely because those forms were not used is not within itself a sufficient ground for reversing a judgment so long as the instructions state the law. A discussion of a few of the assignments will suffice.

[4, 5] Defendants' instruction number 5 stated that the jury was required to find that the driver was under duty to exercise only reasonable care in keeping a lookout ahead and in keeping the car under control. But it was not vicious because it did not define reasonable care or did not reflect the true relationship between a pedestrian and a motorist. Its evident purpose was to emphasize the principle that a motorist is not obligated to anticipate every possible action of persons upon the highway but that it is his duty to act with reasonable care. The term "reasonable care" was not calculated to mislead the jury. The word "reasonable" is an ordinary word and in common use, and is familiar to the average person. It occurs frequently in statutes that were intended for the daily guidance of laymen. Vehicle Code, § 510, St.1935, p. 176. In any event, it means the amount of care exacted of the motorist under the circumstances detailed by the evidence. Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 83, 97, 239 P. 709, 41 A.L.R. 1027. It could have meant nothing other than that the driver was not required to exercise excessive or extraordinary care in the operation of the automobile. Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Hatzakorzian v. Rucker-Fuller Desk Co., supra. BAJI instructions 108-C and 108-D were both given to the jury.[1] They require that both motorist and pedestrian exercise ordinary care; that the driver must be conscious of operating an engine capable of immense and potential danger, and that the pedestrian must be conscious of the fact that he is in the midst of such dangers on the highway and guard against the possibility of injury apparent to a careful, prudent person.

[6] Defendants' instruction number 7 is criticized because it stated that all that is required of defendants to defeat plaintiff's case is to prove by a preponderance of the evidence that some act of negligence on the part of plaintiff proximately contributed even in the slightest degree to the happening of the accident, and that it is not necessary to establish the contributory negligence beyond all reasonable doubt. The instruction was not confusing because of its failure to define reasonable doubt.

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[1] 108-C Degree of Caution Involved in Ordinary Care.

While it is the duty of both the driver of a motor vehicle and a pedestrian using a public roadway, to exercise ordinary care, that duty does not require necessarily the same degree of caution from each. The driver of a motor vehicle, when ordinarily careful, will be alertly conscious of the fact that he is in charge of a machine capable of projecting into serious consequences any negligence of his own. Thus his caution must be adequate to that responsibility—as related to all the surrounding circumstances. A pedestrian, on the other hand, has only his own physical body to manage and with which to set in motion a cause of injury. While, usually, that fact limits his capacity to cause injury, as compared with a vehicle driver, still, in exercising ordinary care, he too, will be alertly conscious of the mechanical power acting, or that may act, on the public roadway, and of the possible serious consequences from any conflict between himself and such forces. And the caution required of him is measured by the possibilities of injury apparent to him in the conditions at hand, or that would be apparent to a person of ordinary prudence in the same position.

108-D Duty of Driver—Vigilance—Control of Car.

It is the duty of the driver of a motor vehicle, using a public highway, to be vigilant at all times and to keep the vehicle under such control that, to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver, in like position.

Since the reasonable doubt rule was not applicable, there was no occasion for its definition.

[7] Defendants' eighth instruction, after defining contributory negligence and after stating that it must have contributed directly and proximately to the injuries sustained in order for it to bar recovery, advised the jury that plaintiff could not recover if it should be determined from the preponderance of the evidence that he was guilty of a want of ordinary care which contributed in any degree to the injuries sustained. No prejudice could arise because of the failure of that instruction to define want of ordinary care. Its meaning is as well known as is that of reasonable care. Not only is the meaning of the word "ordinary" known to the average person, but its significance was made clear in other instructions defining negligence, given at the request of plaintiff.

[8, 9] Defendants' instruction number 9 consists of two elements: (1) the use of public highways is a privilege to which all citizens are equally entitled; (2) the doctrine of contributory negligence is to control if any negligence of plaintiff contributed to the collision and injuries. If neither party had a superior right to be upon Long Beach Boulevard, no prejudice could have resulted from a statement of the first element. Rush v. Lagomarsino, supra; Raymond v. Hill, 168 Cal. 473, 143 P. 743. Whether the plaintiff had the right of way or exercised a sufficient amount of ordinary care which the circumstances required of a prudent person was for the determination of the jury. Salomon v. Meyer, 1 Cal.2d 11, 32 P.2d 631; Mitrovitch v. Graves, 25 Cal.App.2d 649, 653, 78 P.2d 227; Lavin v. Fereira, 10 Cal.App.2d 710, 712, 52 P.2d 518; Bush v. Southern Pacific Co., 106 Cal.App. 101, 108, 289 P. 190; White v. Davis, 103 Cal.App. 531, 284 P. 1086. They fairly so determined upon conflicting evidence. Because the instructions required the driver to exercise a greater amount of caution (Raymond v. Hill, supra; Dawson v. Lalanne, 22 Cal.App.2d 314, 70 P.2d 1002), such rule did not excuse plaintiff from exercising ordinary care. If he was walking at the place fixed by the testimony of Mr. Roach, he was under positive duty to yield the right of way to the truck (Chase v. Thomas, 7 Cal.App.2d 440, 443, 46 P.2d 200), and hence instruction number 9 was applicable. By sections 562 and 560, respectively, of the Vehicle Code a pedestrian is required to yield the right of way if crossing a street outside of a marked crosswalk, while the motorist is required to yield the right of way to the pedestrian if the latter is crossing the street within a marked crosswalk. Both sections were read to the jury. BAJI Instruction 108-C requires that plaintiff must have exercised ordinary care but that he too should have been alertly conscious of the dangers on the street. It was clearly the meaning of defendants' instruction number 9 that plaintiff could not recover if any negligence on his part contributed proximately and directly to the collision. It did not relieve either of the parties of his duty as defined by BAJI 108-C.

[10] As a final illustration of plaintiff's criticisms of defendants' instructions which were read to the jury, we take defendants' instruction number 10. It consists of two parts, namely (1) an abstract statement of the doctrine of imminent peril, and (2) an application of that doctrine to the evidence presented in this case. It does not purport to include all of the evidence. In order to enable the jury to apply the facts before them the instruction says that if the jury finds that plaintiff appeared in the street in such a manner as to constitute a confusing emergency, the driver, if proceeding with ordinary care, was not required to exercise the highest degree of care to avoid a collision, but only ordinary care. It left for the jury's determination whether the driver was acting with ordinary care under all circumstances, and whether plaintiff's appearance constituted a confusing emergency. The criticism of this instruction that it failed to define ordinary care is utterly without merit. That term was thrice defined elsewhere in the instructions as that degree of care which an ordinarily prudent person would exercise under all the surrounding circumstances.

Thus we might extend the volume of this opinion by a meticulous discussion of each of the criticized instructions and with the same result, towit: that no prejudicial error appears.

[11-17] Throughout his brief plaintiff has proceeded upon the assumption that the evidence was not contradictory and that the jury had found that plaintiff with due caution stepped from the curb into the marked crosswalk and, while lawfully and cautiously proceeding, was run down by the truck. In the first place, the evidence

of Mr. and Mrs. Roach as to the manner in which plaintiff undertook to cross the boulevard appears from the record to be more convincing than the evidence of plaintiff and his witnesses. But aside from the evidence of the Roach couple, it must be borne in mind that the statutory rules for the guidance of persons using a public street prescribe only the minimum measure of care to be exercised, and that whether a traveler has used sufficient care under the circumstances is to be determined by the jury. Bush v. Southern Pacific Co., supra. As circumstances vary, the amount of ordinary care required of a motorist or of a pedestrian will vary. There is no such thing as absolute rules for the conduct of men in their civil relations. Rights are enlarged and duties are diminished with change of circumstance. A pedestrian may not "proceed blindly and in reckless disregard of obvious danger." Fischer v. Keen, 43 Cal.App.2d 244, 110 P.2d 693, 697. For a pedestrian to yield when outside of a marked crosswalk is not the end-all of his duties. He must at all times be reasonably on the alert. When the pedestrian is within the crosswalk the motorist must yield and let him cross over; but when he crosses the street outside of the marked crosswalk he must yield and let the motorist continue on his way. But in any event neither is ever relieved of his duty to exercise reasonable care. The pedestrian has a duty to look in the direction of anticipated dangers and to continue to be alert to safeguard against injury. Lavin v. Fereira, supra.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concurred.

20 Cal.2d 787

In re KACHIGIAN'S ESTATE.

KACHIGIAN v. KACHIGIAN.

L. A. 17961.

Supreme Court of California.
Sept. 11, 1942.

1. Homestead 🔑81

The 1929 amendment to the homestead statute providing that property out of which a homestead may be selected includes any freehold title, interest or estate which vests in the claimant immediate right of possession, even though such right of possession is not exclusive, operated to change the former rule prohibiting selection of a homestead from an undivided interest in property. Civ.Code, § 1238.

2. Homestead 🔑84

Tenancies in common and joint tenancies are estates from which a homestead may be selected under the 1929 amendment to the homestead statute. Civ.Code, § 1238.

3. Homestead 🔑5

The policy underlying "homestead" legislation is to provide a place for the family and its surviving members where they may reside free from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence or from the importunity of their creditors, and to this end a liberal construction of the law and facts will be adopted. Probate Code, § 661; Civ.Code, § 1238; St.1929, p. 339.

See Words and Phrases, Permanent Edition, for all other definitions of "Homestead".

4. Homestead 🔑137

Where deceased and his brother owned vineyard lands as tenants in common, which they operated together and on which they both lived, the court must on petition of surviving spouse set apart to her a probate homestead from decedent's undivided interest. Civ.Code, § 1238; Probate Code, § 661.

5. Executors and administrators 🔑174

The principle of liberal construction applies in construing statutes relating to setting apart of personal property to a surviving spouse as exempt, the same as in the case of a homestead. Civ.Code, § 1238; Probate Code, §§ 660, 661.

6. Executors and administrators 🔑177

A surviving spouse may have set apart to her, as exempt, deceased husband's undivided interest in farming tools and implements used on vineyard lands owned by decedent and his brother as tenants in common. Probate Code, § 660.

7. Executors and administrators 🔑194(7)

Although the right of surviving spouse to have exempt personal property set apart to her is subject to the discretion of the court, an order denying her petition will be reversed where it is apparent from the order that the court did not purport to exercise its discretion in denying such petition, but that it was based on the fact that decedent held the property only as cotenant. Probate Code, § 660.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Proceeding in the matter of the estate of Harry Kachigian, deceased, wherein Aghavnie Kachigian filed a petition asking the court to set apart to her as a homestead decedent's undivided interest in real estate and to set apart to her as exempt from execution, certain personal property, opposed by Toros Kachigian. From an order of the probate court denying her petition, petitioner appeals.

Reversed.

For prior opinion, see 121 P.2d 869.

Harold M. Child and L. N. Barber, both of Fresno, for appellant.

Harry Sarkisian, of Fresno, for respondent.

GIBSON, Chief Justice.

The decedent, Harry Kachigian, and his brother Toros owned as tenants in common forty acres of vineyard in Fresno County and certain personal property consisting of farming tools, implements, and equipment used in cultivation. The brothers had operated the vineyard together, and both lived on the land. There were two houses upon the property, one of which was occupied by Toros and the other by Harry and his wife, Aghavnie, the appellant herein. Harry and Aghavnie had no children, and Harry's interest in the land and personalty was his separate property. Pending the administration of Harry's estate his surviving wife petitioned the probate court to set the above real property apart to her as a homestead and also asked that the personal property, designated as exempt from execution and necessary for the operation of the vineyard, be set apart to her. Toros filed objections to the petition, contending that any order setting apart to the widow the decedent's interest in the property would be prejudicial to Toros' rights as tenant in common. That the property is physically suitable for a homestead was not disputed. The trial court denied the petition, and the widow now prosecutes this appeal from the court's order contending that the probate court erred in refusing to set apart a homestead in the realty and that, if this is true, there was an abuse of discretion in refusing to set aside the decedent's interest in the personal property. The principal question now before us, therefore, is whether the probate court should, upon the petition of a surviving wife, select and set apart a homestead for her use out of her deceased husband's undivided one-half interest in real property held by the decedent and a third person as tenants in common.

Prior to 1929 it was well settled in California that, with certain exceptions where the owners were husband and wife, land owned by persons as tenants in common or joint tenants could not be subject to a homestead. The rule announced in Wolf v. Fleischacker, 1855, 5 Cal. 244, 63 Am. Dec. 121, was first applied to an attempt by a co-owner to create a homestead exempt from execution during his life. Reynolds v. Pixley, 6 Cal. 165; Giblin v. Jordan, 6 Cal. 416; Kellersberger v. Kopp, 6 Cal. 563; Bishop v. Hubbard, 23 Cal. 514, 83 Am.Dec. 132; Elias v. Verdugo, 27 Cal. 418; Seaton v. Son, 32 Cal. 481; Cameto v. Dupuy, 47 Cal. 79; First National Bank v. De La Guerra, 61 Cal. 109; Fitzgerald v. Fernandez, 71 Cal. 504, 12 P. 562; Rosenthal v. Merced Bank, 110 Cal. 198, 42 P. 640; Schoonover v. Birnbaum, 148 Cal. 548, 83 P. 999. Subsequently, upon the authority of these decisions, it was held that the probate court could not designate a homestead in such property for the use of the family of one of the owners after his death. Kingsley v. Kingsley, 39 Cal. 665; Estate of Carriger, 107 Cal. 618, 40 P. 1032; Estate of Davidson, 159 Cal. 98, 115 P. 49; Estate of Carraghar, 181 Cal. 15, 183 P. 161.

The statutes pertaining to probate homesteads did not define the property out of which such a homestead could be set apart, simply providing that under certain circumstances the probate court could select a homestead out of the real estate of the decedent (former § 1465 of Code Civ.Proc.; Probate Act of 1851, § 124 and § 121 as amended in 1866 and as construed in Estate of Busse, 1868, 35 Cal. 310), and the courts looked to the earlier decisions relating to homesteads sought under the Homestead Act, and, later, the Civil Code, to determine the nature of the property that might be used. For example, in Kingsley v. Kingsley, supra, the first decision refusing to create a probate homestead out of property in which the decedent held an undivided interest, it was stated at pages 666, 667 of 39 Cal.: "There is nothing in [the probate] sections tending to the conclusion that any property could be set apart as a homestead by the Probate Court which might not have been dedicated as a homestead under the Homestead Act, immediately preceding the death of the deceased." In Estate of Davidson, supra, the court said at page 100 of 159 Cal., at page 50 of 115 P.: "It is, of course, well settled that the court in the administration of the estate of a decedent cannot set apart lands of the estate, as a probate homestead, unless they were lands upon which a homestead could have been impressed in the lifetime of the deceased. * * * So the question presented here is, Could either spouse during the lifetime of the husband impress a homestead solely on his undivided interest * * *? If this could have been done, the court erred in refusing to make the homestead order asked by petitioner." Similar reasoning was expressed in other probate cases. Estate of Carriger, supra; cf. Estate of Noah, 73 Cal. 590, 592, 15 P. 290, 2 Am.St.Rep. 834.

The probate homestead statutes have remained substantially unchanged, insofar as the present question is concerned, and the Probate Code, enacted in 1931, now provides that the court must select the probate homestead "out of the separate property of the decedent" if there is no community property or property owned in common by the decedent and the person entitled to the homestead. Prob.Code, § 661. If we find, therefore, that the restrictive rule as to homesteads declared during the life of the owner has been changed by the Legislature, it necessarily follows from the reasoning of the probate cases that a like result must be reached where a probate homestead is sought.

The respondent contends that it must be presumed that the Legislature was familiar with the former decisions and that in failing to change the probate statutes it must have intended to leave the probate law unchanged; but, if we presume that the Legislature was familiar with the former decisions, it would seem improper for us to presume that it was unaware of their basic reasoning and hold that it did not realize the probate rule must change if the basis therefor were changed.

[1, 2] In our opinion the former rule prohibiting the selection of a homestead from an undivided interest in property during the lifetime of the owner has been abandoned. Prior to 1929 section 1238 of the Civil Code read: "If the claimant be married, the homestead may be selected from the community property, or the separate property of the husband, or, with the consent of the wife, from her separate property. * * *" In that year the Legislature added the following sentence: "Property, within the meaning of this section, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession, even though such right of possession is not exclusive." St.1929, p. 339. In view of the law prevailing at the time of this amendment it seems obvious that the amendment could have referred only to estates such as tenancies in common and joint tenancies, for the cases establishing that law were based upon the theory that because of the nature of such tenancies, in particular, the absence of an exclusive right of possession, it was impossible to segregate and delimit the undivided interest sought to be impressed with a homestead. Estate of Davidson, supra, 159 Cal. pages 100, 101, 115 P. 49; Seaton v. Son, supra, 32 Cal. page 484. The Legislature removed this judicially imposed obstacle. In Watson v. Peyton, 10 Cal.2d 156, 73 P.2d 906, this court, in holding that a husband could without the consent of his wife declare a homestead upon property held by them as joint tenants, cited the earlier cases and said at pages 159, 160 of 10 Cal.2d, at page 908 of 73 P.2d: "The amendment to section 1238 of the Civil Code followed these cases and declared that the 'property' from which a husband could select a homestead was that 'estate' which vests in the claimant the immediate right of possession, even though such right of possession is not exclusive. It is such an estate that the husband has in property held in joint tenancy with his wife—a right of possession though not exclusive, but nevertheless a separate estate upon which he may declare a homestead." Cf., also, In re Sterling, D.C.S.D.Cal., 20 F.Supp. 924; In re Miller, D.C.S.D.Cal., 27 F.Supp. 999. The reasoning in the Watson case seems equally applicable to situations wherein the cotenants are not husband and wife.

[3] The policy underlying all homestead legislation, whether providing for the selection of a homestead by a person during his lifetime or by the court for his family after his death, is as stated in Estate of Fath, 132 Cal. 609, 613, 64 P. 995, 997, "to provide a place for the family and its surviving members, where they may reside and enjoy the comforts of a home, freed from any anxiety that it may be taken from them against their will, either by reason of their own necessity or improvidence, or from the importunity of their creditors," and to this end a liberal construction of the law and facts will be adopted by the courts. See, also, Estate of Adams, 128 Cal. 380, 383, 57 P. 569, 60 P. 965; Lucci v. United Credit & Collection Co., 220 Cal. 492, 496, 31 P.2d 369; Greenlee v. Greenlee, 7 Cal. 2d 579, 583, 61 P.2d 1157. Our view that tenancies in common and joint tenancies may now be subject to homestead rights is in furtherance of this policy, and it extends the benefits of the statutes to many families which would otherwise be deprived thereof. The former restrictive rule was early recognized as harsh in its operation, but the court felt bound by its first decision in Wolf v. Fleischacker, 5 Cal. 244, 63 Am.Dec. 121. For example, see Giblin v. Jordan, 6 Cal. 416, 418; In re Carriger's Estate, 107 Cal. 618, 621, 40 P. 1032; Swan v. Walden, 156 Cal. 195, 198, 199, 103 P. 931, 134 Am.St.Rep. 118, 20 Ann.Cas. 194. Mr. Justice Olney, by a separate concurring opinion in Estate of Carraghar, supra, at page 21 of 181 Cal. at page 163 of 183 P., said: "I concur, but solely on the ground that the question is now determined by the previous decisions of this court. If it were not for those decisions I believe the rule should be that a homestead may be imposed in the instances provided by the statute regardless of the character of the title of the homestead claimant or his or her spouse, the homestead, of course, affecting only the interests of the claimant or spouse, whatever those interests may be. The only requirement of the statute in this respect is that the claimant be residing upon the premises, and to require more than this and make the validity of the homestead dependent upon the character of the interests affected is without statutory warrant, and

contrary to the object of the statute. The injustice, I think, is manifest in the present case." Further, the majority of the other jurisdictions have held that no distinction is to be made between estates in severalty and estates in cotenancy. See cases collected in 89 A.L.R. 511, 540, et seq.

It cannot be said that the rights of the other cotenant are in any way prejudiced, as the homestead claimant, or his surviving family, acquires only such rights of occupancy as he had before the creation of the homestead, and the other cotenant's interest is in no way affected; for example, his right to use the property remains exactly as before and he may sell or assign his undivided share. If he objects to his cotenant, his remedy is by partition. Code Civ.Proc. § 752, et seq.; 20 Cal.Jur. 586, et seq.; see, also, other remedies between cotenants enumerated in 7 Cal.Jur. 363, et seq.

[4] We hold, therefore, that the court must select and set apart for appellant a probate homestead from the undivided interest of the decedent in the real property in question.

[5-7] The disposition of the exempt personal property of the decedent is governed by section 660 of the Probate Code, which provides that "the court, on petition therefor, may in its discretion set apart to the surviving spouse * * * all or any part of the property of the decedent exempt from execution * * *." This section, as well as section 661, was derived from former section 1465 of the Code of Civil Procedure, and as in the homestead provisions, no mention is made of property in which the decedent held only an undivided interest. This court, however, in Estate of Pillsbury, 175 Cal. 454, at page 457, 166 P. 11, at page 13, 3 A.L.R. 1396, in holding that the right to exempt property could be waived, said: "In the matter of the probate of an estate the governing principle in construing section 1465, Code of Civil Procedure, is the same in the case of all other exempt property as it is in the case of a homestead. * * * The absolute identity in principle between the setting apart of a homestead under section 1465, Code of Civil Procedure, and the setting apart of all other property declared to be exempt from execution, is announced and established in Estate of Moore, 57 Cal. 446." That personal property held in cotenancy may be exempt from execution is not disputed. Stanton v. French, 83 Cal. 194, 23 P. 355. Thus, in accordance with the principles above discussed with regard to appellant's right to a homestead, she may also have set apart to her the decedent's undivided interest in the exempt personal property. This right, however, is subject to the discretion of the court below. Prob. Code, § 660, supra. In the instant case it is apparent from the face of the order denying the petition that the court relied solely upon the fact that the decedent held the property only as a cotenant and that the court did not purport to exercise its discretion in disposing of the personalty, and we need not at this time determine whether or not, after designating a homestead, a refusal to so set apart the personal property would be an abuse of discretion.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, JJ., and PETERS, J. pro tem, concurred.

20 Cal.2d 779

KENT et al. v. CLARK.

L. A. 17845.

Supreme Court of California.

Sept. 11, 1942.

1. Fraud 🔑31, 34

A purchaser induced by fraudulent representations of the vendor to enter into executory contract for purchase of realty may elect to affirm the contract, retain the realty and sue vendor for damages in an action for deceit and having chosen that course on discovery of the vendor's fraud the purchaser need not continue performance but may properly withhold payments under the contract in an amount necessary to recoup the damages which he has suffered.

2. Vendor and purchaser 🔑314(2)

Since purchaser's failure to make payments under executory contract for purchase of realty is excused by fraud in the inception of contract, purchaser may set up vendor's fraud as a defense to action for the balance due under the contract by way of answer to the whole demand or in abatement of the damages, according to the circumstances.

3. Vendor and purchaser ⚷299(3)

In action by vendor to cancel contract for sale of realty, to quiet title to the property and for possession of the premises, purchaser may plead fraud of vendor in inducing purchaser to enter into the contract.

4. Vendor and purchaser ⚷335

A purchaser induced by fraudulent representations of vendor to enter into executory contract for purchase of realty may elect to rescind contract for fraud, restore possession to vendor and recover the purchase money paid less the fair rental value for the use of the property during occupancy, and that right of rescission is available to a purchaser in default.

5. Vendor and purchaser ⚷117

Actual surrender of property received under executory contract for purchase of realty is not a prerequisite to purchaser's suit to rescind contract for fraud in its inception, if purchaser offers to restore the property to vendor provided vendor makes restitution of the purchase money paid. Civ. Code, § 1691, subd. 2.

6. Vendor and purchaser ⚷299(1)

Where purchaser served notice of rescission of executory contract for sale of realty on the ground of fraud in the inception of contract and offered to restore possession to vendors upon repayment of purchase money paid under contract less reasonable rental value of realty, purchaser thereafter remaining in possession though in default was entitled to set up fraud in the inception of contract as a defense in vendors' action of ejectment, and exclusion of evidence tending to prove such fraud as a conditional defense required reversal of judgment for vendors. Civ.Code, § 1691, subd. 2.

7. Vendor and purchaser ⚷299(3)

In action of ejectment by vendors against a purchaser in default under executory contract of sale, purchaser was entitled to file a cross complaint for rescission of contract on the ground of vendors' fraud in inducing execution of contract and for a judgment representing amount paid under the contract together with reasonable value of improvements placed on the realty less the value of the use during occupancy, since the relief thus sought related to the "transaction" upon which action in ejectment was brought within statute authorizing cross-complaints. Code Civ.Proc. § 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Transaction".

8. Pleading ⚷147

Under statute permitting a defendant seeking affirmative relief relating to a "transaction" to file a cross complaint, the facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the transaction and if the defendant's pleading sets forth matter inextricably related to the matter forming the basis of the complaint, it meets statutory requirements of a "cross complaint" and it is immaterial that the relief sought is independent of that prayed for in the complaint. Code Civ.Proc. § 442.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross Complaint" and "Transactions".

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action of ejectment by Charles R. Kent and others against Alverda Clark, wherein the defendant filed a cross-complaint. From a judgment in favor of the plaintiffs, defendant appeals.

Judgment reversed.

For prior opinion, see 122 P.2d 521.

Lorrin Andrews and Wm. J. Clark, both of Los Angeles, for appellant.

Emil H. Koehl, of Hollywood, for respondents.

EDMONDS, Justice.

The question presented for decision by this appeal is whether, in an action of ejectment brought by a vendor of realty against a vendee in default under an executory contract of sale, the vendee may set up fraud in the inception of the contract, either by way of defense to the action or by way of cross-complaint for rescission or damages. The trial court answered it in the negative and rendered judgment for the respondents, who are the vendors of the property in controversy.

The appellant entered into a written contract with the respondents under which she agreed to purchase a house and lot for the sum of $4,500, of which amount $200 was paid in cash. She agreed to pay the balance in stated instalments, with interest, and also to pay the taxes upon the property. Time was of the essence of the agreement. Although not provided for by the contract, she was given possession of the property.

Three years passed, during which the appellant made all payments required by the contract with the exception of certain taxes. Although these payments were not promptly made, the vendors accepted them. But upon the appellant's failure to pay an instalment which accrued in August, 1939, the respondents demanded, in writing, that she remedy the default immediately. Although there is some dispute as to the amount which was due at that time, the appellant admits that she was then in default so far as the payment of taxes is concerned.

A week later the respondents wrote another letter informing the appellant that unless the delinquent taxes and the balance of the instalment of principal then overdue were paid within three days, a forfeiture would be declared. The day after this letter was written, the appellant served upon the vendors a written refusal to make further payments and a notice of rescission of the contract, offering to restore to them the property upon condition that they return to her all money paid under the agreement, less the reasonable value of the use of the property. One month later, the vendors served a notice advising the appellant that her rights under the contract were thereby declared forfeited and demanding possession of the property. She made no further effort to remedy her default and refused to comply with the demand for surrender of possession. The present action followed.

The complaint alleges the making of the contract, the default thereunder, the vendee's attempted repudiation and rescission, and her refusal to surrender possession after demand. These facts state a cause of action in ejectment upon which the vendors sought no further relief than possession of the property. To this complaint the appellant filed an answer, admitting execution of the agreement, her possession and default thereunder. By way of an affirmative defense, she alleged that the respondents demanded of her more than was due to them, that she was not given a reasonable time in which to remedy her default, and that she was induced to enter into the contract through the false and fraudulent representations of the vendors.

These asserted representations, all of which concern the nature, character and value of the property, are set forth with particularity. The answer also contains an allegation of the appellant's notice of rescission of the contract, her offer of restoration of the property to the respondents upon the condition that they return to her all money paid under the contract less the reasonable value of the use of the premises, and the refusal of the respondents to comply with this demand.

In a cross-complaint, the appellant alleged the same representations, the fact that she had given notice of rescission, and the refusal of respondents to accept her conditional offer of restoration of the property. Under this pleading she prayed for a decree declaring the contract to be rescinded and for a judgment in the sum of $2,219.72, representing the amount paid by her under the contract, together with the reasonable value of the improvements placed upon the property by her, less the value of its use during her occupancy.

At the trial of the case upon these pleadings, when the respondents had concluded the presentation of evidence, the appellant moved for a nonsuit upon the ground that she was not in default in the sum demanded by them and also that she had not been given a reasonable time in which to remedy her default. This motion was denied. She then proceeded with the presentation of her defense and offered evidence tending to prove fraud in the inception of the contract, as alleged in her answer and cross-complaint. The respondents objected to this evidence upon the ground that the alleged fraud was neither a proper subject of defense nor cross-complaint to an action in ejectment where possession only was demanded. The court sustained this objection. The appellant then made an offer of proof, to which the respondents interposed the same objection with the same ruling.

Thereafter the court gave judgment for the respondents, based upon findings that the appellant had repudiated, and was in default under the contract of sale; that the contract was not terminated by mutual consent; that the appellant had at all times since her default refused to make further payments under the agreement; that the respondents, as vendors, were entitled to possession of the property, but that the appellant was entitled to a reasonable time in which to remedy her default. The judgment fixed this time as not exceeding 60 days from its entry.

The appellant asserts that the ruling of the trial court in sustaining objections to evidence in support of her allegations of fraud was erroneous, and that the court also erred in failing to make findings of fact upon that issue. She also contends that it was an abuse of discretion to deny her motion for a new trial. The respondents rest their case upon the proposition that in an action of ejectment, the defendant may not set up fraud in the inception of the contract under which he took and held possession either by way of answer or cross-complaint. More specifically, they rely upon the principle, frequently announced in the authorities, to the effect that where a vendee in possession under an executory contract of purchase has failed to perform his part of the contract and is in default with respect thereto without excuse, he may not maintain an equitable defense to an action of ejectment by the vendor.

[1] Two distinct remedies are open to a vendee who has been induced to enter into the contract of purchase by the fraudulent representations of his vendor. Notwithstanding the vendor's fraud, he may elect to affirm the contract, retain the property received under it and sue the vendor for damages in an action for deceit. Having chosen that course upon the discovery of the vendor's fraud, the vendee need not continue performance but may properly withhold payments under the contract in an amount necessary to recoup the damages which he has suffered. In other words, because of the vendor's fraud, he may avoid the obligation stated by the contract and excuse what would otherwise be a default. Field v. Austin, 131 Cal. 379, 63 P. 692; Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380; Pembrook v. Houston, 41 Cal.App. 54, 181 P. 828; Palladine v. Imperial Valley F. L. Assn., 65 Cal.App. 727, 225 P. 291; 25 Cal.Jur. 560.

[2, 3] In such a situation, as the vendee's failure to make payments is excused, he may set up the seller's fraud as a defense to an action for the balance due under the contract, by way of answer to the whole demand, or in abatement of the damages, according to the circumstances of the case. Toby v. Oregon Pac. R. Co., 98 Cal. 490, 33 P. 550; Field v. Austin, supra; Hunter v. McKenzie, 197 Cal. 176, 239 P. 1090; Paolini v. Sulprizio, supra; Pembrook v. Houston, supra; Palladine v. Imperial Valley F. L. Ass'n, supra And, for the same reason, the fraud of the vendor may be pleaded as a defense in an action by the vendor to have the contract canceled, to quiet title to the property, and for possession of the premises. The reason for this rule was stated in Nevada Land & Inv. Corp. v. Sistrunk, 220 Cal. 174, 30 P.2d 389, 390, where the court declared: "There would be little consistency or justice in a rule which, when the suit was for the payments due under the contract, would allow the buyer to set up damage caused by the fraud of the seller in answer to the demand or in abatement of damages, but, when the action was one for possession of the premises and to quiet title, would not allow the same matter to be pleaded as a defense against a forfeiture for failure to make the payments which the law says he may withhold."

[4] But the defrauded vendee has another and alternative remedy. He may elect to rescind the contract for fraud, restore possession to the vendor, and recover the purchase money paid less the fair rental value for the use of the property during his occupancy. This right of rescission is available to a vendee in default. Graham v. Los Angeles First N. T. & S. Bank, 3 Cal.2d 37, 43 P.2d 543; Lombardi v. Sinanides, 71 Cal.App. 272, 235 P. 455.

However, by certain decisions it has been broadly and unqualifiedly held that a vendee who has elected to disaffirm the contract for fraud, may not thereafter remain in possession of the property and defend against an action in ejectment brought by the vendor. Having taken possession by virtue of the contract, it is said, the vendee may retain that possession only by faithfully performing the conditions of the contract under which he entered, and if he desires to rescind, he may do so only by a surrender of the premises to the vendor. To hold otherwise, according to this reasoning, would allow the vendee to assume the inconsistent position of repudiating the contract and at the same time claiming under it. This analysis of the legal principles involved, at least as applied to the facts of the present case, may not be legally or logically sustained.

[5] True, a defrauded vendee desiring to rescind his contract "must restore to the

other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." § 1691 (2), Civ.Code. But under the express terms of this code section actual surrender of the property by the vendee seeking rescission is not a prerequisite to a suit if he has offered to restore the property to the vendor. McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019; Lanktree v. Spring Mountain Acres, 213 Cal. 362, 2 P.2d 338; O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381; Isom v. Rex Crude Oil Co., 147 Cal. 659, 662, 82 P. 317; Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 58 P. 92, 61 P. 667; Rohrbacher v. Kleebauer, 119 Cal. 260, 51 P. 341; In re McNutt's Estate, 36 Cal.App.2d 542, 98 P.2d 253; Shaffer v. Security T. & S. Bank, 4 Cal.App.2d 707, 41 P.2d 948; Cameron v. Evans Securities Corp., 119 Cal.App. 164, 6 P.2d 272; Moore v. Giffen, 110 Cal.App. 659, 294 P. 730; Appliance Co. v. Kelley, 102 Cal.App. 67, 282 P. 518; Murdock v. Fisher Finance Corp., 79 Cal.App. 787, 251 P. 319; California Credit, etc., Corp. v. Goodin, 76 Cal.App. 785, 246 P. 121; Simmons v. Briggs, 69 Cal.App. 447, 231 P. 604; Haserot v. Keller, 67 Cal.App. 659, 228 P. 383; Norton v. Rosenkranz, 62 Cal.App. 226, 216 P. 380; Bellone v. Kleinau, 54 Cal.App. 428, 201 P. 977. And the statute declares that the offer to surrender possession of property received under the contract need not be unqualified but may be made conditional upon the vendor's restitution of the purchase money. Accord: Rest., Contracts, §§ 480 (3), 349 (3).

[6] Applying the statutory rule to the facts of the present case, the appellant, upon discovery of the respondents' alleged fraud, served notice of rescission and offered to restore possession of the property to them upon condition that they return to her all money paid by her under the contract, less the reasonable rental value of the premises. If the respondents are guilty of the asserted fraud, this notice and offer established the right of the appellant to avoid the transaction, and as a result of their refusal to comply with her demand, she had the right to retain possession of the property until such restitution was effected and assert that right by pleading and proving the facts establishing the fraud. She does not question the vendor's title to the property, and, in fact, she has offered to restore possession of it. In effect, therefore, by her pleading she has agreed to treat the action as an acceptance of her offer. But she demands, as an incident to her right to rescind, that possession be given the vendor concurrently with his restoration to her of the purchase money. Under these circumstances, if, upon trial, the vendee proves that the vendor is guilty of fraud justifying a rescission of the contract, the court should render its judgment that the vendor is entitled to possession of the property in controversy upon payment of the amount he has received, together with the value of any improvements which the vendee has placed upon the land (Barrows v. Harter, 165 Cal. 45, 130 P. 1050; Worley v. Nethercott, 91 Cal. 512, 27 P. 767, 25 Am.St.Rep. 209; Gates v. McLean, 70 Cal. 42, 11 P. 489), less the reasonable rental value of the vendee's occupancy. See Rest., Contracts, §§ 481, 354. The ruling which foreclosed the appellant from introducing any evidence tending to prove fraud as a conditional defense to the action is directly contrary to the principles which have been stated and requires a reversal of the judgment.

Insofar as the case of Los Molinos Land Co. v. MacKay, 175 Cal. 305, 165 P. 926, is contrary to these conclusions, it is overruled and Watkins v. Warren, 122 Cal.App. 617, 10 P.2d 500, and Hincksman v. Delacour, 47 Cal.App. 416, 190 P. 832, are disapproved.

[7, 8] The facts relied upon by the appellant also furnish a proper basis for her cross-complaint. Section 442 of the Code of Civil Procedure provides: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time * * * a cross-complaint. * * *" The more recent cases have approved a broad and liberal interpretation of the phrase "transaction * * * upon which the action is brought." Hanes v. Coffee, 212 Cal. 777, 300 P. 963; California Trust Co. v. Cohn, 214 Cal. 619, 622, 7 P.2d 297; Nevada Land & Inv. Corp. v. Sistrunk, supra. The facts surrounding the cause of action and not the form of the complaint are determinative of what constitutes the

"transaction." If the defendant's pleading sets forth matter inextricably related to the matter forming the basis of the plaintiff's complaint, it meets the statutory requirements of a cross-complaint, and it is immaterial that the relief sought thereby is independent of that prayed for in the complaint.

Tested by these principles, it is clear that the alleged fraud of the respondents arose out of the identical transaction which is the basis of their cause of action in ejectment. They demand possession of the property because of the appellant's breach of contract. She charges fraud in inducing the execution of that contract. Were it not for the contract, therefore, neither party would have had occasion to bring suit.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, JJ., and PETERS, J. pro tem., concurred.

54 Cal.App.2d 285

ENGINEERS, Ltd., v. SUPERIOR COURT OF HUMBOLDT COUNTY et al.

Civ. 6864.

District Court of Appeal, Third District, California.

Sept. 1, 1942.

1. Prohibition 🔑10(1)

Prohibition will lie only when a court is proceeding without jurisdiction or is assuming an unauthorized power.

2. Prohibition 🔑10(2)

Prohibition would not lie to prevent superior court from proceeding with trial on issues raised by complaint seeking recovery of damages for an unlawful trespass and removal of large quantities of gravel from plaintiffs' premises until after determination of an appeal by one of defendants from an order dismissing cross-complaints involving a controversy between defendants and a third party, with which plaintiffs had no concern, since superior court had jurisdiction to determine as a matter of procedure whether it would try issues raised by complaint and answer first.

Proceeding in prohibition by Engineers, Limited, to restrain the Superior Court of Humboldt County, and Harry W. Falk, Judge thereof, from trying an action.

Writ denied.

Hartley F. Peart and Howard Hassard, both of San Francisco, Blaine McGowan, of Eureka, and George A. Smith and Gus L. Baraty, both of San Francisco, for petitioner.

Chas. Reagh, of San Francisco, and Hill & Hill, of Eureka, for respondents.

ADAMS, Presiding Justice.

This is a proceeding in prohibition to restrain the Superior Court of Humboldt County from trying an action pending appeal from an order dismissing cross-complaints.

The petition for the writ alleges that Louis Biasci and Marjorie Connick commenced separate actions in the Superior Court of Humboldt County against C. Dudley DeVelbiss and petitioner as defendants, alleging that defendants had entered upon their premises unlawfully and removed large quantities of gravel therefrom; that petitioner filed answers in said actions denying the allegations of the complaints, and setting up as special defenses that if any trespass had been committed, as alleged in the complaints, same had been committed by defendant DeVelbiss acting for himself and as agent for A. Soda & Sons; that two cross-complaints were filed in the action by Engineers, Ltd., the one being directed against defendant DeVelbiss, and alleging that a contract had been entered into between Engineers, Ltd., and DeVelbiss for the delivery by the latter to the former of a quantity of gravel, said contract providing that said gravel should be procured from places other than any point north of the central line of the Eel River, and that without authority of cross-complainant said DeVelbiss had taken gravel from various places situated on the north bank of the Eel River, and that as a direct result of such action appellant was damaged in the Connick case in the sum of $1,500, and in the Biasci case in the sum of $6,000; that in a second cross-complaint defendant DeVelbiss was joined with A. Soda & Sons, it being alleged that the latter had a contract with the state to build approaches to a bridge which was being constructed by Engineers, Ltd., and had a contract with DeVelbiss under which the latter was to furnish gravel for A. Soda & Sons for such work, and that, acting as agent for A. Soda & Sons, defendant DeVelbiss had trespassed upon the property of plaintiffs, and that as a result, Engineers, Ltd., had suffered damages in the amounts alleged in the first cross-complaint; that on motion of plaintiff the court had stricken out said cross-complaints, and petitioner had appealed; that plaintiffs had moved to dismiss said appeals, and that said motions were under submission by the court.

It is further alleged that in disregard of petitioner's rights, and in spite of its opposition, respondent had set the cases for trial, and would proceed therewith unless prohibited by this court; that said superior court had no jurisdiction in said matter for the reason that said appeals are pending, and that any further action by the trial court with regard to same "will materially affect the order appealed from and your petitioner's rights thereunder to have all of said controversy settled among all of the parties thereto in one action."

[1] In Klement v. Superior Court, 21 Cal.App.2d 456, 69 P.2d 869, this court said that it is only when a court is proceeding without jurisdiction or is assuming an unauthorized power, that prohibition will lie. We also held in that case, an action on a contract in which a cross-complaint for damages for defamation of character by cross-defendants was dismissed and an appeal taken from the order of dismissal, that the trial court had jurisdiction to determine, as a matter of procedure, whether it should try the issues raised by the complaint and answer, and leave the issues formed by the cross-complaint to be determined later, or to await the action of a reviewing court to determine whether or not the cross-complaint was well founded, before proceeding with the trial.

In Hayes v. Pierce, 15 Cal.2d 662, 104 P.2d 499, an action was brought by a first mortgagee to foreclose a mortgage on property covered by a contract to sell. A cross-complaint seeking rescission of the contract was stricken out by the trial court, and the foreclosure action was tried over the objection of cross-complainant and pending an appeal from the order striking out said cross-complaint. There, as here, it was contended that the appeal had divested the trial court of jurisdiction to hear and determine the issues raised by the complaint and answer; but the court held that the trial court had power to determine, as a matter of procedure, whether it should try the issues raised by the complaint and answer and leave the issues formed by the cross-complaint to be determined later, or await the action of a reviewing court to determine whether or not the cross-complaint was well founded, before proceeding to trial. It cited Klement v. Superior Court, supra, and added that in deciding that the trial should proceed despite the pendency of the appeal, the trial court exercised a wise discretion.

[2] In the case before us no good reason appears why the rights of plaintiffs to recover for trespass on their lands, if such trespass there was, should await a determination of the controversy between defendants and another, with which controversy plaintiffs had no concern.

The writ is denied.

THOMPSON, J., and SCHOTTKY, J. pro tem., concurred.

54 Cal.App.2d 348

CALIFORNIA EMPLOYMENT COMMISSION v. BETTHESDA FOUNDATION.

Civ. 13627.

District Court of Appeal, Second District, Division 2, California.

Sept. 10, 1942.

Rehearing Denied Oct. 9, 1942.

1. Appeal and error 🔑**931(1), 1010(1)**

The findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them and all intendments are in favor of judgment of lower court.

2. Taxation 🔑**204(2)**

Provisions for exemption from taxation are to be strictly construed against the taxpayer.

3. Taxation 🔑241(1)

In determining whether a corporation was organized exclusively for "charitable purposes" and therefore exempt from unemployment contributions, the trial court was not bound by the articles of incorporation or the fact that corporation was organized under the statute relating to nonprofit corporations for charitable purposes, but the court could consider the corporation's actual conduct and methods of operation. Gen. Laws 1937, Act 8780d, §§ 7(g), 45; Civ.Code, § 606.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable Purpose".

4. Taxation 🔑241(1)

Where defendant corporation alleged that it was organized exclusively for charitable purposes and therefore exempt from unemployment insurance contributions, the court in making its findings might consider the fact that defendant was incorporated shortly after the enactment of the unemployment insurance act, that without assets of its own it took over a private institution and continued to operate it with the old staff, that it received no gifts or donations and had no legal obligation to perform any particular act of charity, and that the institution was operated and maintained solely on revenue from fixed charges against patients. Gen.Laws 1937, Act 8780d, §§ 7(g), 45; Civ. Code, § 606.

5. Taxation 🔑241(1)

In order to be exempt from making contributions for unemployment insurance, it was incumbent upon the employing corporation to prove that it was organized exclusively for charitable purposes, that it was and is operated therefor, and that no part of its net earnings inured to the benefit of any private shareholder or individual. Gen. Laws 1937, Act 8780d, §§ 7(g), 45; Civ.Code, § 606.

6. Taxation 🔑241(2)

A corporation organized under the statute relating to nonprofit corporations for charitable purposes for the operation of a hospital which has been previously operated for private purposes and which charged a fixed fee for each service rendered, and which made an attempt to collect all charges if the patient was unable to pay therefor, and which made deductions for unemployment insurance from its employees which however were not paid to the commission, was not a corporation organized and operated exclusively for "charitable, scientific, literary or educational purposes" so as to be exempt from unemployment contributions. Gen.Laws 1937, Act 8780d, §§ 7(g), 45; Civ. Code, § 606.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable, Scientific, Literary, or Educational Purpose".

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by the California Employment Commission against the Betthesda Foundation, a corporation, to recover unemployment contributions for certain years. Judgment for plaintiff, and defendant appeals from the judgment and from an order denying its motion for a new trial.

Affirmed.

Milan Medigovich and A. G. Fickeisen, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., and Maurice P. McCaffrey, Glenn V. Walls, and Doris H. Maier, all of Sacramento, for respondent

W. J. WOOD, Justice.

Plaintiff commenced this action under the provisions of section 45 of the California Unemployment Insurance Act, Chap. 352, Stats.1935, Deering's Gen.Laws, 1937, Act 8780d, to recover unemployment insurance contributions for the calendar years 1936, 1937 and 1938. Defendant alleged that it is organized and operated exclusively for charitable purposes and claimed to be exempt from making the contributions. The trial court made findings adverse to the allegations of defendant and gave judgment for plaintiff, from which defendant prosecutes this appeal. There is also a purported appeal from an order denying defendant's motion for a new trial.

We are called upon to determine the question whether the evidence sustains the trial court's finding that defendant is not such an institution as is exempt under the provisions of section 7(g) of the act, which excludes from the obligation to make contributions: "Service performed in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

Defendant corporation was incorporated on October 11, 1935, under the provisions of section 606 of the Civil Code, relating to nonprofit corporations for charitable purposes. On January 1, 1936, defendant began the operation of the Angelus Hospital and the Dr. R. B. Jenkins Clinic. These institutions are located at 1925 Trinity Street and 1901 Trinity Street respectively. The Angelus Hospital is an institution of 110-bed capacity and has been continuously operated as a hospital since its construction in 1904. Before the incorporation of defendant the hospital and the clinic were operated by Dr. R. B. Jenkins directly or indirectly through the medium of R. B. Jenkins Corporation. Dr. Jenkins held the property under a lease from the Washington Holding Company and he subleased the properties to defendant corporation upon the commencement of its operations, the rental price being $500 per month during 1936, $600 per month during 1937 and $650 per month during 1938. Defendant had no assets or liabilities at the time it took over the properties. Dr. Jenkins, the president of defendant corporation, continued to be in charge of the hospital and the clinic.

In operating the clinic and the hospital defendant charged a fixed fee for each service rendered. If a patient could pay the charge it was collected in full but if he could pay only a part of the charge the down payment was taken and an attempt was made to collect the balance at a later date. If the patient was entirely without funds the services rendered were set up at the fixed rate and an attempt was later made to collect the amount of the charge or as much of it as possible. The secretary of defendant corporation testified that some of the nonpaying patients might actually develop later into paying patients and if so the money received was credited to income. Attempts were made to collect all charges for services through an outside collector employed by defendant. During the year 1936 the hospital had a total of 1,782 patients, classified as 1,156 full-pay, 578 part-pay and 48 non-pay. Of the 578 part-pay patients, 519 were school children who were referred to the hospital for tonsilectomies by a Dr. Dryer, who performed the necessary surgical work and paid to the hospital the $2.50 charge for each pupil. During the years 1937 and 1938 a larger number of patients were admitted but the proportion of full-pay and non-pay patients remained substantially the same as in 1936.

Deductions for unemployment insurance were made by defendant from all cash wages paid to its employees but these deductions were not remitted to plaintiff.

[1-3] The general rule that the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them is applicable to the present appeal. All intendments are in favor of the judgment of the lower court. The evidence must be considered in light of the rule that provisions for exemption from taxation are to be strictly construed against the taxpayer. Helping Hand Home v. San Diego County, 26 Cal. App.2d 452, 459, 79 P.2d 778. The trial court could draw reasonable inferences from the facts established and base its findings thereon. In making its findings the trial court was not bound by the articles of incorporation of defendant or the fact that it was organized under section 606 of the Civil Code but it could take into consideration the actual conduct of defendant and its methods of operation. Estate of Dol, 182 Cal. 159, 166, 187 P. 428; Stewart v. California Medical, etc., Association, 178 Cal. 418, 421, 176 P. 46.

[4] In making its findings the trial court could properly take into consideration the fact that defendant was incorporated shortly after the enactment of the statute sought to be enforced by this litigation; that without assets of its own it took over a private institution which it continued to operate with the same staff which had previously operated it; that it received no gifts or donations from individuals or from the Community Chest or any similar organization; that it has no legal obligation whatever to perform any particular act of charity; that the institution under defendant's control was operated and maintained upon revenue derived wholly from fixed charges against its patients.

[5, 6] In order to be exempt from making the contributions it was incumbent upon defendant to prove that it was organized

exclusively for charitable purposes; that it was and is operated for charitable purposes; and that no part of its net earnings inured to the benefit of any private shareholder or individual. We are satisfied that the finding of the trial court that defendant failed to establish these points is sustained by the evidence.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is affirmed.

We concur:

MOORE, P. J., and McCOMB, J., concurred.

54 Cal.App.2d 257

LINDSTROM v. PALMER et al.

Civ. 13729.

District Court of Appeal, Second District, Division 1, California.

Aug. 31, 1942.

1. Licenses 🔑26

Evidence sustained finding that agreement for exchange of brokerage company's stock for stock held by customer, made by officer of brokerage company who was in complete charge thereof, and who used company's stationery in all transactions, was not merely the personal agreement of the officer but was the agreement of the company and within the coverage of brokerage company's bond.

2. Licenses 🔑26

In fraud action by customer of brokerage company on brokerage company's bond, conditioned upon faithful application of funds received and faithful performance of obligations in purchase or sale of securities by broker, evidence sustained finding that agreement for exchange of company's stock for stock in aircraft company held by customer, made on false representation that brokerage company was in sound financial condition was a "brokerage transaction" within the terms of the bond and surety on the bond was liable therefor. Gen.Laws 1937, Act 3814, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Brokerage Transaction".

◆

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by August H. Lindstrom against Douglas B. Palmer and others for fraud and deceit. From a judgment for plaintiff, defendant National Surety Corporation appeals

Affirmed.

James H. Sims and Bailie, Turner & Lake, all of Los Angeles, for appellant.

Erwin H. Haas, of Los Angeles, for respondent.

YORK, Presiding Justice.

Respondent brought the instant action for fraud and deceit against the corporation, Palmer, Miller & Co., a licensed security broker, and joined Douglas B. Palmer, James Crosson Miller, officers and stockholders of the corporation, and Harold Carter, a salesman. National Surety Corporation was also joined as surety for the corporation on its bond in the sum of $5,000.

From the judgment in favor of respondent and against Douglas B. Miller, Palmer, Miller & Co., and the National Surety Corporation, for $4,069.37, the National Surety Corporation prosecutes this appeal.

Appellant urges primarily that the evidence is insufficient to support the court's findings that the transaction here sued upon was a corporate rather than a personal transaction; and secondarily, that the evidence does not disclose that the said transaction was one covered by the surety's bond.

In addition to finding that respondent beginning on November 23, 1938, was a customer of defendant corporation and that he purchased through it as his broker 1,660 shares of common capital stock of Interstate Aircraft & Engineering Corp., and on the 7th of February, 1939, was the owner of said shares, the court also found that on February 7, 1939, defendant corporation, through defendant Palmer acting in his capacity as president and general manager thereof, entered into an agreement to purchase from respondent said 1,660 shares of said Interstate stock, at the agreed price of $4,070, of which the sum of $35 was forthwith paid in cash, the balance payable August 1, 1939, with interest at 6 per cent per annum. That at the time and as a part of the same agreement, defendant agreed that the said corporation would issue to respondent an aggregate of 370 shares of its preferred capital stock and 740 shares of its common capital stock and that on August 1, 1939, said preferred shares would be repurchased at $11 per share plus 6 per cent accrued interest from February 1, 1939. That on April 14, 1939, a certificate evidencing 370 shares of preferred stock of defendant corporation was transferred by defendants Palmer, Miller & Co. and Douglas B. Palmer to respondent, but only 74 shares of common stock were issued; "and it is true that the defendants did not, on August 1, 1939, or at any other time, faithfully and honestly perform their obligation to pay to plaintiff the agreed balance of $4015 together with interest at six per cent (6%) per annum from February 1, 1939, except that it is true that the defendants have heretofore paid to plaintiff the sum of $466 as and for interest for the period from February 1, 1939, to January 20, 1941, and the sum of $182 on account of said principal."

The court found that defendant corporation and defendant Palmer purchased said 1,660 shares of Interstate from respondent "with the purpose of reselling them and of offering them for sale to the public and that all of said shares were thereafter and within a short period of time sold by" defendant corporation.

It was further found that in order to induce respondent to enter into said agreement, "and for the purpose of deceiving, injuring and defrauding the plaintiff, the defendants, Palmer, Miller & Co., and Douglas B. Palmer, concealed from him facts which were particularly within their knowledge and which they knew to be true, to-wit: That the financial condition of Palmer, Miller & Co., was bad and that it had accounts payable which were due and which it was unable to pay and knew that it had a deficit from operations in the sum of $16,000 or thereabouts and knew that the broker's certificate theretofore issued to it was to be cancelled and revoked by the Commissioner of Corporations because of the company's bad financial condition and impairment of capital. * * *

"VII. The court finds that it is true that the defendants Palmer, Miller & Co., and Douglas B. Palmer represented to plaintiff that the defendant Palmer, Miller & Co., was in a good condition and * * * that it had been in business a long time and was going to continue in the brokerage business; * * * that defendants represented that Palmer, Miller & Co. was to be the exclusive broker for the sale of all the stock of the Interstate Aircraft & Engineering Corp., and that if anyone wanted to buy its stock he would have to come to them to purchase it. That said representations were false and untrue and were known by the defendants at the time of making same to be false and untrue and that it is true that said statements and representations were made for the purpose of deceiving, injuring and defrauding the plaintiff and for the purpose of inducing the plaintiff into said agreement for the sale of his 1660 shares * * * that plaintiff believed and relied on said statements and representations and thereupon entered into said agreement and was injured and defrauded thereby."

It was further found that on February 7, 1939, the articles of incorporation of defendant corporation did not provide for any preferred stock and that an amendment to its articles of incorporation creating such preferred stock was not filed in the office of the secretary of state until March 2, 1939, and at the time the said agreement was made on February 7, 1939, said corporation had no permit to sell and issue its preferred stock and at no time was such a permit issued by the commissioner of corporations. "That it is true that plaintiff did not purchase said shares of stock of Palmer, Miller & Co., but accepted same as a guarantee that the defendants would faithfully perform the obligations of their agreement."

As a conclusion of law from the facts found, the court decreed: "That the said transaction referred to in the foregoing findings of fact constituted a brokerage transaction under the terms and conditions of the bond filed and maintained by said defendant with the Commissioner of Corporations and within the meaning of the Corporate Securities Act of the State of California."

The agreement heretofore referred to was evidenced by the following letter introduced in evidence as Plaintiff's Exhibit No. 2:

"Palmer, Miller & Co., Investment Securities, 650 South Spring St., Los Angeles * * * February 7th, 1939 Mr. August H. Lindstrom, 228 West 30th St., Los Angeles, Calif. Dear Mr. Lindstrom: Attached is my personal note for the amount of $3,700 dated February 1st, 1939 and maturing August 1st, 1939 which bears interest at the rate of six per cent per annum. As collateral security for this note is 7500 shares of Palmer, Miller & Co. Common stock of which there is 25,000 shares outstanding.

"Palmer, Miller & Co. are amending their Articles of Incorporation to create a Six per cent Cumulative Preferred Stock $10.00 par value, callable at $11.00 per share. With each share of Preferred stock will be given two shares of Common stock.

"When the Preferred stock is ready for delivery it is understood you are to return the 7500 shares of Common stock and personal note $3700 to me and receive 370 shares of the Preferred stock of Palmer, Miller & Co., and 740 shares of Common stock.

"Receipt is hereby acknowledged of 1660 shares Interstate Aircraft & Engineering Corp. Common stock @ $2.25 per share, value $3735. Attached is my check for $35.00

"It is further understood I am to repurchase from you the 370 shares of Palmer, Miller & Co. Preferred stock on August 1, 1939 at $11.00 per share plus accrued interest from February 1st, 1939.

"Your very truly, Douglas B. Palmer."

Plaintiff's Exhibit 3 reads as follows:

"Palmer, Miller & Co., Investment Securities, 650 South Spring Street, Bank of America Building, Los Angeles, Calif.

Douglas B. Palmer, Office Feb. 7, 1939

As Principals we have this day Bought from you for our own account:

Quantity	Security	Price	Amount	Accrued Interest
1660	Interstate Aircraft & Engineering Corp.	2-1/4	$3735.00	

Commission	Tax	Ins. Post, etc.	Credit
	.68		3734.32

Assuring you of our appreciation of this business, we are,

"Yours very truly, Palmer, Miller & Co. By CCR."

The evidence adduced at the trial reveals that defendant Carter, a licensed salesman for defendant corporation Palmer, Miller & Co., sold respondent the 1,660 shares of Interstate Aircraft stock through Palmer, Miller & Co.; that during the early part of 1939 said Carter contacted respondent, at defendant Palmer's suggestion, and had him come to the office of the corporation. Moreover, Cater told respondent he could liquidate his Interstate Aircraft stock for more money.

Defendant Palmer, called as a witness by respondent testified he was the president and general manager, as well as one of three directors of the corporation and owned one-half of its 25,000 outstanding shares of stock, defendant Miller owning the other half; that between January 1 and February 7, 1939, the commissioner of corporations made an investigation of the books of the corporation and took objection to a lot of items which the corporation had in its statement referring to deferred liability; that after the purchase of respondent's 1,660 shares of Interstate Aircraft had been placed in the inventory of the corporation on February 7, 1939, the corporation's assets were above its liabilities and it had an operating loss of approximately $14,000; said witness testified he did not tell respondent that Palmer, Miller & Company had an operating deficit and did not tell him that it had been operating at a loss, but he did tell respondent that the company needed additional working capital for the business; that the company intended making application to the commissioner of corporations for a permit to raise $10,000 through the sale of preferred stock and "I asked Mr. Lindstrom if he would be interested in acquiring some of the preferred stock of the corporation and Mr. Lindstrom said he would see what the situation was, that he had contemplated a trip to the old country, but that he would let me know his situation at a later date. At a later date Mr. Lindstrom was in my office and we again discussed— * * * I told Mr. Lindstrom that the brokerage companies had been rather hard put of late; that the market had been dull;

that I didn't know of any houses on the street that were making any money * * * that we had made arrangements to handle such an issue of the American Aircraft Company * * * Mr. Lindstrom came into the office a few days afterwards at which time we went into the market value of his Interstate Aircraft Corporation stock. * * * The market at that time was $2.25. I told Mr. Lindstrom that we would sell his stock at that price; that he would realize $3735 and that he would acquire 370 shares of preferred stock of Palmer, Miller & Company." After some further negotiations, Mr. Lindstrom came to the office of the corporation and told Mr. Palmer that "he had pretty well made up his mind that he desired to go to the old country in a year and therefore wanted to leave without having any securities here * * * he wanted to be sure that anything he bought at this time could be relinquished. I told Mr. Lindstrom that under the laws of the State of California a corporation could not buy back its own stock; therefore, that I could not obligate the corporation in any way, but that if he desired to make a personal transaction with me, that I would buy his stock and give him a repurchase agreement * * * that is in writing (Plaintiff's Exhibit 2)." After said agreement was executed, Mr. Lindstrom turned over to Mr. Palmer the 1,660 shares of Interstate Aircraft stock, with respect to which Mr. Palmer stated: "I gave them into the cashier's department at Palmer, Miller & Company and told them that I had purchased this stock from Mr. Lindstrom and for them to make out statements.

"Q. And immediately received a credit on the books of the corporation for the sale of those 1660 shares of stock to the Palmer, Miller & Company? A. The stock would enter my personal account, Mr. Haas. From my personal account I turned over the stock to Palmer, Miller & Company.

"Q. On the same day? A. Yes." Whereupon, plaintiff's Exhibit 3, heretofore set out, was introduced into evidence.

Respondent testified that early in 1939 Mr. Carter came to see him to find out if he (respondent) wanted to dispose of some stock he owned and if he would be interested in oil stock. "* * * Then he introduced Mr. Palmer of Palmer, Miller Company. * * * He (Palmer) was going to issue preferred stock. He (Carter) asked me how I would like that. Well, I told him I didn't know anything about it but maybe I could look into it. So he wanted me to see Mr. Palmer. Then I talked to Mr. Palmer a little about it. I wanted to sell for cash if I could and get the money. I wanted to invest the money in something else. At that time Mr. Palmer told me, and Mr. Carter I think had told me too, that he was going to have an amendment to their incorporated business, and that they were going to issue some preferred stock in place of the common. And I thought myself that will be all right, but I wanted to dispose of that Palmer, Miller Company stock. * * * The agreement was drawed up and I looked at it and it was all right * * * and we done the business and I was going to get the preferred stock as soon as it was issued but it was not ready yet; I had to wait for a little while. Then he gave me a note and some common stock as the security, or whatever you call it, so that when the preferred stock is all fixed up I will get that and then I have to turn back the common stock I held to Palmer, Miller, and also Mr. Miller's (Palmer's) note. * * * Mr. Palmer never said anything about the company's affairs and business, only that it was all right; they were in that business and was going on with that business, and get all the aircraft corporation stock, and have a sale of that and them alone. And for that reason he insisted upon getting that 1660 shares I held because he was going to get all the aircraft corporation stock himself. * * * They were licensed and had a bond up so that everything was solid. That is what Mr. Carter told me, that they were solid. * * * Mr. Carter and Mr. Palmer both mentioned that to me." On cross-examination respondent was asked:

"Q. Mr. Lindstrom, Mr. Palmer told you that the company could not guarantee to buy this stock back, and that he would handle this matter personally, didn't he? A. No, sir; not that I can remember—never anything said about buying anything personally, but he promised he was going to buy the company's ten dollar preferred stock back in six months, which would be the first of August.

"Q. You knew Mr. Palmer was the one that was going to buy it back? A. He didn't say that he would, but I was doing business with him so naturally I thought he was doing it in the company's name, or his own—I thought it was in the company's name. The head on the paper was 'Palmer, Miller & Company,' and I thought it was all under the company.

"Q. You never had anything signed by the company by Mr. Palmer, did you? A. No, not that agreement.

"Q. They didn't sign the note, did they? A. The note was signed by Mr. Palmer, yes, sir.

"Q. And when you wrote to Mr. Palmer on July 25, you addressed the letter to Mr. Palmer, did you not? A. Yes. I found out his address and he was not in the office down there any more, so I believe I sent it to his home."

Mr. Palmer further testified that when he received the stock mentioned in Exhibit 2 from Mr. Lindstrom "I subjugated the stock to Palmer, Miller & Company. It went into their inventory and they sold the stock.

"The Court: Who got the money when that was sold? A. Palmer, Miller & Company. * * *

"Q. And you had actually turned over the 1660 shares to Palmer, Miller & Company and Palmer, Miller thereby received $3700? A. That is correct."

It was stipulated that the broker's certificate of Palmer, Miller Company was suspended on March 9, 1939.

It should be noted that defendant Miller had ceased to be active in the corporation in July, 1938, and that he and the corporation's secretary had moved away from the office, leaving defendant Palmer in sole charge of the affairs of the corporation, as general manager.

The agreement to purchase the 1,660 shares of Interstate Aircraft stock from respondent was clearly within the ordinary course of business of the corporation licensed to purchase and sell securities in this state. Moreover, the issuance by the Commissioner of Corporations under date of March 6, 1939, of a permit allowing said corporation to issue new common and preferred stock, pursuant to its application therefor, constituted a ratification of the agreement of February 9, 1939.

[1,2] It must not be overlooked that respondent had been a customer of the corporation for several months prior to the transaction here in question; that all of his dealings were with Palmer, as an officer of the corporation, and with Carter as a salesman employed by the corporation. While it is true that Palmer used the personal pronoun in his letters to respondent and that he signed the agreement without any designation of his official capacity or that he was acting on behalf of the corporation, all of these documents were written on the official letter head of the corporation. Moreover, the testimony on the issue as to whether defendant Palmer was dealing with respondent in his personal capacity or on behalf of the corporation is directly conflicting. While appellant urges that this conflict is not substantial, an examination of all of the evidence adduced as well as a consideration of all the circumstances surrounding the transaction reveal that such evidence is amply sufficient to sustain the findings of the trial court that the corporation was a party to the agreement of February 9, 1939.

Section 6 of the Corporate Securities Act, in effect when the bond here sued upon was filed with the commissioner of corporations, provided as follows: "* * * Said bond shall be conditioned upon the strict compliance with the provisions of this act, and the honest and faithful application of all funds received and the faithful and honest performance of all obligations and undertakings in the purchase or sale of securities, by said broker, his agents and employees." Deering's Gen. Laws, 1937, Act 3814.

In the case of Bridges v. Price, 95 Cal. App. 394, 396, 273 P. 72, 73, "The evidence showed that on September 29, 1925, respondent Bridges delivered to one Ormond, as agent for Price, 210 shares of capital stock of National Automatic Music Co., to be exchanged for 336 shares of Monolith Portland Cement Company stock. Subsequently Price admitted to Bridges that he had sold his Music Company stock and had not procured the Cement Company stock, and on November 19, 1925, Price persuaded respondent to take his (Price's) promissory note for the value of the stock, payable 27 days after date. The note was never paid, and after its maturity this action was brought on the original obligation, and appellant [surety company] was joined as a defendant upon its bond. Judgment followed against both defendants."

It was there held: "Whatever may be meant by the word 'honest,' the 'faithful performance of all obligations and undertakings' means no more than performance of those obligations and undertakings according to their terms. Bonds conditioned for the 'faithful performance' of a contract have always been construed as being breached by any failure of performance in the principal contract. [Citing authorities.] In fact, such bonds are frequently referred to as 'faithful performance bonds.' Price having failed in the faithful performance of his obligation in the sale and purchase of securities for Bridges, appellant became liable to Bridges upon its bond." The ruling in the cited case is applicable to the facts presented by the case at bar.

There was evidence before the trial court which justified each and all of the material findings upon which the judgment herein was predicated; therefore, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

SIPPER v. URBAN, Real Estate Com'r.

Civ. 13614.

District Court of Appeal, Second District,
Division 2, California.

Sept. 10, 1942.

Hearing Granted Nov. 5, 1942.

1. Mandamus 🔑173

Upon petition for writ of mandate to annul state real estate commissioner's order suspending petitioner's license as a real estate broker for ten days on the ground that such order was void and that commissioner exceeded his authority and jurisdiction in making such order, petitioner was entitled to a trial de novo on the issues involved.

2. Appeal and error 🔑781(4)

Question whether state real estate commissioner's order suspending real estate broker's license for a period of ten days was void did not become "moot" upon expiration of the ten day period where hearing on commissioner's order that broker show cause why his license should not be suspended or revoked for violation of the original order of suspension was still pending awaiting outcome of broker's appeal from order of superior court denying a writ of mandate annulling the original order.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

3. Brokers 🔑3

If state real estate commissioner's order suspending real estate broker's license for a period of ten days was without legal justification, broker could not be subjected to the revocation of his license for violation of the terms thereof.

4. Appeal and error 🔑781(4)

If a judgment which is left unreversed will prejudice the party against whom it is rendered as to an act vital to his rights, it cannot properly be held that the question before the reviewing court is "moot".

5. Mandamus 🔑3(11)

Where no hearing had been held on state real estate commissioner's order that real estate broker show cause why his license should not be suspended or revoked for violation of prior order suspending license for ten days, mandamus would not lie to annul the order to show cause since broker had not exhausted his administrative remedies as petitioner for writ of mandate is required to do before seeking aid of courts.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding upon the petition of Albert Abraham Sipper for a writ of mandate to annul orders of Clarence Urban, as Real Estate Commissioner, etc., suspending petitioner's license as a real estate broker for a period of ten days from September 29, 1941, and ordering petitioner to show cause why his license should not be suspended or revoked for continuing to operate as a real estate broker during the ten days in which his license had been suspended. From an order denying the writ of mandate, petitioner appeals.

Order reversed.

Silverman & Hindin, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

W. J. WOOD, Justice.

This is an appeal by petitioner from an order of the superior court denying a writ of mandate. Respondent, as real estate commissioner of the State of California, after a hearing, on September 19, 1941, made an order suspending the license of petitioner as a real estate broker for a period of ten days from September 29, 1941. On October 23, 1941, an order was issued by respondent ordering petitioner to show cause on November 5, 1941, why his license should not be suspended or revoked for the reason that he had continued to operate as a real estate broker during the ten days in which his license had been suspended. By stipulation and because of the present appeal respondent has continued the hearing on the order to show cause issued on October 23, 1941. In his petition appellant alleges that the findings and order of September 19, 1941, are not supported by any sufficient or competent evidence, that the order is void and that respondent has exceeded his authority and jurisdiction in making the order of suspension.

No appearance was made by respondent in the court below. Attached to the amended petition was a transcript of the proceedings before respondent. The trial court received no evidence and did not conduct a hearing or trial de novo but upon reading the petition and the transcript attached thereto made the following minute order: "The Court having read and considered the entire record of the evidence introduced and the proceedings had before respondent, finds that there is sufficient competent evidence to sustain the decision and the implied findings of respondent and the order suspending petitioner's license and finds no reason for annulling said order. The petition for a writ of mandate is denied."

[1-4] Subsequent to the making of the order from which the appeal is being prosecuted the Supreme Court of California rendered its decision in Laisne v. California St. Bd. of Optometry, 19 Cal.2d 831, 844, 123 P.2d 457, a case in which the petitioner sought to have annulled an order of a state board which had revoked a certificate of registration to practice optometry. The court held that, "if the order is questioned in a court of law, then under the Constitution of this state the petitioner must be given a trial de novo on the issues involved." 19 Cal.2d 831, 844, 123 P.2d 457, 465. This ruling is binding upon the present appeal. But respondent contends that the question has become moot, since petitioner was suspended for a period of only ten days and this period has long since elapsed. This contention cannot be sustained, for there must be taken into consideration the fact that respondent has issued an order to show cause for the alleged violation of the original order of suspension and the hearing on the second order is still awaiting the outcome of the present appeal. Clearly, if the original order was without legal justification petitioner cannot be subjected to the revocation of his license for violation of its terms. An affirmance of the order from which the appeal is now prosecuted would leave petitioner in the situation where, without his day in court, he would be bound by an order which he claims to be void and which would subject him to punishment for its violation. If a judgment which is left unreversed will prejudice the party against whom it is rendered as to an act vital to his rights it cannot properly be held that the question before the reviewing court is moot. Hartke v. Abbott, 106 Cal. App. 388, 289 P. 206; 4 C.J. 576; 4 C.J.S., Appeal and Error, § 1354; Clarke v. Beadle County, 40 S.D. 597, 169 N.W. 23. The question now before us has not become completely moot.

[5] From the foregoing it is apparent that the order appealed from must be reversed insofar as it is applicable to the order made by respondent on September 19, 1941. A different situation is presented by petitioner's contention that the order to show cause issued on October 23, 1941, should be annulled, for petitioner's contention runs counter to the rule that petitioner must exhaust his administrative remedies before seeking the aid of the court. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715. No hearing has been held by respondent on this order to show cause. Respondent has shown no disposition to conduct such hearing during the pendency of this appeal and it is apparent that petitioner's rights will be safeguarded.

The order is reversed.

MOORE, P. J., and McCOMB, J., concurred.

54 Cal.App.2d 214

MERIDIAN, Ltd., et al. v. SIPPY, District Health Officer.

Civ. 6708.

District Court of Appeal, Third District, California.

Aug. 29, 1942.

Rehearing Denied Sept. 26, 1942.

Hearing Denied Oct. 26, 1942.

1. Food ⚿1

Dairy and milk production business is essentially one which is affected with a public interest, and as such is subject to governmental regulations. St.1933, p. 60, § 1 et seq.; St.1939, p. 1743, § 491(b).

2. Municipal corporations ⚿592(1)

The provisions of the Agricultural Code authorizing municipalities to provide higher standards for grades of market milk than that provided by state laws, and giving municipalities the right to set up its own dairy system of inspection did not expressly relinquish any other power vested in the state; hence regulations as to inspection by city must not be in conflict with state laws. St. 1933, p. 60, § 1 et seq.; St.1939, p. 1743, § 491(b).

3. Municipal corporations ⚿592(1)

Where the state relinquished to municipalities certain regulation and inspection rights relative to the dairy and milk production business, the relinquished rights could be reasserted by the state at any time as the business was affected with a public interest. St.1933, p. 60, § 1 et seq.; St.1939, p. 1743, § 491(b).

4. Municipal corporations ⚿592(1)

A city ordinance providing that no permit shall be issued to sell milk in the city, unless the dairy is inspected by the health officer of the city, was in direct conflict with provision of Agricultural Code that whenever a producer sells milk within two or more cities or counties the Director of Agriculture shall designate the county or city which shall conduct the inspection. St.1933, p. 60, § 1 et seq.; St.1939, p. 1743, § 491(b).

5. Evidence ⚿83(1)

It must be presumed that a health officer designated by Director of Agriculture to make inspection of dairies selling milk within two or more cities, and who was directed to enforce regulations of municipality calling for higher standards, will do his duty. St.1933, p. 60, § 1 et seq.; St.1939, p. 1743, § 491(b).

6. Municipal corporations ⚿592(1)

The Agricultural Code, dealing with permits to milk producers who sell milk in two or more cities, which provides for inspection by the city or county designated by Director of Agriculture and provides that cities shall "enforce" all local ordinances establishing higher standards of quality, gives cities the coercive power but means that in issuing permits state will "give force to" local ordinances, and that no permits will issue unless the municipal standard of requirements be maintained. St.1933, p. 60, § 1 et seq.; St.1939, p. 1743, § 491(b).

To "enforce" a law usually means to cause the arrest and to coerce by "actual force and punishment" but it does not necessarily imply this; it may mean to give effect to, to cause to have force.

See Words and Phrases, Permanent Edition, for all other definitions of "Enforce".

7. Municipal corporations ⚿592(1)

Where state law provided for state inspection and licensing of dairies which sell milk in two or more cities and authorized municipalities to require higher standards of quality than that fixed by state law, a city ordinance providing that no permit should issue to any producer unless inspected by city inspector and unless milk originated in the county, was invalid. St.1933, p. 60, § 1 et seq.; St.1939, p. 1743, § 491(b).

8. Constitutional law ⚿88
Municipal corporations ⚿611

Any ordinance or statute which prevents any person from engaging in lawful business cannot be upheld unless protection of life, health or property makes it reasonably necessary.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Meridian, Ltd., a corporation, and others against Dr. John J. Sippy, as District Health Officer, for a judgment declaring petitioner's rights and duties with respect to a certain ordinance of the City of Stockton relating to the inspection of milk dairies. From a judgment upholding the validity of the ordinance, plaintiffs appeal.

Reversed with directions.

Lafayette J. Smallpage and Forrest E. Macomber, both of Stockton, for appellants.

Louttit, Marceau & Louttit, of Stockton, for respondent.

Earl Warren, Atty. Gen., W. T. Sweigert, Deputy Atty. Gen., and F. Bert Fernhoff, City Atty., and Homer Buckley, Asst. City Atty., both of Oakland, as amici curiae, for respondent.

ALLEN, Justice pro tem.

This is an action for a judgment declaring petitioner's rights and duties with respect to respondent in relation to a certain ordinance of the city of Stockton. The petitioners assert that certain provisions of said ordinance are invalid. The trial court upheld the validity of such ordinance, and from this judgment petitioners have appealed.

The facts are undisputed. Meridian, Ltd., a corporation, appellant, is the owner of a ranch known as "El Solyo" located principally in Stanislaus County and partly in San Joaquin. It owns and operates a dairy, the buildings whereof are located in Stanislaus County, approximately four or five miles from the southern boundary of San Joaquin County. This dairy is engaged in the production and sale of Grade A milk, and the dairy buildings and the dairy herd are all maintained and operated in compliance with all requirements of the State Department of Agriculture and the ordinances of San Joaquin County. Respondent Sippy is the district health officer of San Joaquin Health District. This district was created under the local Health District Act of 1917, and its boundaries are identical with those of San Joaquin County. The city of Oakland, the city and county of San Francisco, and the city of Los Angeles, all maintain a milk inspection service approved by the director of agriculture of the State of California, and each of said milk inspection services has issued appellant Meridian, Ltd., a permit under the provisions of the Agricultural Code, St.1933, p. 60, § 1 et seq., and said permits are still in force. The San Joaquin local health district also has a milk inspection service approved by the Department of Agriculture.

The ordinance in question, No. 1229 of the city of Stockton, was enacted in 1931. Section 1 thereof designates the district health officer of the San Joaquin Health District as "health officer" of the city of Stockton. Section 5 requires every person engaged in the production, processing, or distribution of milk for retail redistribution, to obtain a permit from the health officer before selling, distributing or offering for sale any milk in the city of Stockton. It also provides that "In no case shall a permit be issued to any person, firm, association or corporation to sell * * * any milk in the city of Stockton unless the dairy, source of supply or place of origin is regularly inspected by the health officer or his authorized representatives." Such ordinance also requires higher standards for the grades of market milk than those required by the Agricultural Code.

Appellant "Cloverleaf Farms" is a limited partnership and maintains and operates a pasteurizing, processing and milk distributing plant in the city of Stockton and holds permits issued by the director of agriculture and the city of Stockton. Appellant, Meridian, Ltd., is selling Grade A market milk in the city of Oakland and delivering market milk for sale to Tracy for pasteurization and cream separation and thereafter for distribution in San Francisco, Oakland, Tracy and elsewhere.

Section 491(b) of the Agricultural Code, as amended in 1939, St.1939, p. 1743, provides that whenever a producer or distributor of milk sells or delivers within the jurisdiction of two or more cities, the director of agriculture, after an investigation and consultation with the health officer of each city and county involved, shall designate a county or city to conduct dairy and milk plant inspection. It further provides that:

> "All market milk and dairy products so inspected may be sold and delivered within the jurisdiction of any county and city; provided, that applicable local ordinances of such county or city are not thereby violated. The county or city designated by the director to render such inspection shall enforce all applicable local ordinances of each county and city into which such market milk and dairy products are sold or delivered."

In compliance with the foregoing provision, the director of agriculture made an investigation and consulted with the health officers of the above-mentioned cities and also with the health officer of the city of Stockton, and thereupon designated and appointed the health officer of the city of Oakland to conduct the dairy inspection of the appellant Meridian, Ltd. The permit said appellant now holds was issued by such authority.

This appellant desires to deliver milk from its dairy to appellant, "Cloverleaf Farms" for pasteurization in the city of Stockton and thereafter for resale through said "Cloverleaf Farms" and other authorized distributors in Stockton holding valid permits, and said "Cloverleaf Farms" desires to receive and purchase such milk. Petitioners made application to respondent for forms for a permit as provided in Ordinance No. 1229, but respondent refused to issue such forms or permits for the reason that appellant's Meridian, Ltd., dairy, the source of the supply of milk, was not regularly inspected by the district health officer of San Joaquin local health district, who is also the health officer of the city of Stockton. The district health officer of San Joaquin local health district does not inspect dairies beyond the external boundaries of his district which are identical with the boundaries of San Joaquin County.

As a result of this Ordinance No. 1229 of the city of Stockton, no dairy, although approved by the director of agriculture, may bring any market milk from outside the boundaries of the county of San Joaquin and sell in the city of Stockton. The effect of the ordinance is absolutely prohibitive.

Respondent maintains that the ordinance is valid as a reasonable exercise of the city's police power to protect and maintain the public health of its inhabitants. He claims that as section 451 of the Agricultural Code, St.1937, p. 1974, provides that "no provision of this division * * * or any rule and regulation of the director is a limitation on the power of a municipality or county to provide for reasonable additional regulations not in conflict therewith requiring standards higher than the minimum requirements for the grades of market milk established in this division," therefore this statute expressly authorizes the city to "require higher standards" and that the Stockton ordinance has done this. He further maintains that it would be idle to require "higher standards" without having some way of checking or method of inspection to determine whether or not the "higher standards" are being maintained, and that inspection is an incidental power necessary to the exercise of the right to have "higher standards"; that the approved and efficient method of milk inspection requires that it be made at the dairy or source of its origin, which makes it necessary that a reasonable boundary of an area within which the inspection may be made, be established, which is the only proper method, and one that has been approved by the courts (citing Whitney v. Watson, 85 N.H. 238, 157 A. 78); that to require any municipality to inspect any dairy wishing to supply its inhabitants with milk located anywhere between Siskiyou and San Diego would make efficiency inspection impossible, and that therefore definite and reasonable areas are necessary; that the city cannot be required to go beyond this area and inspect (citing Witt v. Klimm, 97 Cal.App. 131, 274 P. 1039), and that, because of administrative necessity, innocent and harmless products may be excluded, does not render the ordinance unconstitutional (citing Carolene Products Co. v. Harter, 329 Pa. 49, 197 A. 627, 119 A.L.R. 235); that Stockton is a charter city and the Constitution has conferred upon it full power, unhampered by acts of the Legislature, to legislate upon its own local "municipal affairs," and that the enforcement of its own ordinance for the protection of the health of its own inhabitants is such a municipal affair; that the Constitution of California (§ 6, art. XI) particularly provides that cities and towns are "empowered * * * to make and enforce all laws and regulations in respect to municipal affairs"; that section 491(b) of the Agricultural Code, supra, cannot be construed to conflict with the constitutional provision giving cities the right to enforce their ordinances relating to "municipal affairs"; that it is more reasonable to hold that the state, after the amendment giving municipalities the right to require higher standards, withdrew from the field of inspection in such cities as may have established higher standards.

These contentions all seem very plausible and logical and are supported by much respectable authority, but we believe that respondents take too limited a view of this important matter. If the position of respondent is sound, it may lead to dire results. It would be possible for every city in the State of California to erect prohibitive trade barriers around the boundary of the county of its locale; not only milk, but many other food products designed for human consumption could be barred in this same manner. The free flow of goods from one community to another is conducive to the general prosperity and economic welfare of the state and nation. Furthermore, milk production is a legitimate business; millions of dollars in this state are invested in this industry, and so long as the persons engaged in this business put out a clean, pure and wholesome product, a way should be found to allow their products to flow freely in the market, unburdened by duplication of inspection and prohibitive trade barriers, and if the present law on our statute books can be given a reasonable construction which will bring about this result, it should be given such construction.

[1, 2] It is now generally recognized that the dairy and milk production business is essentially one which is affected with a public interest, and as such is subject to governmental regulation. 22 Am.Jur. 851. Because of this, many laws have been passed by most states in the Union and held not to be in violation of the Constitution providing for control of milk and its price, and for inspection and certification. In California, a general dairy law was passed in 1923. Stat.1923, p. 849. This law did not purport to cover the entire field of milk production and distribution. It was expanded by amendment. However, until 1937, the state did occupy the whole field of milk inspection and distribution. Pacific Coast Dairy v. Police Court, 214 Cal. 668, 8 P.2d 140, 80 A.L.R. 1217. All parties practically agree on this point. A well-considered superior court decision in Los Angeles in 1935 (Pater v. City of Los Angeles) so held, and in recognition of the soundness of this decision the law was changed in 1937 by amending section 451 of the Agricultural Code, which authorized municipalities to provide higher standards for grades of market milk than that provided by state law. It did not expressly relinquish any other power. It only permitted municipalities to pass ordinances "to provide for reasonable additional regulations * * * requiring standards higher than the minimum requirements for the grades of market milk established in this division." This amendment also provided that this relinquished right must not be in conflict with Division IV of the Agricultural Code. Therefore, assuming that this amendment did give the municipality the incidental right to set up its own dairy system of inspection, this inspection must not be in conflict with the code.

[3, 4] Being a matter of general concern, this relinquished right could be reasserted by the state at any time. If it did not do so before, it did reassert it when, in 1939, section 491 of the Agricultural Code was amended and section 491(b), supra, was added. This section now specifically deals with dairy inspection and provides that whenever a producer or distributor delivers or sells milk within the jurisdiction of two or more cities or counties, the director of agriculture, after an investigation and consultation with the health officers of each county and city involved "shall designate the county or city which shall conduct the dairy and milk plant inspection." Thus it reoccupied this field of inspection, and declared that "milk and dairy products so inspected may be sold and delivered within the jurisdiction of any county and city." Section 5 of Ordinance No. 1229 is in direct conflict with this because it states "in no case shall a permit be issued * * * to sell or expose for sale or exchange * * * any milk in the City of Stockton unless the dairy * * * is regularly inspected by the Health Officer" of the city of Stockton.

[5] It is true that section 491(b), supra, provides that milk inspected by the authority of the director may be sold in any county or city provided the local ordinances of such county or city are not thereby violated, but it also provides that the county or city designated by the director to render such inspection shall enforce all applicable local ordinances of each city and county into which such market milk and dairy products are sold or delivered. Thus if a state permittee sells milk in a city having local ordinances fixing "higher standards," he must comply with these standards, and the state inspector is directed to enforce them. Therefore, the state law provides a method which permits the free flow of whole milk into the market without unnecessary duplication of inspection without depriving the cities having higher standards of their full protection. This inspection by the designated health officer is state inspection. LaFranchi v. City of Santa Rosa, 8 Cal.2d 331, 65 P.2d 1301, 110 A.L.R. 639; Peterson v. Board of Supervisors of Solano County, 65 Cal.

App. 670, 225 P. 28. It must be presumed this officer will do his duty.

[6, 7] To give effect to section 491(b), supra, we must consider the section as a whole. "To enforce" a law usually means to cause the arrest and to coerce by "actual force and punishment," but it does not necessarily imply this; it may mean "to give effect to, to cause to have force." Sharp v. State (Widener v. Sharp), 109 Neb. 766, 192 N.W. 726. Section 491(b) deals with permits and it must mean that in issuing those permits the state "will give force to" local ordinances or "give effect to them"; therefore, that no permit will issue to sell milk in Stockton unless the municipal standard of requirements be so maintained. The coercion and force to be applied to violators still lies with the city. If there were no general law on the subject giving to the people of the city of Stockton the protection of its high standards required by its ordinance, it might be reasonable to hold that Stockton or any other municipality, for the protection of the health of its inhabitants, could establish a reasonable inspection area; but the general law gives the state no right to issue a permit to sell or distribute milk in the city of Stockton, unless the permittee meets the standards of its ordinance. Therefore, it is unreasonable to require double inspection of the distributors, one by the city and another by the state, and also to require that the milk so distributed originate in San Joaquin County.

[8] Any ordinance or statute which prevents any person from engaging in a lawful business cannot be upheld unless protection of life, health or property makes it reasonably necessary. Such is not the case here. The contention of respondent if approved might result in the erection of trade barriers that would affect the economic prosperity of the whole state.

The judgment is reversed, and that portion of section 5 of Ordinance No. 1229, which reads, "In no case shall a permit be issued to any person, firm, association or corporation to sell or expose for sale or exchange, deliver or distribute any milk in the City of Stockton unless the dairy, source of supply or place of origin is regularly inspected by the Health Officer or his authorized representatives," is held to be invalid; and petitioners are declared to have a right to carry on their respective businesses in the city of Stockton, upon compliance with the terms of the Agricultural Code, and the higher standards required by said ordinance.

ADAMS, P. J., and THOMPSON, J., concurred.

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54 Cal.App.2d 244

MISITA v. DISTILLERS CORPORATION, Ltd., et al.

Civ. 12014.

District Court of Appeal, First District, Division 1, California.

Aug. 31, 1942.

As Corrected Sept. 22, 1942.

Rehearing Denied Sept. 30, 1942.

Hearing Denied Oct. 29, 1942.

1. Receivers 🔑35(1)

Generally, the power of a court to grant an ex parte order appointing a receiver for a corporation rests in the court's sound discretion, in the exercise of which the court must be governed by the situation as it is presented to the court at the time of making the order.

2. Corporations 🔑557(3)

The appointment of a receiver for a corporation may be made ex parte and without notice, if the imperative necessity or emergency is shown in the petition or supporting affidavits. Code Civ.Proc. § 566.

3. Appeal and error 🔑955

Since the power to appoint a receiver for a corporation ex parte lies in the superior court, the question on appeal is not one of jurisdiction, but of error, and as such is limited to the inquiry whether the trial court abused its discretion. Code Civ.Proc. § 566.

4. Appeal and error 🔑955

An appellate court is never justified in substituting its discretion for that of the trial court sitting nisi prius, with reference to the ex parte appointment of a receiver for a corporation, and the appellate court's power is limited to the determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. Const. art. 6, § 4½.

5. Corporations ⇨294

A court of equity has the power to appoint a receiver in a stockholder's suit for the purpose of preserving the assets of a corporation and prevent irreparable loss or injury pending suit.

6. Corporations ⇨553(5, 6)

Internal dissensions deadlocking corporation or frustrating it or threatening its purposes, official breaches of trust, mismanagement and waste, are generally regarded as grounds for a receivership to protect rights.

7. Corporations ⇨294

Where receivership proceeding is not directed toward closing the affairs of a corporation or to dissolve it, but is merely directed against the individual directors whom it is sought to remove and place the assets of the corporation in safe hands, the unfaithful directors having abandoned their trust, it is proper for the court through the agency of a receiver, to take charge of the property, if necessary for its preservation, pending proceedings for the removal of the directors.

8. Corporations ⇨553(5)

Dissensions, or honest differences of opinion, which result in making it impossible for a corporation to carry on its business to advantage, or to carry it on at all, are sufficient to invoke the action of a court of equity to appoint a receiver.

9. Corporations ⇨553(6)

Allegations that by reason of restraining orders, board of directors of corporation was not able to function, that corporation was being managed dishonestly by one of the three directors who was the majority stockholder, that such director was raising his own salary and was using the corporation for personal purposes, and that he had refused access to or inspection of corporation's books, justified trial court in appointing a disinterested person as ex parte receiver to control corporation's business, on ground that a temporary restraining order would not give adequate protection. Code Civ.Proc. § 566.

10. Corporations ⇨553(5), 555

A court of equity has inherent power in a proper case to appoint a temporary receiver for a solvent, going corporation, at the instance of stockholders, on the grounds of fraud or gross mismanagement or where there are such dissensions in corporation's governing body as to make it impossible for corporation to carry on its business to advantage.

11. Corporations ⇨552

The power of a court of equity to appoint a temporary receiver for a solvent corporation will not be exercised in a doubtful case, and the remedy being a drastic one, only in case of an urgent necessity, where there is no other adequate remedy.

12. Appeal and error ⇨955

Where trial court decided that temporary restraining order would not give adequate protection, and that order appointing a receiver ex parte for corporation was necessary, and its decision was supported by substantial legal authority, the decision was controlling on appeal.

13. Appeal and error ⇨837(2)

A showing made at hearing of order to show cause could not be properly considered in determining whether on a date several weeks prior to hearing of order to show cause, sufficient legal grounds appeared to trial court to warrant granting of ex parte order appointing a receiver for corporation pending hearing and determination of order to show cause.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Peter L. Misita against the Distillers Corporation, Ltd., and others to remove Mitchell L. Misita as director of the Distillers Corporation, Ltd., and to have a receiver pendente lite appointed for the corporation. From a series of orders made by the trial court in the matter of the receivership pendente lite, the defendants appeal.

Orders affirmed.

Hearing denied; CARTER, J., dissenting.

W. H. Spaulding, Keyes & Erskine, and J. Benton Tulley, all of San Francisco, for appellants.

Albert Picard, Ben K. Lerer, and John A. O'Kane, all of San Francisco, for respondent.

KNIGHT, Justice.

Defendants appeal from a series of orders made by the trial court in the matter of a receivership pendente lite.

The plaintiff in the action, Peter L. Misita, his sister Danica, and his brother Mitchell L., owned the outstanding capital stock and constituted the board of directors of Distillers Corporation, Ltd., which was engaged in the business of selling liquor, wine and tobacco, and operated three stores and a warehouse in San Francisco under the name of Martell's Wine, Liquor & Cigar Stores. Mitchell, Peter and Danica were respectively the president, vice-president and treasurer, and secretary of the company. There were 350 outstanding shares of stock of the par value of $10 a share. Mitchell owned 175 thereof, and Peter was the record owner of 116 shares, but claimed to be the beneficial owner of 59 additional shares which stood of record in Mitchell's name. The business was operated by Mitchell and Peter, the former receiving a salary of $100 a week and the latter $80 a week. For about two years a bitter, violent quarrel had been carried on between the two brothers concerning the affairs of the corporation and the operation of the business; and on July 16, 1940, Peter filed the present action for the removal of Mitchell as a director, and for the appointment of a receiver pendente lite. He joined as parties defendant the corporation and Mitchell, individually and as president of the company. The complaint was verified, and along therewith there was filed an affidavit made by Danica, wherein she joined in the application for the appointment of a receiver. Upon the presentation of the verified complaint and the affidavits to the trial court, and on July 16, 1940, an ex parte order was granted appointing a receiver, and ordering the defendants to appear on a date specified to show cause, if any they had, why the receivership should not continue until the final termination of the action. The order appointing the receiver was made conditional that plaintiff file a bond in the sum of $5,000. Plaintiff furnished the bond, and the receiver qualified and took charge of the business, but at the end of approximately three weeks the receivership was terminated under the following circumstances: At the hearing of the order to show cause, plaintiff moved to continue the receivership, and defendants moved to vacate the appointment; numerous affidavits and counter-affidavits were introduced and considered, and on August 10, 1940, an order was made continuing the receivership pendente lite and denying defendants' motion to vacate; but immediately following the making of the order and on the same day, to-wit, August 10, 1940, the parties stipulated that the receivership be terminated, that the receiver be discharged, and that an injunction pendente lite be issued whereunder the rights of the respective parties were to be governed and protected. Appropriate orders to that effect were made, and such an injunction was issued, but thereafter defendants appealed from the ex parte order of July 16, 1940, appointing the receiver, and from the order subsequently made on August 10, 1940, continuing the receivership and denying defendants' motion to vacate; also from certain orders made for the payment of the fees and expenses incurred by reason of the receivership.

Defendants state that their purpose in seeking a reversal of the two receivership orders of July 16, 1940, and August 10, 1940, is to place them in a position whereby they can sue on the bond to recover the expenditures made and damage done by reason of the receivership. It is obvious, however, that no expenses whatever were incurred, nor any damage done, as the result of the making of the order of August 10, 1940, continuing the receivership, because, as stated, immediately after such order was made, and on the same day, on stipulation, the receivership was terminated, the receiver was discharged, and the rights of the parties were thereafter protected and the business operated under the terms of the stipulated injunction. The appeal narrows down, therefore, to the question of the validity of the order of July 16, 1940, appointing the receiver; and the determination of that question depends entirely upon the situation as presented to the trial court at the time the order was made, and eliminates from consideration the affidavits or counter-affidavits subsequently made and used at the hearing of the motions on August 10, 1940, to continue the receivership and to vacate the same, because they pertain only to the propriety of the court's later action continuing the receivership pendente lite; which, as stated, becomes an immaterial issue by reason of the fact that on the same day, on stipulation, the receivership was terminated by the issuance of the stipulated injunction.

[1] Directing our attention, then, to the question of the validity of the ex parte order of July 16, 1940, appointing the receiver, it may be stated generally that the granting of such orders rests in the sound discretion of the trial court, in the exercise of which it must be governed necessarily by the situation as it is presented and ap-

pears to the court at the time of making the order. Here, according to the allegations of the verified complaint, the condition of the corporation and the operation of the business, at the time the complaint was filed, was and for some time prior thereto had been in a chaotic state. Speaking generally, it appeared from said allegations that certain lawsuits were then pending wherein restraining orders had been issued which prevented the holding of any stockholders' meetings and completely deadlocked the corporate directorate so that the corporation, as such, had ceased to function; that for nearly two years Mitchell had been in control of the business without legal authority, and that he had been and was then committing certain illegal acts in connection with the operation of the business, which, if the allegations were true, would inevitably ruin the business of the corporation; all of which was being done, so plaintiff alleged, for the purpose of wrongfully and fraudulently compelling him to sell his stock for a price far less than its true value.

The complaint is lengthy, covering approximately 50 typewritten pages of the transcript; consequently reference will be made herein only to the more important allegations thereof. With respect to stock transactions it was alleged that on or about the month of July, 1938, Mitchell entered upon "a fraudulent and wrongful scheme" to obtain Peter's stock; that in pursuance of such scheme he illegally caused certain stock certificates to be cancelled, transferred and reissued; that thereupon he assumed control of the corporation and its business and purported to discharge Peter and thereafter refused to pay his salary; that on March 22, 1939, Peter brought suit to establish his claim to the additional 59 shares of stock and obtained a restraining order against the holding of any stockholders' meeting; that two days afterwards Mitchell commenced a suit to prevent the holding of a directors' meeting and obtained a restraining order to that effect. It was further alleged that after Mitchell illegally took control of the corporation and the operation of its business he caused false resolutions to be sent to the banks so that they would no longer cash Peter's checks as vice-president and treasurer of the company; that he instructed the clerks to inform anyone phoning the stores that Peter was no longer connected with the business; that he informed the wholesalers and jobbers that Peter was no longer connected with the stores, and advised the employees they should not follow directions from Peter and encouraged them to pick fights with Peter; that he employed a watchman whose sole duty was to watch Peter and pick fights with him; that he discharged the women cashiers and employed men in order to prevent Peter from balancing the cash receipts of the stores; that he withdrew the cash receipts from the Powell Street store on November 24, 1939, in order to prevent Peter from performing his duties as treasurer of the company; that he changed the locks on the warehouse to keep Peter out; that he threatened to make Peter's interest valueless by payment of bonuses and increasing his own salary unless Peter would accept $4,000 for his stock; that he told Peter he contemplated certain capital expenditures which would prevent the payment of dividends; that he refused Peter's right to examine the books and changed the combination on the safe after Peter had made an examination by means of passkeys, and that it then became necessary for Peter to have the safe drilled and new keys made; that Mitchell engaged a public accountant to audit the books and agreed to furnish Peter with a copy of his report, but failed to do so; that he removed certain books from the office of the corporation and refused to tell Peter where they were; that he prevented and failed to assist the accountants employed by Peter in the making of an audit; that he prevented the making of an inventory and compelled the auditors to leave the premises, and that he furnished false statements of profit and loss. Continuing, Peter alleged that he commenced an action to compel the inspection of the books and for an audit on April 13, 1940, but Mitchell failed to appear in compliance with the order to show cause; that auditors were appointed by the court, and that Mitchell impeded and delayed the making of the audit; that the audit showed that the books of the corporation were inadequate, lacking in accounting control, and that Mitchell had caused the inventory to be understated in the sum of $21,535.97 in the financial reports of the business for the year ending 1939.

With reference to acts of malfeasance, the complaint alleged that in October of 1938 Mitchell claimed to be a creditor of the corporation in the sum of $8,770, which he admitted was not a true liability; that in August, 1939, he increased his salary to $125 a week with an expense account of $30 a month; that he attempted to get the bookkeeper to prepare a false inventory; furthermore, that he changed the accounting control so that there was no control on merchandise received; that he appropriated the property and assets of said corporation to his own use, and had paid certain personal expenses out of corporate funds.

It was further alleged that Mitchell accepted unlawful rebates from transportation companies, resulting in three suits against the corporation; that he accepted unlawful rebates from wholesalers and jobbers; that he had refilled liquor bottles, affixed internal revenue stamps thereto and resold the contents; that numerous physical encounters took place between Peter and Mitchell, and that in September, 1939, Mitchell threatened Peter's life.

The complaint then alleged that the foregoing acts were fraudulent and dishonest and constituted a gross abuse of discretion and that Mitchell should be removed as a director; that ill-feeling, dissension, hatred, mutual hostility and distrust had arisen and existed in the board of directors; that by reason of the discharge of Peter and certain employees it was impossible for the corporation to carry on its business with advantage to its stockholders and said corporation had lost a large part of its good will, and its gross business had decreased in the hands of Mitchell in the sum of over $50,000 from January to April, 1940, and that the business was being mismanaged and would be substantially impaired and diminished unless a receiver was appointed.

[2-8] As held in Lent v. H. C. Morris Co., 25 Cal.App.2d 305, 77 P.2d 301, 302, the appointment of a receiver "may be made 'ex parte' and without notice if the 'imperative necessity' or emergency is shown in the petition or supporting affidavits. Section 566, Code Civ.Proc.; Real Estate Associates v. Superior Court, 60 Cal. 223, 227; Nichols v. Nichols, 135 Cal. App. 488, 492, 27 P.2d 414; Huellmantel v. Huellmantel, 124 Cal. 583, 589, 57 P. 582. Since the power to appoint 'ex parte' lies in the superior court, the question on appeal is not one of jurisdiction, but of error, and, as such, is limited to the inquiry whether the trial court abused its discretion. 23 R.C.L., pp. 39, 40; Sunset Farms, Inc. v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106; Anderson v. Anderson, 124 Cal. 48, 56, 56 P. 630, 57 P. 81, 71 Am. St.Rep. 17. An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius. Its power is limited to the determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice. Const., art. 6, § 4½; Davies v. Ramsdell, 40 Cal.App. 432, 433, 183 P. 702; Sunset Farms, Inc., v. Superior Court [supra]." And beyond question a court of equity has power to appoint a receiver in a stockholder's suit for the purpose of preserving the assets of a corporation and prevent irreparable loss or injury pending suit. In Ballantine on Private Corporations (1927 Ed., § 253) the rule is stated thus: "Under statutes in some states, and independently of any statutes in others, the court may appoint a receiver in a stockholder's suit if the directors and majority of the stockholders are so managing or disposing of its business or assets in their own interest that they will probably be lost or destroyed before a decree can be rendered, or where there are such dissensions within the corporation that its business cannot be honestly or properly managed, or if for any other reason it clearly appears to the court that the appointment of a receiver pending the suit is necessary to preserve the assets of the corporation, and protect the rights of the complaining stockholders." The same doctrine is stated more definitely in California Jurisprudence (vol. 6A, p. 1535) as follows: "Internal dissensions deadlocking the corporation or frustrating it or threatening its purposes and objects, official breaches of trust, mismanagement and waste, are generally regarded as grounds, according to usages of equity, for a receivership to protect rights. Therefore, where the proceeding is not directed toward closing the affairs of the corporation or to dissolve it, but is merely directed against the individual directors whom it is sought to remove and to place the assets of the corporation in safe hands, the unfaithful directors having abandoned their trust, it is proper for the court, through the agency of a receiver, to take charge of the property, if necessary for its preservation, pending proceedings for the removal of the directors. Dissensions, or honest differences of opinion, which result in making it impossible for the corporation to

carry on its business to advantage, or to carry it on at all, are sufficient to invoke the action of a court of equity." See, also, Pomeroy's Equity Jurisprudence, 4th Ed., §§ 1537, 1541, 1543, 1545; Boyle v. Superior Court, 176 Cal. 671, 170 P. 1140, 1141, L.R.A.1918D, 226. "These receivers are not appointed," says the court in the case last cited, "to close up the affairs of a corporation, to work its dissolution, but to preserve its properties, and, where possible, continue its corporate functions."

[9] Under the foregoing principles it would seem clear that in the present case there is no justification for holding that the trial court abused its discretion in appointing the receiver ex parte. By the allegations of the complaint it was represented to the court that by reason of the restraining orders theretofore issued the board of directors of the corporation was not able to function as such, nor the stockholders to meet; that the corporation was being managed illegally and dishonestly by one of the three directors who was the majority stockholder; that the other stockholder claimed to be entitled to an equal share of the stock; that the one who had complete control of the management of the corporation was raising his own salary, using the employees, the premises, and the equipment for personal purposes and paying for such out of corporate funds; that he had refused access to or inspection of the books; that he had changed the accounting control; that he was in difficulties with the Railroad Commission for taking rebates from transportation companies; that he was refilling liquor bottles, which illegal act could result in the loss of the corporation's license to do business at all. Under these circumstances, and also in view of all other pending litigation which had not been disposed of, it would seem that the trial court was justified in appointing a disinterested party as receiver to control the business of the corporation, to preserve its assets, and protect the rights of the complaining stockholders, pending the hearing of the order to show cause whereby the court would determine whether the receivership should continue.

[10, 11] Appellants contend that the court has no jurisdiction to appoint a receiver ex parte of a solvent, going corporation, where there is no showing of irreparable injury or drastic emergency. However, it is well settled that a court of equity has inherent power in a proper case to appoint a temporary receiver for a solvent, going corporation, at the instance of stockholders, on the ground of fraud or gross mismanagement, or where there are such dissensions in its governing body as to make it impossible for the corporation to carry on its business to advantage. This power will not be exercised in a doubtful case; and the remedy being a drastic one, only in case of an urgent necessity, where there is no other adequate remedy, will a receiver be appointed for such corporation. Boyle v. Superior Court, supra; Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 90 P.2d 75; and see note, 43 A.L.R. p. 242. But the pending emergency and the necessity for the appointment are matters which the trial court is called upon to decide (Lent v. H. C. Morris Co., supra); and in the present case we do not find such an abuse of discretion in appointing the receiver as would warrant this court in setting the order aside, but on the contrary, the facts and circumstances amply justified the trial court's action.

[12] Appellants also argue that other adequate remedies were available to protect the interests of the plaintiff, and that both prior to and after the commencement of the present action he filed several other suits and requested and obtained such remedies; that therefore the court exceeded its jurisdiction in appointing a receiver. The record shows, however, that some of the important litigation instituted by plaintiff prior to the commencement of this action had not been finally determined at the time the ex parte order herein was made. It was a question for the trial court to decide, therefore, whether in view of the serious and numerous charges of misconduct and illegal acts made in the complaint, a temporary restraining order would give adequate protection; and the trial court having decided that question in the negative, and its decision being supported by substantial legal authority, it is controlling on appeal.

[13] It should be here stated in fairness to the defendant Mitchell L. Misita that at the hearing of the subsequent motions to continue and to vacate the receivership, which resulted in the making of the order of August 10, 1940, evidence was introduced by way of affidavit and oral testimony in refutation of most of the allegations of the complaint, and particularly those charging Mitchell with illegal, fraud-

ulent and dishonest conduct in operating the affairs of the company; furthermore, that it appears from the evidence introduced at said subsequent hearing that at the time the verified complaint in the present action was filed, the two lawsuits brought respectively by Peter and Mitchell to restrain the holding of stockholders' and directors' meetings were consolidated and had been tried in another department of said court, and an order made for judgment in favor of Mitchell, but that the judgments had not been entered until after the appointment of the receiver ex parte on July 16, 1940. As already pointed out, however, the showing made at said subsequent hearing of the order to show cause, which resulted in the making of the order of August 10, 1940, cannot be properly considered in determining the question of whether three weeks prior thereto and on July 16, 1940, sufficient legal grounds appeared to the trial court to warrant the granting of the ex parte order appointing the receiver pending the hearing and determination of the order to show cause.

The orders appealed from are affirmed.

PETERS, P. J., and WARD, J., concurred.

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54 Cal.App.2d 352

STEWART v. CONNOLLY et al.

Civ. 13019.

District Court of Appeal, Second District, Division 3, California.

Sept. 10, 1942.

Hearing Denied Nov. 5, 1942.

1. Appeal and error 🔑934(1)

The appellate court, in determining the propriety of a judgment for defendant notwithstanding the verdict, views the evidence in the light most favorable to plaintiff without regard to any asserted contradiction in the proof.

2. Automobiles 🔑164(2)

Under provisions of Vehicle Code, where there is no marked passenger safety zone at place where street car is stopped to discharge passengers, motorist is required to stop automobile to rear of rear door of street car and remain standing until passenger has reached a place of safety. Vehicle Code, § 571(a), St.1935, p. 189.

3. Automobiles 🔑164(2)

Under Vehicle Code provision prohibiting motorists from passing beyond rear door of stopped street car where there is no marked safety zone and to remain until passenger shall have reached a place of safety, when street car stopped to discharge a passenger, rectangular area between right side of street car and curb of street extending from rear of rear door of street car to front of street car became an area in which it was lawful for passenger who had left street car to be in, to the exclusion of automobiles. Vehicle Code, § 571(a), St.1935, p. 189.

4. Automobiles 🔑164(2)

The purpose of the statute prohibiting motorists from passing beyond rear of nearest door of street car stopped for purpose of discharging passenger, until passenger alighting from street where there was no marked safety zone car shall have reached a place of safety, was to establish an area for the protection of street car passengers in alighting and proceeding to the curb. Vehicle Code, § 571(a), St.1935, p. 189.

5. Negligence 🔑136(26)

Generally, question of contributory negligence of a plaintiff is for trier of facts.

6. Appeal and error 🔑842(4)

Where a law exists, imposing regulation on motorist for protection of pedestrian at scene of accident, question of whether pedestrian, whose knowledge of such law may be considered in determining question of contributory negligence, took due precaution for his own safety, is usually "question of fact" for trial judge and not a "question of law" for appellate court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

7. Automobiles 🔑164(2)

The statute prohibiting motorists from passing beyond rear door of stopped street car where there is no marked safety zone is for the protection of alighting passengers and founded upon a recognition that passengers alighting from street car in exercise of ordinary care are required to give close attention to car steps in descending and to proceed at least sufficient distance therefrom to be clear when street car started. Vehicle Code, § 571(a), St.1935, p. 189.

8. Automobiles ⚷164(2), 206, 245(76)

Under the statute prohibiting motorists from passing beyond rear door of stopped street car where there is no marked safety zone, motorist owed passenger alighting from street car a special duty of care to remain to rear of street car, and passenger was entitled to rely on the protection afforded by such statute creating a prohibited zone for automobiles between the stopped street car and the curb, but extent to which passenger was entitled to rely upon such protection depended upon all of the attending circumstances and was for the jury. Vehicle Code, § 571(a), St.1935, p. 189.

9. Automobiles ⚷245(76)

Where street car passenger leaving car by front door at stop which had no marked safety zone, who was required, in exercise of ordinary care, in leaving street car to give careful attention to descending steps and to proceed on street sufficient distance to clear car as it started, looked to the rear, but saw no traffic in 10 feet he could see from within the street car and did not again look until he had taken one step from street car when he was struck by defendant motorist who did not apply brakes until she had passed rear end of stopped street car in violation of statute requiring motorist to stop at rear door, whether street car passenger was guilty of contributory negligence was for the jury. Vehicle Act, § 571a, St.1935, p. 189.

◆

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by William W. Stewart against Betty Connolly, and others, for injuries sustained when struck by automobile driven by named defendant. From a judgment for defendant, notwithstanding the verdict, plaintiff appeals.

Reversed with directions.

Ralph C. Curren, of Los Angeles, for appellant.

Betts & Garrison and John A. Loomis, all of Los Angeles, for respondents.

PARKER WOOD, Justice.

The jury returned a verdict in favor of plaintiff for $1,200 damages for personal injuries. Defendants' motion for judgment notwithstanding the verdict was granted and judgment was entered in favor of defendants. Plaintiff appeals from the judgment. The question upon appeal is whether plaintiff was guilty of contributory negligence as a matter of law.

Defendant Betty Connolly, seventeen years of age, had possessed an automobile operator's license three months at the time of the collision. Defendants Elizabeth Connolly and Frank J. Connolly, the parents of Betty, signed her application for the operator's license which was issued to her and they were included as parties to the action by reason of the liability imposed upon them as such signers by section 352 of the Vehicle Code, St.1935, p. 145. Betty Connolly will be referred to hereinafter as the defendant.

[1] Viewing the evidence in the light most favorable to plaintiff, without regard to any asserted contradictions in the proof, as the rule requires the court to do in determining the propriety of a judgment notwithstanding the verdict (Neel v. Mannings, Inc., 1942, 19 Cal.2d 647, 652, 122 P.2d 576), the following appears:

On November 21, 1939, about 4:30 p. m., plaintiff was a passenger in the front open section of a street car proceeding west on West Seventh Street in Los Angeles. After the street car had crossed Hoover Street and gone about one-third the distance of 400 feet from Hoover Street to the next street car stop, plaintiff pressed the buzzer to signal the motorman to stop at the next stop. The motorman then commenced to slow up, threw off the power and coasted down the hill about 150 feet. Then, when he was about 150 feet from the place where he stopped, he put on the brakes and commenced to stop. He stopped at an overhead triangle stop sign for street cars about 400 feet west of Hoover Street. He did not make an emergency stop but made an ordinary, usual stop. The overhead stop sign was hanging on a wire which extended from the trolley wire to a post by the north curb and was about 120 feet east of the east curb line of Magnolia Street which intersected the south curb of West Seventh Street. Magnolia Street did not extend across or continue north of West Seventh Street, but ended at the south curb of West Seventh Street. The highest speed of the street car after it left Hoover Street until it started to stop was 16 to 18 miles an hour.

After giving the signal to stop, plaintiff went to the front of the car, stood there, the car stopped, the door opened by breaking in half and folding against the right side of the doorway, plaintiff alighted from the street car and took one step straight forward. When he was about 2½ feet from the street car he was struck by an automobile driven by defendant, was knocked into the air and he landed 18 or 20 feet in front of the street car. The automobile made skid marks 39 feet in length and stopped about 18 or 20 feet in front of and to the right of the street car.

There was no passenger safety zone on the street at the place where the street car stopped. The distance from the curb to the street car track was 20 feet and the street car was 47 feet in length.

While plaintiff was standing at the front door on the north side of the street car about the time the street car came to a stop he looked back to the right or along the north side of the street car toward the rear and could see for a distance of 10 feet toward the rear. He did not see an automobile proceeding on the north side of the street car or at all before he left the street car platform to descend the two street car steps to the street. In leaving the street car platform he gave his attention to descending the steps to the street and proceeding one step on the street toward the curb and did not look toward the rear again until he turned partially to the right immediately before the automobile struck him.

Defendant was about two automobile lengths behind the street car when the street car started to stop about 150 feet from the place where it stopped and she did not decrease her speed of 30 or 35 miles an hour. When the street car stopped she was 180 feet from the front end of the street car and did not stop or decrease her speed. She decreased speed when the automobile was "somewhere near the middle" of the stopped street car, but she continued forward making skid marks 39 feet in length and stopped about 18 or 20 feet beyond the front of the street car.

The above mentioned surrounding circumstances, as shown by the evidence, are those most favorable to plaintiff.

Respondents claim that appellant was guilty of negligence as a matter of law for the reason he did not look toward the rear of the street car for approaching traffic while descending the steps of the street car and proceeding toward the curb. It is conceded on this appeal that respondent Betty Connolly was negligent.

Appellant contends that the question whether or not he was guilty of contributory negligence was one of fact for the jury.

[2] It was the duty of defendant by virtue of the provisions of Section 571, subdivision (a), of the Vehicle Code, St.1935, p. 189, there being no marked passenger safety zone at the place where the street car stopped, to stop the automobile to the rear of the rear door of the street car and remain standing until the plaintiff had reached a place of safety. Said section of the Vehicle Code provided as follows: "The driver of a vehicle overtaking any * * * street car stopped or about to stop for the purpose of receiving or discharging any passenger shall stop such vehicle to the rear of the nearest running board or door of such * * * street car and thereupon remain standing until all passengers have boarded such car or upon alighting have reached a place of safety * * *."

[3, 4] When the street car stopped at said place, a regularly designated and marked street car stop, the rectangular area on the street between the north or right side of the street car and the north curb of the street extending from the rear of the rear door of the street car to the front of the street car, became an area into which it was unlawful for vehicles to enter until plaintiff had arrived at a place of safety. By reason of such provision of the Vehicle Code and such stopping of the street car it became lawful for plaintiff to be in that area to the exclusion of the automobile driven by defendant. That area was established by statute for the protection of plaintiff in alighting from the street car and proceeding in said area to the north curb.

[5, 6] "The existence or lack of contributory negligence must be determined from all the facts of the case, one of which may be knowledge of a law imposing a regulation upon an automobile driver for the protection of the pedestrian at the scene of the accident. When such a law exists, the question of whether a plaintiff took due precaution for his own safety is usually a question of fact for the trial judge and not one of law for the appellate court." Garrison v. Booth, 1935, 10 Cal.App.2d 738, 741, 52 P.2d 535, 536.

In the case of Medlin v. Spazier, 1913, 23 Cal.App. 242, 137 P. 1078, the plaintiff had alighted from a street car, was within an area of four feet next adjoining the right side of the street car and was struck by defendant's automobile. An ordinance provided that automobiles should not be driven within such area of four feet of a stopped street car. Plaintiff had not looked in the direction of the approaching automobile. Defendant claimed that plaintiff was guilty of contributory negligence as a matter of law. The court said, at page 244 of 23 Cal.App., at page 1079 of 137 P., "This contention is without merit. 'Negligence' is a comparative term, and hence the degree of care which in one case would constitute negligence might in another be deemed the exercise of more than prudence. Of necessity the question presented is nearly always one of fact for the jury to determine from the circumstances surrounding the case." That case further stated at page 245 of 23 Cal.App., at page 1079 of 137 P.: "Plaintiff had the right to assume that while within such zone she occupied a position of safety; and, in the absence of any warning or reason to believe that defendant would violate the city ordinance, she was not negligent in failing to look up and down the street when she alighted from the car to see if the drivers of approaching vehicles were operating same on that part of the street upon which they were prohibited from traveling. * * * Being lawfully there, she had the right to assume that for the time being she would be as safe from collision with automobiles as she would be upon the sidewalk."

It was claimed in the case of Market Street Ry. Co. v. George, 1931, 116 Cal. App. 572, 3 P.2d 41, that the individual plaintiff was guilty of negligence as a matter of law. The street car had stopped at the end of the line and it was the custom to discharge passengers from the left side. Plaintiff alighted into the space of about one foot between the left side of the street car and the center of the street and was standing there facing the street car, assisting another person to alight, when he was struck by defendant's truck. At no time before he was struck did plaintiff look for approaching vehicles. The court stated at page 574 of 116 Cal.App., at page 42 of 3 P.2d: "Under such circumstances, can it be said that Harris [plaintiff] was guilty of contributory negligence as a matter of law? We are satisfied that it cannot. Harris would be entitled to assume that no vehicle north bound on Stanyan Street would be operated upon any portion of the street westerly of the center line. 'There is no positive duty on the part of pedestrians about to cross a street to stop, look, and listen, and * * * the question of negligence * * * must be examined in the light of all the attending circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing fixed regulations for observance by automobile drivers.'" In that case the circumstances were comparable to the circumstances in this case. It is to be noted that the case of Medlin v. Spazier, supra, decided in 1913, was cited with approval in the case just referred to, decided in 1931.

In Mann v. Scott, 1919, 180 Cal. 550, 182 P. 281, the plaintiff was struck by an automobile while she was attempting to cross from the sidewalk to a stopped street car. Plaintiff looked for approaching vehicles as she stepped from the sidewalk but did not look again after leaving the sidewalk. An ordinance required drivers of vehicles intending to pass a stopped street car to stop the same at least ten feet to the rear of such street car to protect passengers boarding the street car. The court said at page 554 of 180 Cal., at page 282 of 182 P.: "The question of negligence under the usual rule of ordinary care that devolves upon foot travelers, must be examined in the light of all the attendant circumstances, one of which may be knowledge of the existence of a statute or an ordinance prescribing certain fixed regulations for observance by automobile drivers. And it may be that if the jurors * * * concluded * * * that if she did see the automobile before leaving the sidewalk, she reasoned that its driver would comply with the city ordinance, * * * requiring an automobile traveling behind a street car to stop 10 feet in the rear of the car if it stops to let off or take on passengers, until the passengers have safely alighted from or boarded the car. Whether, if she saw the automobile, respondent would have been warranted in going toward the street car without further watching the automobile approach, relying upon a compliance by the appellants with the requirements of the ordinance, was a question upon which men's minds might well differ, and hence it was properly a case for the jury. * * *"

In the case of Hoffman v. Maguire, 1935, 6 Cal.App.2d 398, 44 P.2d 444, the plaintiff, a newsboy, had been standing in a pedestrian cross walk two minutes and had not looked for thirty seconds in the direction of the approaching automobile which struck him. It was claimed that he was guilty of contributory negligence as a matter of law. The court stated at page 399 of 6 Cal.App. 2d, at page 445 of 44 P.2d: "It is not negligence as a matter of law for a person in a pedestrian zone to fail to look for approaching vehicles for a period of 30 seconds."

In the case of Gornstein v. Priver, 1923, 64 Cal.App. 249, at page 259, 221 P. 396, at page 401, it was stated: " 'While a person who asserts a right of recovery on the ground of negligence must be prepared to show that he exercised vigilance to discover and avoid the danger embodied in the offending instrumentality, he excuses himself for an omission to take active measures—such as looking, listening, and making inspections—by proof that the defendant owed to him a duty of care, and that he relied upon the performance thereof.' "

In respondents' brief it is stated, "That a passenger alighting into a safety zone would not be negligent in failing to look until she was about to leave the zone of safety, cannot be disputed." It is further stated in the brief, "It is undisputed that a person is not required to look where he is not entering a position or place of danger."

Respondents argue that the case now before the court is to be distinguished from Medlin v. Spazier, supra (wherein there was a prohibited zone "four feet wide"), for the reason that in that case plaintiff was standing in a zone of safety whereas in the present case there was no safety zone, no markings were on the pavement to indicate a car stop and plaintiff was moving. The area "four feet wide" in which vehicles were forbidden, referred to in Medlin v. Spazier, supra, also was not marked on the pavement but the stopping of the street car fixed the outline of the protected area in that case. In the present case, the area between the street car and the curb in which vehicles were forbidden likewise was not marked on the pavement but the stopping of the street car fixed the boundaries of the zone for the protection of alighting passengers. It seems to be respondents' position that as a matter of law a passenger in a safety zone "four feet wide" is not required to look for approaching automobiles, but a passenger in an unmarked area in which vehicles are forbidden, extending from the side of the stopped street car to the curb, is required as a matter of law to look for approaching automobiles.

If a passenger alighting from a street car is entitled to rely upon the protection afforded by an existing law forbidding automobiles from entering a safety zone "four feet wide," it would seem that a passenger should be entitled to rely upon the protection afforded by an existing law forbidding automobiles from entering a safety zone not restricted to "four feet wide" but extending from the street car to the curb.

[7] In descending the street car steps, plaintiff was required to use ordinary care to avoid injury to himself which might come in various ways from the act alone of leaving the street car and not connected with automobile traffic, including an unexpected movement by the street car or slipping or stumbling by plaintiff. In the ordinary course of events the street car would have moved forward immediately after plaintiff was upon the pavement and he was required, in the exercise of ordinary care to avoid injury by the moving street car, to proceed at least a sufficient distance on the street to be in the clear of or away from the moving street car. The legislative enactment prohibiting drivers of automobiles from passing beyond the rear door of a stopped street car where there was no marked safety zone was for the protection of alighting passengers and undoubtedly was founded upon a recognition of the fact, among others, that such attention was required of passengers in alighting from a street car.

[8] Defendant owed plaintiff a special duty of care to remain to the rear of the street car. Plaintiff was entitled to rely upon the protection afforded by the statutory provision creating a prohibited zone for automobiles between the stopped street car and the curb. The extent to which plaintiff was entitled to rely upon such protection depended upon all the attending circumstances.

[9] The street car was 47 feet in length; defendant was traveling 30 or 35 miles per hour until she applied the brakes at the center of the stopped street car, about 23 feet from the front door; at that rate of speed she was traveling about 45 feet per second or one-half the length of the street car in one-half second; when the street car

stopped defendant was about 180 feet from the front door or in measurement of time about 4 seconds from the front door, or about 157 feet or 3½ seconds from the center of the street car; a fraction of a second elapsed from the time plaintiff alighted upon the pavement until he was struck; plaintiff looked to the rear for approaching traffic before the front door was opened; he could see ten feet and did not see any traffic; he was required, in the exercise of ordinary care in the act of leaving the street car, to devote careful attention to the act of descending the street car steps and proceeding on the street a sufficient distance to clear the street car as it would move forward.

The circumstances presented herein were such that the question as to whether plaintiff was guilty of contributory negligence was one, as stated in Mann v. Scott, supra, "* * * upon which men's minds might well differ, and hence it was properly a case for the jury."

Defendants rely principally upon the case of Bence v. Teddy's Taxi, 1929, 101 Cal. App. 748, 282 P. 392, 283 P. 86, to sustain their contention herein. The plaintiff therein alighted from a street car. There was a safety zone at the place where the street car stopped, four feet wide, outlined on the street and parallel with the street car. The distance from the safety zone to the curb was twelve and one-half feet. Plaintiff had left the safety zone without looking toward the rear of the street car, proceeded toward the curb in a pedestrian marked crosswalk without looking to the right, reached a point eight feet from where he alighted, and was struck by defendant's taxicab. The taxicab driver was not required to stop back of the stopped street car but was permitted to pass the street car in the space between the safety zone and the curb. In the present case the defendant was operating the automobile in an area in which the operation of automobiles was prohibited by statute. That case so relied upon is distinguishable, therefore, from the present case.

The judgment, and the order granting the motion for judgment notwithstanding the verdict, are reversed. It is ordered that the superior court enter judgment in accordance with the verdict of the jury.

SCHAUER, P. J., and SHAW, J. pro tem., concur.

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54 Cal.App.2d 200

PICKERING LUMBER CO. v. WHITESIDE et al.

Civ. 6705.

District Court of Appeal, Third District, California.

Aug. 29, 1942.

Rehearing Denied Sept. 26, 1942.

Hearing Denied Oct. 26, 1942.

1. Vendor and purchaser 🔑6

Contract that vendor should sell and convey mortgaged land to purchaser under prescribed terms, and that if purchaser would pay for the land, vendor would execute a deed to purchaser to be delivered by bank holding deed in escrow, the contract authorizing vendor to bid on the property on default by purchaser without prejudice to vendor's rights as owner did not pass title to purchaser as a "deed" but was an executory "contract of sale" and title remained in vendor subject to the mortgage.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract of Sale" and "Deed".

2. Mortgages 🔑5

A mortgagee has no right of specific performance or to bid on the property and in the event that no bids are received higher than his highest bid to call off the sale, credit the amount bid, and sue for deficiency.

3. Mortgages 🔑29, 137

Where vendor assigned his interest under contract of sale to trustee bank to secure his note issues, the transactions were security transactions as to the contract of sale, and created an equitable second mortgage held in trust by bank, but did not transfer vendor's title which he held as security for purchaser's payments.

4. Accord and satisfaction 🔑23

Where bank held deed of land subject to contract of sale under escrow agreement authorizing delivery upon receipt of the purchase price and bank, as assignee of vendor's rights under the contract to secure vendor's note issues, entered into purported accord and satisfaction with purchaser whereby purchaser transferred its rights to reorganized corporation which issued stock to bank, bank's delivery of deed and attempt to separate its equitable second mortgage from the debt was ineffective to pass title as against vendor's estate, notwithstanding that the land was of little value above the encumbrance.

5. Vendor and purchaser 🔑266(7)

Although a vendor in an executory contract for sale of land, who retains title as security for payment of the purchase money, sues to recover the unpaid contract price and obtains judgment thereon, which has not been paid in full, such suit and judgment do not affect the vendor's right to foreclose against the land as security for any uncollected portion of the purchase money.

6. Mortgages 🔑5

Where vendor had executed an equitable mortgage on land, subject to contract of sale to bank to secure note issues and assignment of vendor's rights under the contract to bank did not transfer his title to purchaser, that vendor held title to secure payment of purchaser's obligation did not cause purchaser's contract to be a "mortgage" or its obligation to be a mortgage debt, nor did the assignment change purchaser's obligation to a mortgage debt.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgage".

7. Mortgages 🔑5

The distinction between a mortgage and an executory contract of sale is that in a "mortgage", the mortgagor holds title to the land and the mortgagee has a lien on the land for payment of the mortgage debt, while in an executory "contract of sale" the vendor holds title to the land as security for payment of the purchase price.

8. Assignments 🔑2

Vendor and purchaser 🔑47

Where vendor of California land assigned his rights under the sale contract to a Minnesota bank to secure note issues, the contract of assignment was to be construed according to Minnesota law, but any contract affecting title to the land was to be construed according to California law.

9. Mortgages 🔑593

An equity of redemption is an "interest in real property" and any contract affecting title to such equities situated in California must be construed according to California law.

See Words and Phrases, Permanent Edition, for all other definitions of "Interest in Real Property".

10. Judgment 🔑707

Where vendor had assigned interest under sales contract to bank holding deed in escrow to secure note issues and decree of bankruptcy court in corporate purchaser's reorganization proceeding ordering withdrawal of sale under the assignment by bank dismissed intervention petition of vendor's executors without prejudice, the executors were not "parties" and subsequent decree ordering bank to deliver deed to reorganized corporation for its securities was not "res judicata" so as to bar claim of vendor's executors to the land as against the reorganized corporation. Bankr.Act § 77B, 11 U.S.C.A. § 207.

See Words and Phrases, Permanent Edition, for all other definitions of "Party" and "Res Judicata".

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action to quiet title by Pickering Lumber Company against Sophia Whiteside and others as executors of the estate of Robert B. Whiteside, deceased. From an adverse judgment, defendants appeal.

Reversed with directions.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, and F. H. De Groat, of Duluth, Minn., for appellants.

Rowan Hardin, of Sonora, and Paul Barnett and Watson, Ess, Groner, Barnett & Whittaker, all of Kansas City, Mo., for respondent.

ALLEN, Justice pro tem.

This is an action to quiet title to a large tract of timber land situated in Tuolumne and Calaveras Counties. The appeal was taken by defendants from a judgment in favor of plaintiff. The various transactions bearing on the problem involved are evidenced by many instruments and records of judicial proceedings. For the purpose of clarity it may be well to set out the matter in controversy before examining the facts and pleadings. The transcript contains a lengthy stipulation of facts. Briefly stated, the problem is this: Plaintiff's predecessor in interest, Pickering Lumber Company, entered into a written contract with Robert B. Whiteside and Sophia Whiteside, his wife, in which said Pickering Lumber Company agreed to pay a stipulated consideration for said tract of land, all of which consideration has been satisfactorily paid, except the sum of $300,000 and interest thereon. Plaintiff contends that this $300,000 obligation and interest thereon was extinguished by an accord and satisfaction consummated by the duly authorized representatives of the parties to the contract, and that, in pursuance thereof the United States District Court in Bankruptcy, at Kansas City, Missouri, having jurisdiction of the subject matter and the parties, approved such accord and satisfaction, and by its final judgment and order directed the delivery of the deed, in evidence of the title which had passed; and that this judgment is a bar to defendants' assertion of any claim to title or interest in the lands.

The essential facts are as follows: Robert B. Whiteside was the owner, subject to a mortgage to the Detroit Trust Company, of this large tract of timber land. On January 5, 1927, he contracted for the sale thereof for $1,804,400 to the Pickering Lumber Company. The price was to be paid, $404,400 cash on execution of the contract, $600,000 by assuming and agreeing to pay the outstanding mortgage, and $800,000 payable in four annual installments of $200,000 each on January 5th of the years 1929 and 1932, inclusive. The Pickering Lumber Company was to have immediate possession, the deed to be placed in escrow with First National Bank of Duluth, Minnesota, for delivery to the purchaser upon payment of the entire purchase price, payments to be made to said bank to and for the account of Whiteside.

On January 5, 1928, Whiteside executed to the First National Bank of Duluth a so-called "collateral trust agreement" to secure an issue of $400,000 of his notes. Thereby Whiteside "sold, assigned, transferred, pledged and set over" to said bank all rights to the installments due under his contract with Pickering Lumber Company on January 5, 1930, and January 5, 1931 (aggregating $400,000), with interest thereon, in trust for the security of the holders of the notes. He also transferred all rights under the contract "insofar as the same may be necessary or applicable to enforcing payment of said amounts from said Pickering Lumber Company." Payments by the said company subsequently reduced the amount due under this agreement to $100,000, the time of payment of which was extended to January 5, 1934.

On July 5, 1928, there was a similar agreement with said bank to secure another issue of Whiteside notes, this time $200,000 in amount. The terms were similar, and the installment of $200,000 due January 5, 1932, under the Pickering contract was assigned as security. The First National Bank of Duluth and American Exchange National Bank of Duluth consolidated under the name of First and American National Bank of Duluth, which succeeded to all the rights, duties and obligations of the First National Bank of Duluth.

Throughout the determinative period, $100,000 of the installment originally due January 5, 1930, and the whole of the $200,000 due January 5, 1932, and interest thereon, assigned to the bank as security for the Whiteside notes, have remained unpaid. Everything else owing by the Pickering Lumber Company to Whiteside has been paid, except this part of the said installments so assigned to the bank.

On September 19, 1931, Whiteside died. His estate is in process of administration in the probate court of St. Louis County, Minnesota, with ancillary administration pending in the probate court of the state of California, in and for the city and county of San Francisco, the defendants being executors under the will of deceased in both courts. The bank's claim on the Whiteside first notes and first trust agreements owned by it was allowed by the Minnesota probate court for $106,986.30, and also the bank's claim as trustee under the second trust agreement in the sum of $212,000. Under the Minnesota law these amounts became judgments against the Whiteside estate.

In May, 1931, a receiver was appointed for the Pickering Lumber Company, by the United States District Court in Missouri. In November, 1934, the company filed therein a petition for reorganization under section 77B of the Bankruptcy Act, 11 U.S.C.A. § 207.

In 1931, after the death of Whiteside, and while Pickering Lumber Company was having financial difficulty, a Whiteside Noteholders' Protective Committee was formed. In 1936 there were negotiations between that committee and the bank, a Pickering Bondholders' Committee which had been formed, and the voluntary committee for reorganization of Pickering Lumber Company, touching the treatment in the plan of organization of the company's indebtedness under the Whiteside contract.

The bank filed three claims against the bankrupt, either on the "Whiteside notes" or the security held thereunder on Pickering Lumber Company's obligation to pay the installments on the Whiteside contract, depending on the construction of the language in the claims. One of these was on the

$100,000 obligation "as trustee," reserving its right to the security; another was on this $100,000 obligation "as owner," with the same reservation; the other was on the $200,000 obligation "as trustee," with same reservation. The noteholders' committee filed a claim on the $200,000 obligation, "on behalf of owners," with same reservation. The claims of bank as owner, and of noteholders' committee "on behalf of owners" were allowed, and the other two claims were disallowed.

In May, the Whiteside noteholders made a written proposal, "to release the above mentioned claim against the Pickering Lumber Company, and deliver to the reorganized Pickering Lumber Company the deed in our possession," and receive in return therefor $105,000 of 4 per cent income bonds, $195,000 of 5 per cent non-cumulative preferred stock, and 3,000 shares of common stock of the reorganized Pickering Lumber Company. (The deed should have been in possession of the bank, as escrow-holder, and not the noteholders.) However, it was stated in the proposal that it would be necessary for the representatives of Whiteside's estate to procure approval of the probate court of St. Louis County, Minnesota, of the plan of reorganization. Mr. DeGroat, as attorney for the executor, signed a letter consenting to the plan of reorganization and to the proposal, "subject to the approval of the probate court * * *."

On February 19, 1937, the federal court entered an order of approval of the plan of reorganization, accepting the proposal in regard to the Pickering-Whiteside note obligations. On February 17, 1937, the Minnesota probate court made an order authorizing the executors to consent to the plan for exchange of securities of the reorganized Pickering Lumber Company in return for the deed, and authorizing them to direct the bank to deliver the deed held in escrow on condition that the claims on Whiteside's notes which were judgments against the estate, would be satisfied and discharged.

The bank, holding as trustee, apparently believing it had no legal right to waive a possible deficiency judgment on the Whiteside notes, commenced foreclosure proceedings on the securities it held, and advertised the same for sale. The Minnesota executors of the Whiteside estate then filed a petition in intervention in the bankruptcy court. It set out the probate court order, and asked that the bank be directed to satisfy its claim against Whiteside's estate; that the bank be directed to deliver the deed held in escrow, and that the Whiteside noteholders be directed to deliver the Whiteside notes to Pickering Lumber Company upon the issuance of the stock and bonds of the reorganized company; that the court enjoin foreclosure sale by the bank until after hearing; that the bank be directed generally to do all things necessary to carry out the proposed plan of reorganization; and that the court enter an order upon respondents to show cause why the directions and orders prayed for should not be granted. The sale was ordered withdrawn, and the matter set for hearing.

On March 17, 1937, the bankruptcy court entered an order directing the bank to withdraw the sale without prejudice to respondents' rights. On March 26, 1937, the petition in intervention was heard, and the order of March 17th was reaffirmed. Otherwise the court dismissed the intervening petition "without prejudice, however, to the rights of the said interveners (Whiteside executors) and respondents (First and American National Bank of Duluth, A. C. Weiss, Charles D. Brown, Robert W. Hotchkiss) with respect to the matters and things alleged in said intervening petition." On March 27, 1937, the bankruptcy court entered its final decree in the reorganization proceedings adjudging, among other things, that the bank deliver the deed it held in escrow, and that "the securities issued * * * in exchange for said deed, shall be delivered to said First and American National Bank of Duluth, to be held by said Bank in lieu of the collateral represented by said contract dated January 5th, 1927, and the payments due thereunder."

On April 24, 1937, the bank petitioned the bankruptcy court for protection in making delivery of the deed, and the court, by an ex parte order, directed that the bank deliver the said deed to the judge of said court, to be by him deposited with the clerk of said court, and that said delivery should constitute compliance by the bank, as trustee, with the court order in the final decree of March 27, 1937. The plaintiff, Pickering Lumber Corporation, is the reorganized corporation growing out of said reorganization plan, and is composed of the bondholders, other creditors and stockholders of Pickering Lumber Company. On April 24, 1937, on further order of the bankruptcy court, the clerk of said court delivered said deed to plaintiff. Plaintiff promptly recorded the deed in California and began this action to quiet title.

The bank brought an action in the District Court of St. Louis County, Minnesota, to determine its right to a deficiency judgment on the Whiteside notes in case the proceeds from the sale of the securities received by it in the reorganization proceedings were insufficient to pay the same in full. The district court adjudged that the bank would be entitled to such deficiency, and the Supreme Court of Minnesota affirmed the decision. First & American National Bank of Duluth v. Whiteside et al., 207 Minn. 537, 292 N.W. 770.

[1, 2] The legal questions involved in this maze of facts will now be considered and analyzed. Plaintiff contends that the effect of the contract of January 5, 1927, was to pass title to Pickering Lumber Company; that this contract gave the vendee all the rights of a mortgagor, and reserved to the vendor only the rights of a mortgagee,—that it was, in effect, a deed. With this contention of the plaintiff we cannot agree. It is very plain that the contract was an executory contract of sale, and that title remained in the vendor. The language of the contract permits of no other construction. It states: "Vendors shall sell and convey to the purchaser, and the purchaser shall purchase from the vendors, for the price and upon the terms and conditions hereinafter set forth, the lands." It also states: "If the purchaser shall pay for said lands as herein provided, the vendors shall, and they covenant that they will make, execute and deliver to the purchaser, a good and sufficient general warranty deed * * * conveying to the purchaser * * * title in fee simple to all of said lands." It also states: "When the purchaser has paid the entire purchase price as hereinabove provided * * * said bank shall deliver said deed to the purchaser." Also, in providing for rights and remedies, in case of default by the purchaser, the contract states: "The vendors may, without prejudice to their position or rights as owners of the property, make such bid." These clauses, and other language employed throughout the instrument, indicate that the vendor has rights far beyond those of a mortgagee; for instance, "specific performance," "to bid on the property, and in the event that no bid or bids are received from others, higher than the highest bid of the vendors * * * the vendors may call the sale off, credit the amount bid, and sue for a deficiency." No such rights are given to a mortgagee. Fisher v. Chaffee, 49 Cal.App.2d 97, 121 P.2d 51; Stanislaus Water Co. v. Bachman, 152 Cal. 716, 722, 723, 93 P. 858, 15 L.R.A.,N.S., 359. In fact, the language of the instrument is so plain that it did not transfer title, that it requires no further citation of authority. The case of First & American National Bank of Duluth v. Whiteside, 207 Minn. 537, 292 N.W. 770, supra, speaks of it as a contract of sale. After the execution of this contract, Whiteside still held title, subject to the first mortgage of the Detroit Trust Company.

The next transactions involve the Whiteside "collateral trust agreement" to the Duluth Bank to secure an issue of $400,000 of his notes, by means of which Whiteside "sold, assigned, tranferred, pledged and set over" to the bank all rights to the installments due on the Pickering contract on January 5, 1930, and January 5, 1931, with interest thereon, in trust as security for the holders of the notes, and also transferred all rights "insofar as the same may be necessary or applicable to enforcing payment of said amounts from said Pickering Lumber Company"; and the subsequent agreement, in regard to the loan by the bank of $200,000, by which Whiteside assigned the final payment under the Pickering contract.

[3] These were security transactions insofar as they affected the Pickering contract; they did not transfer Whiteside's title. He held the title to the land as security for these payments. This assignment, being a security transaction, created an equitable lien or mortgage on the Whiteside tract. Roller v. Smith, 76 Colo. 371, 231 P. 656; Farmers & Merchants Nat'l Bank v. Arrington, Tex.Civ.App., 98 S.W.2d 378; vol. 5, Tiffany Real Property, 3rd Ed., § 1573; vol. 4 Pomeroy's Eq.Jur., 5th Ed., § 1259, page 763. These authorities clearly determine that the effect of these transactions, insofar as Whiteside's land was concerned, was an equitable second mortgage on his land, held in trust by the bank. We must bear in mind that the bank owned the mortgage but not the land. The Whiteside notes constituted the mortgage debt, and the land was Whiteside's security that Pickering Lumber Company would pay an amount sufficient to satisfy the Whiteside notes. This was a relationship existing between Whiteside and the bank, to which the Pickering

Lumber Company was not a party. After the contract of January 5, 1927, Whiteside had a debt, claim, or chose in action against Pickering Lumber Company; Pickering Lumber Company was a party to that transaction, and this debt, claim, or chose in action Whiteside transferred to the bank as security for the payment of his notes. The value of this debt, insofar as the Pickering Lumber Company was concerned, depended entirely upon that company's ability to pay. The Pickering Lumber Company held no title to the Whiteside tract to back it up. Its value, insofar as the Pickering Lumber Company was concerned, did not depend upon the value of the Whiteside tract. The bank also received Whiteside's separate personal promise to pay the notes, backed by his financial ability to pay. Whiteside had the right to expect that if the bank required him to pay the notes, it would return his security, consisting of the equitable second mortgage.

At the time the plan of reorganization was proposed, what rights or interests did each party own? Pickering Lumber Company owned an executory contract giving it a right to purchase the Whiteside tract upon payment of the purchase price, and it also had a valuable equity therein for the payments it had already made. Duluth Bank held an equitable second mortgage on the Whiteside tract, as security for the payment of the Whiteside notes, these notes being the mortgage debt. Whiteside estate owned and held title to the Whiteside tract, subject to the equitable second mortgage held by the Duluth Bank, and the contract of purchase held by Pickering Lumber Company.

Who were the parties to the compromise plan or purported accord and satisfaction? The Whiteside estate was not a party thereto, because its acceptance thereof was conditional upon full satisfaction of the Whiteside note obligations, which condition was never complied with. Therefore, the only parties to this compromise, insofar as it affects this case, were the Duluth Bank and Pickering Lumber Company, the bankrupt corporation. The Pickering Lumber Company agreed to transfer, and did transfer to the reorganized corporation, Pickering Lumber Corporation, all its rights and interest in the Whiteside tract, to-wit: Its equity therein, and its right to purchase and acquire title upon full payment of the purchase price; and the reorganized corporation, in consideration therefor, did agree to issue and deliver, and did so issue and deliver to Duluth Bank, a creditor of the bankrupt corporation, certain of its stock and securities, and Duluth Bank did agree to deliver to the reorganized corporation, and did deliver, the deed to the Whiteside tract, which it held in escrow, but was authorized to deliver only upon full payment of the purchase price of the Whiteside tract according to the contract of January 5, 1927; and it also undertook to relieve the bankrupt corporation from any further payments under the contract of January 5, 1927, and to pass to the reorganized corporation, title to the Whiteside tract, which was retained to Whiteside in said contract as security for such payment in full, and to still hold and retain to itself the equitable mortgage debt, to-wit: the Whiteside notes.

[4] We believe that the attempt of the bank to pass title to land it did not own was futile, as was the attempt to separate the mortgage from the mortgage debt. To illustrate: "A" owns a tract of land, subject to an executory contract of sale held by "B," on which X amount will become due, and must be paid before "B" is entitled to title, and for the payment of which X sum, "A" holds the title as security. "A" borrows X amount from "C" on his, "A's" promissory note, and assigns the X amount coming to him from "B" under the contract to "C" as security for the payment of the X amount of "A's" note. This creates an equitable mortgage on "A's" land, held by "C," and "A's" note being the mortgage debt. It is obvious that "C" cannot cancel the amount X, or any part of it, due "A" under "B's" contract, and for the payment of which "A" holds title to the land as security, and pass title to the land to "B" and still hold "A" on his note. Under these circumstances the mortgage debt and mortgage cannot be separated. The fact that the land may have been of little or no value above the encumbrance did not give the parties the right to compromise and to transfer title to this land in the making of the accord and satisfaction. The owner of land, no matter what its value, cannot be deprived of his property without due process, and the law has established the procedure which must be followed.

[5] The equitable mortgage lien will subsist until the debt it was given to secure (Whiteside notes) is paid in full, or the mortgage lien foreclosed in the manner provided by law. Although a vendor in an executory contract for the sale of land who

retains title to such land as security for the payment of the purchase money, sues to recover the unpaid contract price, and obtains judgment thereon, which judgment has not been paid in full, the suit for the unpaid contract price, and recovery of such judgment does not affect the vendor's right to foreclose against such land held as security for any uncollected or unsatisfied portion of the purchase money. Longmaid v. Coulter, 123 Cal. 208, 55 P. 791.

[6, 7] The equitable mortgage was executed by Whiteside, to secure his notes, and not Pickering Company's obligation to pay the contract price. The fact that Whiteside held title to the land to secure him for the payment of Pickering Company's contract obligation did not cause the Pickering Company's contract to be a mortgage, nor was the obligation of Pickering Company to pay the contract price, a mortgage debt. 13 Pomeroy's Eq.Jur., 4th Ed., p. 3041, § 1260; Maltby v. Conklin, 50 Cal.App. 201, 204, 195 P. 280. The distinction being, that in a mortgage, the mortgagor holds title to the land, and the mortgagee has a lien on the land for the payment of the mortgage debt, while in an executory contract of sale, the vendor holds the title to the land as security for the payment of the purchase price, which is more effective than a lien. Nor did the assignment by Whiteside of his claim against Pickering Company under the contract, as security for the payment of his notes, change this obligation of Pickering Company under its contract, to a mortgage debt, because this assignment did not transfer the vendor's title to the land to Pickering Lumber Company.

[8-9] The contract of assignment is to be construed according to the laws of Minnesota, but any contract affecting title to real property situated in California is to be construed according to the laws of California. An "equity of redemption" is an interest in real property. Graves v. Arizona Cent. Bank, 205 Cal. 715, 272 P. 1063; Grant v. Cumberland Valley Cement Co., 58 W.Va. 162, 52 S.E. 36.

It is apparent that after the reorganization plan was consummated and approved by the federal court, unless the Whiteside estate was barred by the order and judgment of the said court, Whiteside's estate still held title to the land, subject to the equitable mortgage held by Duluth Bank, and the contract of sale of January 5, 1927, held by Pickering Lumber Corporation.

We will now consider whether or not the judgment of the Federal Court is a bar to defendant's assertion of any claim to the lands in question.

Section 77B of the Bankruptcy Act gives the bankruptcy court exclusive jurisdiction over the debtor's property and assets wherever situated. Title 11 U.S.C.A. § 207. Executory contracts may constitute valuable assets, and it is customary in bankruptcy proceedings to either affirm or reject the obligation thereon. Rejection would give the vendor a claim for damages, if any, and affirmance would give him a right to the contract price before title could be taken from him. Consolidated Gas, Electric Light & Power Co. of Baltimore v. United Rys. & E. Co., 4 Cir., 85 F.2d 799; In re Burgemeister Brewing Co., 7 Cir., 84 F.2d 388, 389; In re Ideal Laundry, D.C., 10 F.Supp. 719; In re Lake's Laundry, D.C., 11 F.Supp. 237. In the case at bar the bankruptcy court did not reject the contract. There is no doubt that if it had acquired jurisdiction over the parties, it had the right to require the contract to be performed; and if and when the contract was performed, to direct the delivery of the deed. It also had a right to direct a foreclosure on the securities held in the security transaction, as the security-holder (the Bank), had submitted to its jurisdiction; but it had no jurisdiction over the Whiteside executors without bringing them in by proper process, or unless they voluntarily submitted to its jurisdiction. If it had ordered the bank to foreclose on its securities, the bank could only have sold the equitable mortgage, and the debt secured thereby, together and not separately. If the equitable mortgage and debt were sold and acquired by Pickering Company, it no doubt could then be foreclosed in the bankruptcy court (In re Murel Holding Corporation, 2 Cir., 75 F.2d 941), provided the parties to the mortgage were before the court or submitted to its jurisdiction.

In this case the Whiteside executors came before the bankruptcy court by filing a petition in intervention to enjoin the bank from the threatened sale of securities unless it satisfied the claims which it had filed against the Whiteside estate. It is perhaps true that the bankruptcy court might have then tried, determined and adjudicated the issues between the bank and the Whiteside executors, as to the right to the delivery of the deed. If it can fairly be said it did this, the judgment of the bankruptcy court is res adjudicata, and although perhaps erroneous, is a bar to defendants in this action; but if, as appears to be the case, the petition was dismissed without prejudice, nothing was adjudicated thereby as against interveners (Goddard v. Security Title Ins. & Guar. Co., 14 Cal.2d 47, 92 P.2d 804; North Carolina Ry. Co. v. Story, 268 U.S. 288, 45 S.Ct. 531, 69 L.Ed. 959), and they have no right to appeal and are not barred thereby. Brunswick Tire Corp. v. Credit Tire Stores, Inc., 8 Cal. App.2d 69, 70, 46 P.2d 804.

[10] The question to be determined then, is: Did the bankruptcy court adjudicate the question herein involved? The order of March 17, 1937, was that the bank should withdraw and discontinue the sale, and "that the rights of said respondents (the bank and noteholders' committee), with respect to the matters and things alleged in intervener's petition herein, shall not thereby be prejudiced"; that is, the bank, noteholders and Whiteside executors were relegated to the same situation they had occupied before the notice of sale was started, and the court, in said order, reserved "jurisdiction to hear and determine, insofar as it has jurisdiction to do so, all matters and things set forth in said intervening petition, at the time of the hearing upon the final decree in said reorganization proceedings." On March 26, 1937, further hearing on intervener's petition was had. The court reaffirmed its former order, insofar as it had ordered withdrawal and discontinuance of the sale by the bank, reciting that "it appearing to the court that the other controversies involved in said intervening petition are more properly cognizable in the courts of Minnesota."

What were the other matters? According to the petition in intervention they were the satisfaction of the bank's claim against the Whiteside estate, and the surrender of all Whiteside's notes to the executors, and a direction to deliver the deed in exchange for the securities of the reorganized corporation. The order further continued: "Except as above provided, said intervention petition be, and it hereby is, dismissed, without prejudice, however, to the rights of said interveners and said respondents with respect to the matters and things alleged in said intervening petition." That order meant that except as to the withdrawal of the sale, without prejudice to any rights of the bank of noteholders' committee, the petition was dismissed "without prejudice." After this, the final decree was made, directing the delivery of the deed in exchange for the securities mentioned. But when, as was the case, the intervener's petition was dismissed "without prejudice," interveners were no longer before the court. They were not parties. They had filed no claim in the bankruptcy proceedings. They had no right to appeal, and the court had no power to take title to their land away from them.

Assuming that the bankruptcy court did have a right to order the bank to deliver the deed, which we believe it could not do without having the Whiteside executors as parties to the proceedings, it could not adjudicate their property rights. Therefore, the defendants are not bound by the decree in bankruptcy. In the case of First and American National Bank v. Whiteside, supra, the Minnesota court held this decree was not res adjudicata in that action, and we hold that it is not res adjudicata in this action.

Therefore, we determine that the defendants hold title to the Whiteside tract, subject to an equitable mortgage lien thereon for any unpaid remainder of the Whiteside notes, and also subject to the contract of January 5, 1927; and that the deed of record was delivered without authority, and conveys no title to the lands therein described, and will not become effective to transfer title until the full contract price is paid according to the terms of said contract of purchase.

The judgment is reversed, with directions that a judgment be entered adjudging defendants to be the owners and holders of title to the lands described in the complaint, subject, however, to a lien thereon for any unpaid remainder of the Whiteside notes, and subject, further, to the terms and conditions of the contract of purchase of January 5, 1927.

ADAMS, P. J., and THOMPSON, J., concurred.

54 Cal.App.2d 363

LORD v. KATZ.

Civ. 12182.

District Court of Appeal, First District, Division 2, California.

Sept. 11, 1942.

Hearing Denied Nov. 9, 1942.

1. Evidence 🔑594

Trial court may not arbitrarily reject the uncontradicted testimony of a witness unless it is inconsistent with surrounding circumstances or unless inconsistencies in the witness' testimony or his manner of testifying or the inherent improbabilities of the testimony justify such action.

2. Gifts 🔑49(1)

Every element necessary to constitute a gift inter vivos must be sustained by explicit and convincing evidence.

3. Appeal and error 🔑717

Inconsistencies between written opinion of a trial judge or his antecedent expressions and the findings of fact cannot be considered by an appellate court.

4. Appeal and error 🔑1010(1)

District Court of Appeal was bound by trial court's findings of fact having some evidentiary support, even though there was evidence that would have supported contrary findings.

5. Gifts 🔑50

Donee's uncontradicted testimony that a close friend of her husband and her intimate friend before and after husband's death had a year before death given her the key to his safe deposit box and stated that everything in it was hers, enumerating the securities found therein after his death, did not as matter of law require a finding of a "gift inter vivos" of such securities, where portions of donee's testimony indicated she did not consider securities would be hers until after donor's death, and securities were donor's only means of support except for a $1,100 bank account.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Inter Vivos".

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Jean Lord against Phil C. Katz, as administrator of the estate of John Ryan, deceased, to quiet title to certain shares of corporate stock allegedly given plaintiff by decedent prior to his death. From a judgment in favor of defendant, plaintiff appeals.

Judgment affirmed.

Cleveland R. Wright, of San Francisco, for appellant.

Henry F. Boyen, Frank J. Fontes, and Elkins & Wright, all of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff has appealed from a judgment in favor of defendant as administrator of the estate of John Ryan, deceased, in an action seeking to quiet title to certain shares of corporate stock. Plaintiff's claim of ownership of the shares is based upon an alleged gift inter vivos by the decedent of whose estate respondent is administrator. A second count of the complaint sought to enforce payment of a creditor's claim against the estate of the decedent but at the commencement of the trial this count was dismissed on the statement of counsel that he relied exclusively on the first cause of action.

The decedent at the time of his death on January 27, 1941, was a bachelor seventy-nine years of age. He had been retired for more than twenty years, living on the income and proceeds of securities he had accumulated. The plaintiff is a widow. Her husband, Frank Lord, died on June 13, 1937. Frank Lord and the decedent had known each other since the former was a boy four or five years of age. The decedent was about eighteen years his senior. In about 1920 the two met again in San Francisco and Frank Lord invited the decedent to his home for dinner. Thereafter the decedent called for dinner about every two weeks. Commencing a few years later the decedent was almost a daily visitor. About eighteen years ago the Lords moved to a home on Funston Avenue. Thereafter Ryan spent almost every day there puttering in the garden and having his noonday meal with Mrs. Lord. On occasions he would remain for dinner and sometimes spend the night. On holidays and other occasions such as birthdays he was always among the guests. During this period he lived at a small hotel but for about five months after Mr. Lord's death he stayed at the Lord home. He had frequently told Mrs. Lord that he had no relatives except that he might have some "forty-second cousins." In January of 1940 while he and Mrs. Lord were having lunch, no one else being present, the decedent handed her a key and stated that it was the key to his safe deposit. She inquired why he was giving it to her and he replied, "Well, because everything in it is yours." He then said there were 570 shares of Transamerica, 50 shares of Bank of America, 11 shares of Bank of Blair (Bankamerica Blair Corporation) and 26 of Equity Corporation. (These were the only securities found in the box after Mr. Ryan's death. All the certificates bore dates prior to January of 1940.) Subsequent to this time the key remained in Mrs. Lord's possession continuously. Mr. Ryan at no time asked that it be returned to him. Mrs. Lord did not tell anyone of the conversation except that her daughter knew she had the key and she told her daughter what Mr. Ryan had stated was in the box. (The daughter did not testify.) Mr. Ryan dropped dead on January 27, 1941, at Mrs. Lord's home, and was buried in the Lord family plot. The foregoing facts were brought out by the testimony of plaintiff alone except that the intimacy of the acquaintanceship was corroborated by two other witnesses, and the contents of the box after decedent's death was established by the inventory of a representative of the defendant.

After the alleged gift plaintiff did nothing towards reducing the stock certificates to her physical possession, though she had her own safe deposit box in the same bank. During this same period Mr. Ryan visited the box on five different occasions though his purpose in so doing does not appear nor does it appear where or when he obtained the key to gain access. In her briefs appellant apparently concedes that he must have had a second key at all times. Mr. Ryan had been accustomed to receiving his mail at the Lord residence. Subsequent to January, 1940, dividend checks were received by mail which plaintiff gave to Mr. Ryan unopened. She testified that Mr. Ryan would ask her why she had not opened them and when she replied that she would not he would say that it would all be hers anyway. She testified on one occasion that she had told him, "Well, we will wait until it is"; and on another that she told him he would enjoy it. Plaintiff did state that Mr. Ryan owned the stock "all the time" but immediately thereafter she modified this by stating that she meant all the time prior to his giving her the key. She also testified that she felt the stock would be hers after Mr. Ryan's death but this answer she explained by stating that she felt the stock was hers when Mr. Ryan gave her the key but that she would not take anything while he was alive. Though she further testified that even after Mr. Ryan gave her the key he could have given the stock to someone else she also explained this testimony by stating that if he had wanted to do so she would have given the stock back.

After Mr. Ryan's death a representative of the defendant telephoned to plaintiff and at his request she delivered to him the key to the box but the court found that "plaintiff, at the time of said delivery, claimed to be entitled to the contents of said safe deposit box"; and "plaintiff delivered said key to said safe deposit box under protest." This finding is supported by the evidence.

After defendant's appointment as administrator plaintiff through an attorney filed a creditor's claim against the decedent's estate in the sum of $4,620 for services rendered. (The appraised value of the entire estate was $4,603.79) Plaintiff testified that she had gone to the attorney and stated all of the facts to him and that the idea of filing a claim was that of this attorney and was stated by him to be the proper procedure. This claim was rejected. Plaintiff then abandoned the claim and dismissed her attorney. Some time later she met a friend who told her that if decedent had given her the stock and told her the stock was hers she was entitled to it. She then consulted her present attorney and this action was begun.

[1, 2] We have related the evidence in perhaps greater than usual detail because the first and determinative question presented is whether under this evidence the lower court was justified in finding "that it is not true that said John Ryan gave or delivered said certificates of stock, or any of them, evidencing the right to said stock, or any of said shares of stock, or that said John Ryan intended to make a gift of said stock * * * to plaintiff * * *." More properly stated the question is whether as a matter of law the evidence required a contrary finding. The solution of this question must be found in a determination whether the facts presented

bring this case within the well settled rule that the court may not arbitrarily reject the uncontradicted testimony of a witness or the equally well settled exceptions to said rule that such testimony may be disregarded when it is inconsistent with surrounding circumstances or whether inconsistencies in the witness's testimony or his manner of testifying or the inherent improbabilities of the testimony justify such action. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147. In truth this is not an exception to the rule for if there are such inconsistencies or inherent improbabilities the rejection of the testimony is not "arbitrary." This determination must be made in the light of the rule that "every element necessary to constitute a gift must be sustained by explicit and convincing evidence." Sullivan v. Shea, 32 Cal.App. 369, 371, 162 P. 925, 927.

[3] Appellant stresses the fact that at the conclusion of the testimony and before the argument the trial judge stated the facts were proved without dispute and stated among other things that it was uncontradicted that the decedent "handed the key to his safe deposit box to Mrs. Lord and told her that the contents of the safe deposit box belonged to her." Appellant further argues that the judge's express statement and his written opinion (the opinion is not before us) clearly show that the case was decided by him solely on the question of law as to the sufficiency of the delivery. It is true that the statement of the judge is contrary to the finding of fact hereinbefore quoted and it may be that the statement represents his true determination of the facts, but it is settled that inconsistencies between the written opinion of a trial judge or his antecedent expressions and the findings of fact cannot be considered by an appellate court. In Magarian v. Moser, 5 Cal.App.2d 208, at page 210, 42 P.2d 385, the court said: "We have been shown no authority to support appellant's argument that the written opinion of the trial judge constituted a part of the court's decision and that its inconsistency with the findings and conclusions filed deprives the judgment of the support and conformity required by law. It is obvious that the judgment as entered must be supported by, and conform to, the findings (Nestor v. Burr, 124 Cal.App. 369, 12 P.2d 479), but it seems equally clear that a written opinion of the trial court is no more a part of the decision rendered than an oral pronouncement can be and that such opinion, even if inconsistent with the formal conclusions reached by the court, cannot be made the basis for a reversal when the findings, conclusions, and judgment are consistent." In Phillips v. Hooper, 43 Cal.App.2d 467, 470, 111 P.2d 22, 23, the court said: "And no antecedent expressions of the judge can in anyway restrict his absolute power to declare his final conclusion, in the only manner authorized by law, to wit, by filing his 'decision' (findings of fact and conclusions of law), provided in sections 632 and 633 of the Code of Civil Procedure. Scholle v. Finnell, 173 Cal. 372, 159 P. 1179; Fisk v. Casey, 119 Cal. 643, 51 P. 1077; Montecito Valley W. Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113; Risinger v. Anderson, 10 Cal.App.2d 455, 51 P.2d 1119." This rule has again been followed and reaffirmed in the recent case of Lawrence v. City of Los Angeles, 53 Cal.App.2d 6, 127 P.2d 931.

[4] It is respondent's contention that appellant's testimony was full of inconsistencies of which the trial court was the exclusive judge in reaching its determination whether a gift was intended. Respondent adds that the fact that the gift would have divested the decedent of his only means of support except for a bank account of about $1,100 makes it improbable that such a gift was made. Appellant endeavors to explain each of those inconsistencies and presents a case which would have fully supported a judgment in her favor. But, as there is some evidentiary support for the findings this court is bound by those findings. Appellant cites Gordon v. Barr, 13 Cal.2d 596, 91 P.2d 101; Braun v. Brown, 14 Cal.2d 346, 94 P.2d 348, 127 A.L.R. 773, and similar cases where findings contrary to those made here were approved or where the decision rested solely on a question of law. In those cases the court was concerned with the question of the sufficiency of the delivery as a matter of law; in none is it held that all the circumstances may not be considered in determining whether the testimony tending to prove delivery and intent may be rejected.

[5] In a case of this kind we cannot say that the conclusion of the trial court was entirely arbitrary, and we cannot say that the court was bound as a matter of law to accept all the testimony of appellant as true. Since the judgment must be af-

firmed on this ground it is unnecessary to consider any of the other grounds urged by respondent.

The judgment is affirmed.

STURTEVANT, and SPENCE, JJ., concurred.

CORTOPASSI et al. v. CALIFORNIA-WESTERN RAILROAD & NAVIGATION CO. et al.

Civ. 11823.

District Court of Appeal, First District, Division 2, California.

Sept. 11, 1942.

Rehearing Denied Oct. 10, 1942.

Hearing Granted Nov. 9, 1942.

1. Railroads 🔑330(1)

A person approaching a railroad crossing is not authorized to assume that persons operating a train will not be negligent.

2. Appeal and error 🔑1064(1)

In action for death of pedestrian who was struck by gasoline locomotive when pedestrian was attempting to cross the track, where railroad's only defense was contributory negligence and question of contributory negligence was close, instruction that decedent if exercising ordinary care was authorized to assume that he was not exposed to danger and that acting on such assumption was not contributory negligence was prejudicial as abrogating the doctrine of contributory negligence.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Rosina Cortopassi and another against California-Western Railroad and Navigation Company and others to recover damages for death of Joseph Cortopassi when struck by defendant's locomotive. From a judgment for plaintiffs, defendants appeal.

Reversed.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for appellants.

Renzo Turco, Philander B. Beadle, and Samuel Vartan, all of San Francisco, for respondents.

STURTEVANT, Justice.

This is the second appeal in the above entitled action. See Cortopassi v. California-Western, etc., Co. et al., 39 Cal.App. 2d 280, 102 P.2d 1093. After the remittitur in that case went down the cause was tried before the trial court sitting with a jury. The jury returned a verdict in favor of the plaintiffs and from the judgment entered thereon the defendants have appealed. In addition to the facts stated in the former opinion other facts will be recited as we proceed.

The defendants contend that the deceased was guilty of contributory negligence as a matter of law. A consideration of the point requires a more complete statement of the facts. At Fort Bragg in Mendocino County, the Union Lumber Company operates a saw mill and other plants in the manufacture of products of wood. It has many subsidiaries, among others the defendant, California-Western Railroad and Navigation Company (hereinafter called the railroad company), which conducts the greater part of the transportation business for the Union Lumber Company but which is also engaged as a carrier for other persons and is generally engaged in interstate commerce.

The lumber mill of the Union Lumber Company is located close to the ocean shore on the west side of Fort Bragg. Among other appurtenances it has a planing mill in which Joseph Cortopassi, the decedent, was and had been for many years engaged as a planer. The railroad tracks of the defendant extended in a general northerly and southerly direction on a right of way that lies between the lumber mill and the city of Fort Bragg. A part of that right of way is known as the yard. On the east side of the yard is a round house. On the western side of the yard is a shed used as a garage for cars. Between those two buildings is a switch. One railroad track lies between the switch and the round house. Between the switch and the shed are three other tracks. All are practically parallel. The yard has a grade from the south toward the north. The record shows that the brakes being released a car will roll from the north down by the switch toward the south. For a distance of 170 feet from the switch toward the north there are no buildings or other fixed obstructions. A path exists extending from the northwest to the southeast across the tracks at about the north end of the switch.

The decedent, as stated above, was an employee of the Union Lumber Company. His work day was finished at 4 p. m. He was a man of sound health, good eyesight, and good hearing. At about 4:15 p. m. on the afternoon of September 12, 1936, the decedent was on the above mentioned path. He was seen at a point two or three steps west of the western rail of the eastern track. He was then proceeding in a southeasterly direction and had his head turned toward the south. At about that time W. L. King as motorman, and Tom Golden as conductor, were backing a motor coach from the north on the eastern track down toward the switch. The motorman was at his post operating the motor. The conductor was standing on a step on the eastern side of the north end of the motor coach giving signals to the motorman. At about the same time a train of flat cars was being propelled by a steam locomotive from the south toward the north on the western side of the yard. The steam locomotive had reached a point that was practically abreast of the point where the decedent was first seen, as recited above. Except as hereinabove recited, there was nothing to obscure the view of the decedent either to the north or to the south. The steam locomotive was being propelled at a speed of about 25 miles an hour. The motor coach was "coasting" from the north to the south at a speed of about two miles an hour. The bell on the locomotive was ringing continuously. The bell on the motor coach was ringing continuously. The latter bell, according to the testimony, could be heard for a half a mile.

Under the foregoing circumstances the decedent was knocked down and killed as the motor coach backed to the south. McDonald, an employee of the Union Lumber Company, was in the cab of the locomotive. He saw the decedent take two or three steps until he walked over the rail, turned to the south and was struck by the rear end of the motor coach. The witness Burnie was riding on a flat car immediately behind the steam locomotive. He had been making some repairs. He looked up and, as he stated, in a flash he saw the decedent traveling southerly with his face turned toward the witness. He was nearly on the western rail of the east track. He was facing the south. Here the witness indicated to the jury the position of decedent. The witness observed the front of the body of the decedent. He seemed to be walking. The witness was nearly due west of decedent at the time of the collision and was facing east. The witness Saunders was on the same flat car and looking at the motor coach. He first saw the decedent at a point which he estimated to be four feet eight inches from the track. The decedent was walking. He saw him take a step or two, turn his head to the south, when he was struck and knocked down. The decedent was walking toward the motor coach with his head down, but the witness did not see him look toward the motor coach which was then about ten feet away. The witness Emil Nieminen was riding on a flat car estimated to be 150 feet to the south of the place of the accident. He was looking directly at the decedent. He saw the decedent between the rails and testified, "I started to holler and yell all I could and motion him to get off the road." He also testified that he saw the decedent and the motor coach at about the same time. The decedent at no time looked to the rear. Taking all of these facts into consideration it is clear that the question whether the decedent was guilty of contributory negligence is a close one. But, in view of the conclusion we have reached on the point next to be considered, we do not feel called upon to decide the first contention.

[1, 2] Acting upon the request of the plaintiffs, the court instructed the jury as follows: "You are instructed that the deceased, Joseph Cortopassi, as he crossed the track upon which he was killed, is presumed in the absence of credible evidence to the contrary, to have exercised ordinary care for his own safety. Under such circumstances, the decedent, Joseph Cortopassi had a right under the law to assume until the contrary appeared that he was not exposed to danger which could come to him only by and through the negligence of those operating the motor coach, and that if he acted upon such assumption he was not guilty of contributory negligence merely by reason of the fact that he did so." The defendants contend it was error to give said instruction. The plaintiffs reply that the first sentence implies that the

decedent was acting with due care. Continuing they assert that the remainder of the instruction was based on the first proposition. They conclude that therefore the instruction was properly given. Murphy v. St. Claire Brewing Co., 41 Cal.App.2d 535, 540, 107 P.2d 273. The vice in that reasoning is that the plaintiffs fail to appreciate that their claim is based on the claim that the decedent was hit by an instrumentality operated on a steam railroad track. The distinction is all important. A similar controversy arose in Hoffart v. Southern Pacific Co., 33 Cal.App.2d 591, 92 P.2d 436. On page 598 of 33 Cal.App.2d on page 440 of 92 P.2d, the court said: "The following instruction was given: 'A person about to cross over such crossing cannot rely upon the assumption that the employees operating a train on the track will give the proper warning of approach by sounding the bell and blowing the whistle.' Appellants contend that the foregoing instruction is erroneous, in that the rule applies only where the person about to cross the track is *himself* negligent, and they also predicate error upon the refusal of the court to give an instruction to the effect that one *free from negligence,* in approaching a railroad crossing, *has a right to anticipate* that the law requiring the ringing of a bell and the sounding of a whistle would be complied with. The instruction given correctly stated the law, and the proposed instruction was properly rejected. As stated in Hutson v. Southern California R. Co., 150 Cal. 701–703, 89 P. 1093, 1094: *'It is not the law of this State that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation.'*" (Petition for hearing in Supreme Court denied.) That the giving of said instruction was highly prejudicial in the instant case is patent from the following facts. It is hardly debatable that the defendant railway company was negligent in backing the motor coach in the manner described above. Its only defense therefore was the contributory negligence of the decedent. Referring to the effect of the instruction on assumption of the decedent it was said: "Such a rule would abrogate the doctrine of contributory negligence in all such cases * * *." Hutson v. Southern California R. Co., 150 Cal. 701, 703, 89 P. 1093. See, also, Hamlin v. Pacific Electric R. Co., 150 Cal. 776, 784, 89 P. 1109; Larrabee v. Western Pacific R. Co., 173 Cal. 743, 748, 161 P. 750; Alloggi v. Southern Pacific Co., 37 Cal.App. 72, 78, 173 P. 1117. We conclude, therefore, that the giving of said instruction was reversible error.

The judgment appealed from is reversed.

NOURSE, P. J., and SPENCE, J., concurred.

54 Cal.App.2d 334

BOSTOCK v. HULSE et al.

Civ. 2841.

District Court of Appeal, Fourth District, California.

Sept. 3, 1942.

1. Work and labor 🔑28(4)

Evidence that licensed structural engineer employed to prepare plans and specifications for and superintend the demolition and reconstruction of a building had completed and submitted the plans and specifications, and procured a building permit before employer wrongfully terminated employment, sustained finding that for the services performed engineer was entitled to $300 which represented three-fourths of agreed upon compensation.

2. Appeal and error 🔑1033(1)

Appellants cannot complain of a ruling by trial court in their favor.

3. Appeal and error 🔑110

Order denying a motion for new trial was not an "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

◆

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action by S. M. Bostock against Ben Hulse and others for breach of employment contract whereby defendants engaged the services of plaintiff as a licensed structural engineer to prepare plans and specifications for and superintend the demolition and reconstruction of a building. From a judgment for plaintiff and an order denying a new trial, defendants appeal.

Appeal from order denying a new trial dismissed, and judgment affirmed.

S. P. Williams, of El Centro, for appellants.

Russell Yeager, of El Centro, for respondent.

GRIFFIN, Justice.

This cause of action arose out of a breach of contract of employment wherein the appellants engaged the services of the respondent, a licensed structural engineer, to perform certain reconstruction work. The case was tried by the court without a jury.

The amended complaint set forth three causes of action. In the first, the plaintiff alleged that between May 23, 1940, and July 19, 1940, he drew plans, specifications, inspected the building to be reconstructed, and made estimates for superintending the dismantling and reconstruction of the building; that for these services defendants agreed to pay 5 per cent of the cost of the building; that its cost was $8,000; and that the sum of $400 became due and payable to him for the services above referred to. For the second cause of action he alleged that on June 27, 1940, he submitted completed plans for the above-mentioned building to the Brawley City Building Department, paid $12 for a permit authorizing the erection of the building, and that the defendants agreed to reimburse him for said payment but that they refuse to do so. The third cause of action alleged that on the 23rd day of May, 1940, plaintiff and defendants entered into an agreement whereby the defendants employed the plaintiff to draw plans and specifications for the reconstruction of the above-mentioned building, as well as superintending the reconstruction; that the defendants agreed to pay for the services 5 per cent of the cost of the proposed building; that thereafter plaintiff commenced the performance of these services, drew sketches, designs and plans for the building, oversaw the dismantling of the old building, completed the plans and submitted the same to the Brawley City Building Inspector. This cause of action further alleged that on July 19, 1940, while plaintiff was completing the performance of this contract, the defendants without cause terminated the employment and repudiated the contract. The third cause of action also alleged that by reason of this wrongful termination of employment plaintiff suffered damages in the sum of $100 and that the reasonable value of the services actually performed was $300.

The court's findings in respect to these three causes of action were generally as follows: As to the first cause of action it found that plaintiff performed all of the services alleged therein, except that plaintiff did not superintend the reconstruction of the building because his employment was wrongfully terminated before the reconstruction work commenced, and as a consequence the sum of $400 did not become due and payable to the plaintiff for the services actually performed. The court then found for the plaintiff on the second cause of action to the effect that the defendants should reimburse plaintiff for the $12 fee advanced by the plaintiff for the building permit. As to the third cause of action the court found that the plaintiff did enter into an agreement on the 23rd day of May, 1940, whereby he agreed to prepare plans, sketches, and specifications, make estimates for, and superintend the demolition and reconstruction of the above-mentioned building; that the defendants promised to pay the plaintiff compensation for these services in the sum of 5 per cent of the cost of the building; that the plaintiff did commence the performance of these services; that he drew plans, designs and sketches for the building; that the plaintiff oversaw the dismantling of the old building until such time as the contract was terminated by the defendants; that he submitted the completed plans and specifications to the Brawley City Building Inspector and had them approved. Then the findings go on to state that on the 19th day of July, 1940, while the plaintiff was performing this contract, the defendants wrongfully and without lawful excuse terminated the employment, and that the plaintiff did well and faithfully perform all of the services required of him until said services were terminated. The court found that the plaintiff did not suffer damages in the sum of $100 by reason of the wrongful termination of employment, but the court did find that the reasonable value of the services actually performed by the plaintiff for the defendants was $300.

The issue on appeal has been strictly confined by the appellants to the question of whether there was sufficient evidence presented at the trial to establish the reasonable value of the services performed for the appellants by the respondent. Appellants contend that the evidence is insufficient to support the finding of fact that the plaintiff did not suffer damages in the sum of $100 by reason of the wrongful termination of employment of the plaintiff and that said finding is contrary to the evidence. It is argued that respondent was not entitled to recover the full contract price since that would compensate him for labor unperformed and for expenses of performance he did not bear; citing Weichers v. Dehail, 41 Cal.App. 547, 183 P. 187; and Weaver v. Atlantian Const. Co., 84 Cal.App. 154, 258 P. 111.

[1] The record clearly shows sufficient evidence to support the court's finding that $312 was due for services performed and monies advanced. The compensation agreed upon for the completion of the job was $400, or 5 per cent of the cost of reconstruction, which reconstruction cost was admittedly $8,000. As to the actual work performed, respondent testified that "I immediately proceeded to take certain necessary dimensions and investigations of the job, and they were—the preliminary was blocked out—." The record indicates that other men were working for respondent and assisted him in preparing his plans and specifications. These men were paid for their services by respondent. In response to the question "Approximately how much of your work for Mr. Hulse had you completed at the time he terminated your employment?" the respondent answered: "All of the work on the plans. The plans were completed and the permit had been delivered to Mr. Hulse on June 27, and I received his letter on July 19, three weeks later. All of the work with the exception of field—what we call field inspection during the time of construction, and part of that had been done * * *. All that was left was to see that the building—was to go out and supervise the construction of the new building." The plans and specifications and preliminary plans were admitted in evidence and were before the court. The trial court allowed three-fourths of the agreed contract price of $400, which may have been part of the basis for the court's computation of the value of services performed. Appellants themselves submitted in evidence as part of their case in chief a letter sent by respondent to appellants in which he apparently set forth what he considered to be the terms of the agreement and when his claim would be considered to be due. It reads in part as follows: "Full fee, 5% of $7,000, 75% of fee due upon issuance of building permit." It is agreed that the plans and specifications were completed and that the building permit was issued. There was ample evidence submitted to the trial court upon which that court could satisfy itself as to the percentage of work actually performed in relation to the work contracted to be performed, and inasmuch as the total contract price was agreed upon and admitted in the pleadings, the court could, from the evidence, establish what percentage of the contract price was due and owing to the respondent for the work actually performed. Brown v. Crown Gold Milling Co., 150 Cal. 376, 89 P. 86. The cases cited by appellant are not in conflict with this conclusion.

[2] The final argument of appellants must be considered in a lighter vein, i. e., the argument that the trial court erred in finding "that plaintiff did not suffer damages in the sum of $100," by reason of the fact that there was no basis for estimating the profit or loss on the part of the job that the respondent was prevented from performing. It is obvious that appellants cannot assert error in the ruling of the lower court when that error consists of a ruling in their favor. If the trial court had allowed respondent the sum of $100 by reason of the wrongful termination of employment, then the appellants might be in a position to argue that the trial court was in error, but when the trial court ruled against the respondent on that question, the appellants find themselves in the anomalous position of contending that the court erred in ruling in their favor. In re Estate of Funkenstein, 170 Cal. 594, 150 P. 987.

[3] As no appeal lies from an order denying a motion for new trial, the attempted appeal therefrom is dismissed. Scott v. Landis, 39 Cal.App.2d 163, 102 P.2d 820.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

54 Cal.App.2d 360

THOMPSON v. PIONEER LAUNDRY CO. et al.

Civ. 12083.

District Court of Appeal, First District, Division 2, California.

Sept. 11, 1942.

Hearing Denied Sept. 11, 1942.

1. Appeal and error 🔑933(2)

Where trial court made no ruling on cross-defendant's motion for new trial, it would be deemed denied. Code Civ.Proc. § 660.

2. Automobiles 🔑244(11)

In action by guest in truck against owner and driver of laundry truck for injuries sustained when trucks collided at intersection after laundry truck had proceeded quickly into intersection from opposite direction, after signal turned green, and turned left across path of guest's truck, where driver of latter truck knew that laundry truck was about to cross his path and violent collision ensued between his left front fender and bumper and right front fender of laundry truck, evidence sustained the verdict for owner and driver of laundry truck.

3. Appeal and error 🔑979(2)

Order of trial court granting new trial on ground that the evidence was insufficient to support the verdict may not be reversed on appeal, though the record discloses ample evidence to support the verdict, unless trial court abused its discretion in granting the order.

4. Appeal and error 🔑948

On appeal from order granting new trial on ground of insufficiency of evidence, burden of showing an abuse of discretion is on the appellant.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by James S. Thompson against the Pioneer Laundry Company, a corporation, and others, for personal injuries. The named defendant filed a cross-complaint against John Gruber. Verdicts for defendants against plaintiff, and for cross-complainant against Gruber, covering the property damage. The named defendant appeals from an order granting plaintiff's motion for a new trial on the ground of the insufficiency of the evidence to support the verdict for the named defendant.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Weinmann, Quayle & Berry, of Oakland, for appellants.

Milo Ayer and Pierce & Sherwin, all of Oakland, for respondents.

NOURSE, Presiding Justice.

[1] The plaintiff, who was riding as a guest in a truck operated by cross-defendant Gruber, was injured when the Gruber car collided with a laundry delivery truck operated by the defendant Kennedy in behalf of his employer the Pioneer Laundry Company. The latter filed a cross-complaint against Gruber for damages for injury to the laundry truck. In a trial of the cause to a jury the defendants had a verdict against the plaintiff, and the cross-complainant had a verdict against Gruber covering the property damage. The trial court granted plaintiff's motion for a new trial on the grounds of insufficiency of the evidence. No ruling was made on Gruber's motion for a new trial, and it may be deemed denied under section 660 of the Code of Civil Procedure.

[2] There is no substantial conflict in the evidence. Defendant Kennedy was operating the laundry truck westerly on East 14th Street in the city of Oakland. He stopped near the northerly curb at the intersection with 73rd Avenue in response to a red traffic signal. To his left, or south, in the inner traffic lanes, two other cars stopped at about the same time. When the signal turned green Kennedy started quickly, making a left hand turn in a wide arc, passing in front of the two cars in the inner lanes. The drivers of these two cars saw the movement and stopped to let him pass. Kennedy completed the turn and crossed the two sets of street car tracks in the middle of East 14th Street when he observed Gruber traveling easterly along East 14th Street and about fifteen feet westerly of the intersection. He applied his brakes, but the left front fender and bumper of the Gruber truck collided with the right front fender of the laundry truck at a point about eleven feet easterly from the southwest curb of the intersection. The impact of the collision caused the laundry truck to be pushed out of its course of progress so that when the cars came to a full stop the laundry truck was facing east.

We are unable to perceive in what respect this evidence is insufficient to support the verdict. The defendant Gruber testified that he saw the laundry truck stopped at the northeast corner of the intersection with two other cars stopped at the same line in the inner traffic lanes; he saw this laundry truck start with the signal, make the turn to the left, and saw the two other cars stopped to let him pass. He admitted knowledge that the laundry truck was preparing to make a left turn and hence knew that it would come directly across his path. The most reasonable inference that the jury could have drawn from all the evidence was that Gruber failed to exercise any care or to take any steps to avoid a collision, other than a feeble attempt to apply his brakes just before the impact.

[3, 4] But, when the trial court grants a new trial on the ground that the evidence is insufficient to sustain the verdict, that order may not be reversed on appeal, even though the record discloses ample evidence to support the verdict, unless the appellate court finds that the trial court has abused its discretion in granting the order. 20 Cal. Jur. 27. The decisions do not state upon what basis this finding should rest, but the cases cited hold that the burden of showing an abuse of discretion is on the appellant.

We find no reversible error. The order is affirmed.

STURTEVANT, J., concurred.

SPENCE, J., concurred in the judgment.

54 Cal.App.2d 405

CROMER v. STRIEBY.

Civ. 2865.

District Court of Appeal, Fourth District, California.

Sept. 14, 1942.

1. Account, action on 🔑22
Evidence 🔑354(10), 376(4, 7)

Where it was not disputed that money was advanced by plaintiff to defendant in form of checks in evidence, and plaintiff's bookkeeper testified that he personally knew the handwriting of prior bookkeeper, who was then ill and unable to testify, and that prior bookkeeper had made entries concerning account between plaintiff and defendant, and the entries were the first permanent entries of the transaction, were made within reasonable time, and were evidently correct, evidence sufficiently established an "open book account" and the entries were properly admitted in evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Open Book Account".

2. Account, action on 🔑22

In action on an open book account, wherein plaintiff contended that he advanced defendant money to raise feed for plaintiff's livestock, evidence sustained finding that the parties were not gambling on the results of defendant's crop and that defendant was therefore not relieved from the obligation to respond for any failure to produce a sufficient crop to offset the advance.

3. Pleading 🔑424

The trial court did not abuse its discretion in allowing introduction of evidence on a common count over defendant's objection, though a bill of particulars demanded of the plaintiff by the defendant was not furnished within the ten-day period prescribed by amended statute, where the bill was short, no motion for continuance was made, no prejudice was shown, correctness of items in open book account was not denied, except by general denial, defendant did not deny the transaction, and the complete account was available to defendant for examination. Code Civ.Proc. § 454.

◆

Appeal from Superior Court, Imperial County; Vaughn N. Thompson, Judge.

Action by J. Lon Cromer against Sam Strieby on an open book account. From an adverse judgment, the defendant appeals.

Judgment affirmed.

Clifford W. Twombly and Ardene D. Boller, both of Arcadia, for appellant.

Darwin H. Wolford, of Beverly Hills, for respondent.

GRIFFIN, Acting Presiding Justice.

This is an action by plaintiff and respondent against defendant and appellant on an open book account. From an adverse judgment defendant appeals.

On October 28, 1941, the respondent filed a complaint consisting of one cause of action on an open book account alleging that defendant was indebted to him in the sum of $700; that $283.99 was paid thereon; and that there is a balance due in the sum of $416.*11* which has not been paid.

On November 10, 1941, the appellant demanded from the respondent a bill of particulars which was furnished on December 15, 1941. On December 6, 1941, appellant filed his answer denying the allegations of the complaint. The trial of the matter was had on January 14, 1942. Judgment was rendered against appellant in the sum of $416.*01*. Respondent Cromer was called as a witness. Appellant then objected to the introduction of any evidence on the ground that a bill of particulars had not been furnished, after demand, within the time prescribed by law. The objection was overruled. Cromer then testified and the court found that he had been in the business of cattle feeding for a period of ten years or more; that the method employed by him in carrying on his business was to purchase feed from farmers in Imperial Valley and buy cattle from other states, shipping the cattle in and feeding them; that this food, in the main, was bought several months before it was to be used, and the method frequently used was for the respondent to advance money to a farmer or grower, with which the farmer or grower was to plant and raise the feed; that these advances were made in different sums, as necessity arose; that when the food was grown respondent would pasture his cattle thereon and would credit to the account of the grower or farmer the price of the pasturage until the credit equalled the charges; then respondent would pay the balance, if any, in cash.

In conformity with this verbal agreement respondent testified that he delivered to appellant three checks, one in the sum of $400, dated April 7, 1938, one in the sum of $200, dated April 26, 1938, and one in the sum of $100, dated May 1, 1938; that two credits were made against the charge, one in the sum of $272.06, paid to him by one T. M. Bates, and another credit for $11.93, also turned in to him by Mr. Bates for the account; that as to the nature and method of carrying on his business he testified that his books were kept on all of his feeding business together; that after he had given Strieby the $700 he found that Strieby was growing no feed on the place for which the advance had been made; and he made several demands on Strieby for the pasturage for which he had advanced the money; that had Strieby grown the feed on the place on which the original deal was made he would have "pastured off" according to agreement.

With reference to his books, Cromer testified that one Allen was his bookkeeper at the time of the trial and that Allen had been keeping his books since one Pearson had become ill; that Pearson became ill in December, 1940; that prior to that time and since 1935, Pearson had been keeping the books; that because of a mental illness Pearson could not be brought into court to testify and could not be examined; that respondent made no change or alteration in the books when he took them from Pearson's possession and placed them in the hands of Allen.

Allen testified that he knew Pearson well for many years; that he knew his handwriting, and the entries made in the ledger were in the handwriting of Pearson; and further that the other books of respondent Cromer which were turned over to him under the Strieby account were also in the handwriting of Pearson; that he had worked with Pearson and had come in contact with him and with other books that he kept; and that the handwriting in the journal which was turned over to him by Cromer was the handwriting of Pearson. The rest of Allen's testimony described the entries in the books and identified and explained the charges and credits as they appeared from the books. Cancelled checks in the sums claimed to have been paid to appellant were received in evidence. The ledger sheet containing the account of Strieby, showing the dates of entry, the dates of the credits and balance due were received in evidence.

Appellant first contends that there is no evidence in the case as to how, when, or from what information entries were put into the records. In other words, it is appellant's contention that there was not sufficient evidence to show a proper foundation for the entry of the books into evidence, and he relies upon the case of Chan Kiu Sing v. Gordon, 171 Cal. 28, 151 P. 657. In this respect, appellant argues that even though respondent testified, over objection, that he gave the total sum of $700 to the appellant and that appellant was to grow feed on certain land which he had leased and that this money which he gave to appellant was not a loan, respondent was not authorized to designate this transaction as an open book account but that it amounted only to "gambling with the grower as a sort of hedge should he need or desire fall or winter feed"; that in the light of the testimony of the respondent, "if he had any cause of action against the defendant it would be either for breach of an oral contract, or for money had and received * * * that the transaction between the plaintiff and the defendant did not constitute an open book account and no other remedy was open to the plaintiff because of the statute of limitations."

[1] As to the first point raised, it clearly appears from the record that the entries were made in the usual and ordinary course of the bookkeeping business. The cancelled checks respondent himself gave to Strieby and they were regularly entered by his bookkeeper Pearson. It is not disputed that the money was advanced by the respondent himself in the form of the checks in evidence. Mr. Allen's testimony as to his personal knowledge of Pearson's handwriting and that the entries were in the books when he received them corroborates respondent's testimony. The entries were the first permanent entries of the transaction; they were made within reasonable proximity of the transaction; and they were quite evidently correct because neither appellant nor his counsel in the examination of witnesses in reference to the books in court challenged the items claimed therein. There can be no question, from an examination of the checks and the record of account, that appellant received the total sum claimed. If he contended that these amounts were repaid to respondent, which he did not, the burden would have been upon him to establish this fact. Dyer v. Minturn, 47 Cal.App. 1, 189 P. 1046. We are convinced that the evidence sufficiently establishes an open book account with a balance due in the amount found by the court.

[2] In considering the next point raised, the evidence shows that in the ordinary course of business respondent advanced money to appellant for certain feed to be grown upon a certain place. It shows that appellant did not grow such feed and that he did not pay respondent back the money he had received and that he only supplied feed and then only at a different place, to a different person, and to the extent shown by the credit. Appellant now argues that when respondent made the deal the feed was respondent's and any risk connected therewith was respondent's risk; that there might be feed and there might not be feed, and if there were feed respondent might have cattle to feed it to and again he might not. In other words, the sum total of his argument is that appellant and respondent were gambling on the results of this crop and he was therefore not obligated to respondent for any failure to produce a sufficient crop to offset the advance. The court did not find that such was the result of the evidence, but on the other hand justly found that appellant was indebted to respondent for the balance due on an open book account.

[3] The final point raised by appellant is this: Is it an abuse of discretion on the part of the trial court to allow the introduction of evidence on a common count over the objection of the defendant, where a bill of particulars was demanded of the plaintiff by the defendant and the bill of particulars was not furnished within the ten days period prescribed by section 454 of the Code of Civil Procedure?

In the case of McCarthy v. Mt. Tecarte Land & Water Co., 110 Cal. 687, 43 P. 391, the court construes this section as it existed prior to its amendment in 1939, Stats. 1939, p. 1005. The amendment increased the period within which the bill of particulars had to be furnished after demand from 5 to 10 days. In the cited case it was held that the trial court had the discretion to determine whether or not to exact the penalty of precluding the plaintiff from giving evidence thereof. The reasoning expressed in that case is not affected by the amendment and is a complete answer to appellant's question. See, also, St. John v. Consolidated Construction Co., 182 Cal. 25, 189 P. 276.

In the instant case the bill of particulars was short, consisting only of five entries, and was served upon the defendant 30 days before the day of trial. No motion for continuance was made, no prejudice was shown nor attempted to be shown. The correctness of the items was not questioned other than by the general denial in the answer. Appellant did not even take the witness stand and deny the transaction. In addition to this, the complete account of respondent, contained in the journal and ledger, was in court, and made available to appellant for his examination or any cross-examination. No abuse of discretion appears.

Judgment affirmed.

MARKS, J., concurred.

53 Cal.App.2d 805

JOHNSON v. JOHNSON.

Civ. 13740.

District Court of Appeal, Second District, Division 1, California.

Sept. 3, 1942.

Hearing Denied Oct. 5, 1942.

Executors and administrators 🔑315(4)

Where cursory examination of records in divorce action of alleged widow of deceased against husband to whom she was married before marriage to deceased would have disclosed to deceased's mother that divorce decree was void, but deceased's mother did not exercise reasonable diligence to discover that fact before or at time of alleged widow's petition to have deceased's estate set aside to her as widow, deceased's mother was not thereafter entitled to prevail in action to annul decree setting aside estate to alleged widow.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

On petition for rehearing.

Petition for rehearing denied.

For prior opinion, see 128 P.2d 617.

Harold B. Pool and Robert G. Johnson, both of Los Angeles, for appellant.

Sylvester Isonberg, of Los Angeles, for respondent.

PER CURIAM.

In the petition for rehearing herein respondent contends that the decision is not based upon the portion of the complaint charging constructive fraud or mistake *as admitted by appellant's answer.* However, it does not appear that appellant has admitted the existence of any fraud, constructive or otherwise. It should also be pointed out that the trial court's finding of constructive fraud is not sustained by the evidence. Neither the relationship, if any, of appellant and respondent nor the circumstances under which appellant petitioned the probate court to have the deceased's estate set aside to her as his wife furnished the basis for such a finding, regardless of the legal effect of the entry nunc pro tunc of appellant's final decree of divorce or of the like effect of the failure to enter the decree earlier. No authority has been offered which would justify a ruling that appellant was guilty of constructive fraud under the circumstances here presented.

As already pointed out in the opinion filed herein, the only proper conclusion to be drawn from the evidence is that both parties were laboring under a misapprehension as to the entry of the final decree of divorce. The rule for setting aside judgments because of mistake is well expressed in Bacon v. Bacon, 150 Cal. 477, 89 P. 317, which case comes closer to being analogous to the present one than any other cited by respondent. In the Bacon case, at the hearing of the petition for distribution of an estate the original will in the handwriting of the testator was on file, but it was not produced and examined, or read by or to the court. The petition was prepared from one of the typewritten copies of the will, which copy stated the plaintiff's legacy as two thousand instead of ten thousand dollars. The attorney for the executor read this statement to the court and also stated that it was a correct statement of the contents of the will. The mistake in question appeared to have been common to all parties, as well as to the court. The Supreme Court there stated in its opinion (150 Cal. at page 490, 89 P. at page 322): "If the plaintiff had been present at the hearing, contending that the will gave her $10,000, had presented the point to the court, and the court had thereupon read the word 'ten' as 'two,' and had made the distribution as it was made by the judgment appealed from, no doubt she would be precluded from any relief by way of equitable review, no matter how plain the mistake of the court would appear." The court there stated: "The gravamen of the rule * * * lies in the fact that 'the unsuccessful party has been prevented from exhibiting fully his case,' and, consequently, that there has been 'no adversary trial or decision of the issue,' no 'real contest at the trial,' or, as stated in Pico v. Cohn [91 Cal. 129, 25 P. 970, 27 P. 537, 25 Am.St.Rep. 159], no 'fair submission of the controversy.' Where the unsuccessful party has been thus hindered, he is not to be refused relief on the ground that the fact on which his defense or claim in the original action depended, and by which he expects to bring about a different result in the new suit for equitable relief, was technically in issue in the original action or proceeding, or was necessarily decided by the court in that action and concluded by the original judgment beyond reach on collateral inquiry." The court also stated that the mistake was not caused by the culpable negligence of the plaintiff.

The situation presented by the case at bar, however, is distinct from that in the Bacon case. Unlike the plaintiff in the Bacon case, the respondent here was not misled by any mistake or act of another party. Upon the record, nothing appears to have hindered respondent from ascertaining the facts concerning the decree of divorce in question other than respondent's own failure to exercise diligence in discovering the same. It might also be pointed out that the circumstances here presented would have afforded respondent no grounds to move for a new trial because of newly discovered evidence, since it is plain that with the exercise of reasonable diligence the facts could have been discovered prior to the hearing in probate upon appellant's petition to have the estate set aside to her. Respondent does not complain of any lack of notice of appellant's petition to the probate court. A cursory examination of the records in the divorce action would have revealed the true facts. If the circumstances here presented would not have afforded respondent relief by way of a new trial or hearing, how can they be said to afford respondent grounds for having the decree set aside? From all that appears in the record the equities are in favor of appellant.

It should be emphasized that the opinion of this court is based solely upon the conclusion that the findings of the trial court are not sustained by the evidence and that the evidence presents no justification for setting aside the decree in probate here in question. The legal effect of the entry nunc pro tunc of appellant's decree of divorce has no bearing upon the question here decided.

The petition for rehearing is denied.

54 Cal.App.2d 387

ALEXANDER v. BAMES.

Civ. 13498.

District Court of Appeal, Second District, Division 1, California.

Sept. 14, 1942.

Hearing Denied Nov. 12, 1942.

Limitation of actions 🔑127(4)

Where original complaint against plastic surgeon for malpractice improperly combined causes of action based on negligence and breach of warranty, but was filed before the running of the statute of limitations, cause of action for breach of warranty separately stated in amended complaint subsequently filed which traced its descent directly from original complaint was not barred by two-year statute of limitations. Code Civ.Proc. § 339, subd. 1.

◆

Appeals from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Fanny Alexander against H. O. Bames, a plastic surgeon, for alleged malpractice in performing an operation. From judgments for defendant on three causes of action, respectively, on the verdict, on the pleadings, and on a directed verdict, plaintiff appeals.

Reversed.

Phillip W. Silver and John Boukather, both of Los Angeles, for appellant.

Fred O. Reed, Richard L. Kirtland, Henry E. Kappler, and John K. Ford, all of Los Angeles, for respondent.

YORK, Presiding Justice.

Plaintiff instituted the instant action against defendant, a plastic surgeon, to recover damages for alleged malpractice. Her original complaint alleges that defendant so negligently performed two operations on her nose as to cause the same to become disfigured and unsightly to her damage in the sum of $25,000. Plaintiff's first amended complaint realleges the cause of action for negligence; sets up a second cause of action on an express warranty and breach thereof by defendant with respect to the first operation performed by him; and also sets up a third cause of action alleging an express warranty as to the second operation and a breach of said warranty by defendant.

The answer denied generally and specifically the allegations of the amended complaint with respect to all three causes of action and set up the statute of limitations as a distinct and separate defense to the second and third causes of action.

The trial court granted defendant's motion for judgment on the pleadings as to the second cause of action on the ground said cause was barred by subdivision 1, of section 339 of the Code of Civil Procedure. Thereafter the jury returned its verdict for defendant on the first cause of action. It also returned its verdict on the third cause of action in favor of defendant, pursuant to the order of the court granting defendant's motion for a directed verdict as to that count. "Judgment on verdict in open court" was entered on June 17, 1941, as to the first and third causes of action, but said judgment made no mention as to the disposition of the second cause of action. On August 30, 1941, plaintiff perfected her appeal from the judgment of June 17, 1941. The omission in said judgment of mention of the second cause of action was later discovered and on July 13, 1942, judgment as to said second cause of action was entered nunc pro tunc as of June 17, 1941, and plaintiff on July 16, 1942, filed her notice of appeal therefrom.

The following facts were developed by the evidence adduced at the trial: On February 21, 1939, appellant consulted respondent plastic surgeon concerning an operation whereby respondent would shorten appellant's nose, remove the hump and bulbous tip and narrow the sides thereof. At that time respondent took photographs of appellant's nose and appellant signed a statement of complaint and correction which described appellant's complaint and the work to be done on her nose, closing with the statement: "I understand that in rendering treatment to me, Dr. Bames undertakes to exercise his best skill and judgment as a physician and surgeon to accomplish the desired result, but does not warrant or guarantee such result."

The fee for the work was $175 including whatever treatments were necessary to secure the desired result.

On March 3, 1939, when appellant again consulted respondent, the latter pointed to a pencil line which he had drawn on one of the photographs above referred to and stated: "You see that hump above the line? I will remove that. * * * I will also remove the bulbous tip and make your nose shorter and straighter." Appellant had an oily skin, but in respondent's judgment she did not have a disease known as seborrhea and in his opinion the degree of oiliness of her nose did not indicate that an operation should not be performed or that the oily skin would have any effect on the case. Before the operation appellant had a urinalysis and a heart and chest examination to determine that she was a fit subject for the operation. On March 20, 1939, respondent operated on appellant's nose before which he gave her a sedative and an anaesthetic and washed her face and the inside of her nose with potassium mercuric iodide, an antiseptic which is alkaline in reaction and dissolves fat. Respondent incised the inside of the nose at the fibrous septum carrying the incision up on both sides inside the nose, lifted up the fleshy section of the nose from the bony section, chiseled away the hump of bone, all of which was accomplished without cutting through the external skin of the nose, and then using a chisel, respondent narrowed the bone on the side of the nose. Through the same internal incision he removed cartilage to reduce the bulbous tip and sutured the internal incision, there being no sutures on the external part of the nose.

Two days after the operation respondent removed the bandages and noticed the nose was not progressing normally—it was red and irritated, with a seeping or weeping from the outside. He applied surgical mercurochrome and rebandaged the nose. On appellant's ninth visit to his office on April 7, 1939, respondent noticed a slight transverse rugae over the lower area of the nose, to wit: "a fairly deep wrinkled field also known as a depression" or hole which represented the merging of several broken pores; also a scar on both sides of the nose. On May 5th respondent told appellant that her nose had not healed the way he thought it should and that it might be necessary to operate again, and that it was possible that inflammation might develop. Appellant informed respondent she was willing to undergo whatever he decided, and on July 13, 1939, respondent made a resection from outside of the nose and removed the depression and scar formation. As result of the second operation, one side of the nose cleared up but a depression remained on the other side. The parties had two conversations on February 15th and 19th when respondent "decided not to risk surgical resection but recommended sparking (electrical treatment) and did spark the two most prominent crags with the suggestion that this be repeated approximately a week later." Appellant submitted to two sparking treatments; "the improvement was all that could be hoped for because it had to be a gradual thing"; but appellant "never returned after the second" treatment, and never again communicated with respondent.

At the trial respondent was asked to describe the then condition of appellant's nose which he did as follows: "In profile you can see two irregular scar lines. A square one near the center of the nose and a rectangular one going laterally sideways about a quarter of an inch long. This quarter of an inch one seems to be about a sixteenth of an inch wide and about a thirty-second of an inch deep. The square one is approximately an eighth of an inch and about the same depth." Respondent testified he did not tell appellant that there was any probability of the development of depressions in her nose following the plastic surgery, although he did state to appellant at their very first conversation when she asked him if he could guarantee the result of the proposed operation: "I can cut and trim down, but I do not do the healing. I do not know which way the healing will go, whether it will be in my favor or part of it be against me. It would be the uncertainty of the healing that I cannot guarantee."

From the time appellant saw her nose after the first operation and continuing until the second operation was performed, she was very much embarrassed and ashamed; would not go out any place because people would stare at her; she was ashamed to return to work and felt "terrible." After the second operation she was very embarrassed because of the condition of her nose; was self-conscious and isolated herself from her co-workers; was very solemn and worried. This state of mind continued until the time of trial.

Appellant urges (1) that the court erred in granting respondent's motion for judgment on the pleadings because the second cause of action of the first amended complaint was not barred by the statute of limitations; (2) that there was substantial evidence from which the jury might have found that respondent expressly warranted to appellant that he would remove the scar formation from her nose; that there was a breach of such warranty and the court erred in directing a verdict for respondent on the third cause of action; (3) the court erred in giving the jury respondent's instructions numbers 18, 27 and 29.

In connection with her first point, appellant argues that in granting the motion for judgment on the pleadings the court "concluded that the statute of limitations should be computed from the date of the filing of the amended complaint, rather than the date of the filing of the original complaint." In this regard she claims that her "change from a cause of action based on negligence (as alleged in the original complaint) to include an additional cause of action for breach of warranty (as alleged in her amended complaint) was based on the same operation, and the same attendant results, was a change only in the theory of remedy of the appellant and was not the statement of an entirely, wholly and different cause of action, which was entirely foreign to the original cause of action."

While it is true that appellant's original complaint filed March 14, 1940, is based upon the alleged negligence and lack of skill of respondent in performing the two operations upon appellant's nose, said complaint also alleges "That the defendant *represented* to the plaintiff that by performing a plastic operation on her nose, he would reshape her nose, making it straight and shorter, also remove the bumps therefrom and thereafter she would have a good looking nose. * * * That the plaintiff *believing the representations and guarantees of the defendant,* employed the said defendant, as such plastic surgeon, to perform the operation on her nose." (Emphasis added.)

Appellant's amended complaint filed May 26, 1941, by leave of the court realleges the negligence and lack of skill of respondent in performing the two operations, and as a second cause of action (as to which the court granted respondent's motion for judgment on the pleadings), it is alleged as follows: "* * * That the *defendant represented and expressly warranted* to the plaintiff that by performing a plastic operation on her nose he would reshape her nose making it straight and shorter, also remove the hump. * * * That the *plaintiff believing the representations and warranty of the defendant*, employed the said defendant. * * * That through and by the said *breach of said warranty* of said defendant, plaintiff's nose has become disfigured and made unsightly, causing her extreme humiliation, pain and mental anguish, all to her damage in the sum of $25,000.00." (Emphasis added.)

The original complaint was not a model pleading. However, a general and special demurrer thereto was overruled by the court, and a cursory reading of its various allegations reveals that in addition to negligence the pleader was attempting to charge respondent with having made certain representations and guaranties to appellant and that believing and relying upon such representations and guaranties, she was persuaded to employ the respondent. In other words, the pleading sufficiently states a cause of action on warranty.

In holding that an amended complaint which separately stated two causes of action theretofore improperly pleaded as one cause of action was not barred by the statute of limitations, the court said in Lovelace v. Free, 11 Cal.App.2d 370, 373, 54 P.2d 82, 83:

"The allegations were not made in an approved manner and the cause of action was not separately stated, but they clearly served as a basis for the second amendment and prevented the running of the statute."

See, also, Day v. Western Loan & Bldg. Co., 42 Cal.App.2d 226, 231, 108 P.2d 702, 705, wherein it is said: "Stated another way, if the original complaint defectively states a cause of action, it may be amended after the running of the statute as long as the cause of action stated in the amended pleading can trace its descent from the original pleading."

Since it is the opinion of this court that the amended complaint herein traces its descent directly from the original complaint which was filed on March 14, 1940, it follows that subdivision 1, of section 339 of the Code of Civil Procedure is not a bar and that it was error to grant respondent's motion for judgment on the pleadings as to appellant's second cause of action.

Because it is necessary to remand the case for trial upon appellant's second cause of action which is so closely involved with the first and third causes of action that it is impossible to extricate it from them, it is deemed inadvisable to pass upon appellant's remaining contentions, but to await the outcome of the second trial.

For the reasons stated, the judgments appealed from are, and each of them is, reversed.

DORAN and WHITE, JJ., concurred.

54 Cal.App.2d 393

PEOPLE v. ALEXANDER.

Cr. 3628.

District Court of Appeal, Second District, Division 1, California.

Sept. 14, 1942.

1. Criminal law 🔑1071

Where defendant in his statement of grounds of appeal and demand for phonographic transcript stated that the appeal was taken from the judgment and the order denying his motion for a new trial, and the record failed to disclose any motion for new trial, the appeal was considered as having been taken only from the judgment.

2. Criminal law 🔑1144(13)

On an appeal from a judgment of conviction, the appellate court is required to state the facts in the light most favorable to the prosecution.

3. Indictment and information 🔑59

Information charging defendant with grand theft was not insufficient for failure to state the kind of grand theft with which the defendant was charged under statute eliminating the necessity for the district attorney to elect in advance of the proofs whether the prosecution will proceed upon the theory of larceny, false pretenses, trick and device, embezzlement, etc. Pen. Code, § 950, subd. 2.

4. False pretenses ⇨49(1)

Evidence sustained conviction of grand theft of an automobile.

5. False pretenses ⇨7(1)

"Grand theft" includes the act of depriving another of his property by means of fraudulent representations. Pen.Code, § 484.

See Words and Phrases, Permanent Edition, for all other definitions of "Grand Theft".

6. False pretenses ⇨7(1)

Where defendant on false representation to used car dealer that old automobile was clear and false explanation of absence of registration slip and certificate of title gave dealer the bill of sale to old automobile and obtained another automobile from dealer which defendant removed from the state and repainted, and on which he put different license plates, defendant disclosed a lack of intention of delivering a clear title to old automobile and consequently was guilty of "larceny" of automobile obtained from dealer and was properly convicted of "grand theft." Pen.Code, §§ 484, 950, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Larceny".

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Judge.

Victor Noel Alexander was convicted of grand theft of an automobile, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

[1] In an information filed by the District Attorney of Los Angeles County, defendant was charged in count one with the crime of grand theft of an automobile, while in count two he was accused of a violation of section 503 of the Vehicle Code, St.1935, p. 174, as amended by St.1939, p. 1481, which makes it an offense to take an automobile without the consent of the owner thereof. Following entry of not guilty pleas to both offenses charged, a jury was waived and trial had before the court, resulting in the conviction of defendant on count one and his acquittal of the offense charged in count two. While defendant in his statement of grounds of appeal and demand for phonographic transcript states that the appeal is taken from the judgment and the order denying his motion for a new trial, the record does not disclose that any motion for a new trial was made, and the appeal therefore must be considered as having been taken only from the judgment.

[2] Stating the facts in the light most favorable to the prosecution, as we are required to do following conviction of the defendant, we find in the record evidence that about noon on Saturday, January 24, 1942, defendant drove into the used car lot of William Henry at Hermosa Beach in the county of Los Angeles. Defendant was driving a Studebaker automobile, and wanted to work out a deal whereby he would transfer the Studebaker to the dealer and purchase a 1941 Buick coupé. He stated that he desired to take delivery of the Buick that same Saturday afternoon, so that he could drive back to San Francisco to be at work the following Monday morning. During the negotiations defendant stated to Mr. Henry, the dealer, that he had purchased the Studebaker as a new car in San Francisco, but did not have the white registration slip on it because that document was in transit to Sacramento in connection with his application for 1942 number plates. In response to a question asked of him by Mr. Henry as to whether he ever had a loan on the Studebaker, defendant stated that at one time he had a loan with the Universal Finance Company in Los Angeles; that at that time the car was registered to an address on 92nd Street, but that the loan had been paid off in full. In an attempt to verify the aforesaid statement, Mr. Henry called the Universal Finance Company on the telephone, but that Saturday afternoon its office was closed.

The dealer then contacted the Hermosa Beach Police Department and learned through them that the Universal Finance Company was the legal owner of the Studebaker automobile and that appellant had made the loan from an address in 92nd Street in Los Angeles. When he was asked to produce the "pink slip" on the

Studebaker, defendant replied that it was in San Francisco, but that he could send it down on Monday. The dealer then agreed to take what is called a "buyer's bill of sale" on the Studebaker and to deliver the Buick to the defendant at once after the necessary conditional sales contract was completed in connection with the sale of the Buick. In the conditional sales contract signed by defendant he gave his address at 203 Sutter Street, San Francisco, where he stated that he had lived for about three years, upon property that he owned, and that he was engaged in the business of a roofing contractor in San Francisco.

From the evidence, it appears that defendant first came to the used car lot to look at the Buick a few days prior to the transaction above referred to to-wit, on Wednesday or Thursday of that same week. Upon his return to the lot on Saturday noon, he said to one of Mr. Henry's salesmen on the lot, "I see you still have my Buick," to which the salesman replied, "I am glad to have you come back; I think I have." The salesman then appraised defendant's Studebaker and figured the amount of the contract; the papers in connection with the transaction were completed and signed by defendant with Mr. Henry, the dealer. The salesman testified that in the conversation that occurred among himself, Mr. Henry and defendant, the dealer agreed to deliver the Buick to defendant and take a buyer's bill of sale for the Studebaker, and wait until Monday morning for the certificate of ownership on the latter automobile. The Buick was delivered to the defendant, and he drove it away.

On the following Monday morning the dealer continued his investigation, and as a result of that investigation he was required to deliver the Studebaker automobile to the Universal Finance Company. The testimony shows that on the Saturday in question, when defendant delivered the Studebaker to Mr. Henry, there was due and unpaid a balance of $630 from defendant to the finance company, and his conditional sales contract for the purchase of the Studebaker was in default for three installments of $35 each for the months of November, December and January.

It also appears in the evidence that when a copy of the conditional sales contract on the Studebaker was compared with the original, the number of cylinders had been changed from six to eight, the serial number had been changed, and the words, "used 39 Stude" had been changed to "1941 Buick." Defendant was apprehended in Kansas City, Missouri, and the police officer who returned him to Los Angeles for trial testified that among the personal effects of the defendant at the time of his arrest was a copy of the conditional sales contract on the Studebaker. The officer had a discussion with defendant regarding the erasures and changes that had been made on that form of conditional sales contract. The defendant denied any knowledge of the erasures or changes. He admitted to the officer that at the time he delivered the Studebaker to Mr. Henry and received the Buick he was aware of the fact that he owed a balance on the purchase price of the Studebaker. He further stated that after he had taken the Buick automobile on the afternoon of January 24, he had an accident in Wilmington that night; that after a short interval in California he drove to El Paso, Texas, and had the car painted black and maroon. Defendant also stated that the license plates on the Buick had been stolen; that he found some 1942 Arkansas license plates in a wrecking yard and attached them to the Buick.

Testifying as a witness in his own defense, defendant denied any knowledge of much of the information that appeared on the conditional sales contract and other papers in connection with the transaction involving the Buick, claiming that this information was placed therein after he had signed the document. He admitted in his testimony that he told the dealer's salesman that he had lived in San Francisco at one time, and further admitted that he did give the address of 203 Sutter Street. He denied that he ever made any statement to Mr. Henry or the latter's salesman that he was the owner of the Studebaker or that he had paid off the loan thereon.

[3] Contrary to appellant's claims, the information sufficiently charged the offense of grand theft. Compliance with subdivision 2 of section 950 of the Penal Code does not require that the information state the kind of grand theft with which the defendant is charged. The elimination of the necessity for the district attorney to elect in advance of the proof whether the prosecution will proceed upon the theory of larceny, false pretenses, trick and device, embezzlement, etc., and the reasons

for such elimination, are set forth in People v. Fewkes, 214 Cal. 142, 149, 4 P.2d 538.

[4-6] Appellant next contends that the decision of the court adjudging him guilty of grand theft is contrary to law and the evidence; but in reading the arguments advanced in appellant's behalf we fail to find any clear or direct specification of any particular wherein the evidence fails to sustain the court's decision; but a perusal of the testimony persuades us that the decision of the court is fully supported by evidence and sustained by the law. Included in the crime of grand theft is the act of depriving another of his property by means of fraudulent representations. Pen.Code, § 484. Appellant knowingly and falsely represented to the dealer, Mr. Henry, that he was the owner of the Studebaker automobile; that he was in possession of the "pink slip" thereto; that while at one time he had obtained a loan on the automobile, such obligation had been liquidated and discharged. He further falsely represented that he was living and working in San Francisco and owned property in the latter city. Furthermore, appellant signed a bill of sale to the Studebaker car which he knew he did not own, and upon which vehicle he owed some $630 and was in default of three monthly payments. When there is added to the foregoing the conduct of appellant in removing the Buick automobile from the State of California, altering the same and substituting Arkansas license plates thereon, we can see no escape from the conclusion that appellant gained possession of the Buick automobile by means of false and fraudulent representations concerning his ownership of the Studebaker; that he never had any intention of delivering a clear title to the last named vehicle—in fact, could not—, and consequently he was guilty of larceny.

Appellant's contention that Mr. Henry, the dealer, was informed at the time of the transaction that appellant was not the legal owner of the Studebaker automobile and therefore could not have relied to his detriment upon any representations appellant made, is not borne out by the record. True, the dealer was advised through the police department that a finance company was the legal owner of the Studebaker according to the records of the Motor Vehicle Department; but the dealer testified that in about ninety per cent of the transactions involving financing of automobile purchases the legal title is not transferred upon the records of the Motor Vehicle Department when the conditional sales contract is paid out; that "the finance company signs off on the back of the pink slip and mails it to the customer without it being transferred, and it is up to the customer to put it through Sacramento. It costs them $1.00 for a transfer, to get the finance company's name off, and nine out of ten people put it in their pocket or their safe deposit box, with the owner of record showing the finance company still as the owner of record." Further, in answer, to a question, "And therefore you found out through Mr. Murray of the Hermosa Beach Police Department that this car was still owned, as far as the bare legal title was concerned, by the finance company, and you were not alarmed by that?" the same witness answered, "I wasn't, for the simple reason that when I talked to Mr. Alexander he told me the exact address of where the car was registered, according to the records, which I believe was on 92nd Street. I asked him about that particular address and he said that was the address of his wife's folks and it was registered there for convenience only." When, therefore, a check of the records indicated that a loan had been made on the Studebaker car and that it was registered at the address on 92nd Street as claimed by appellant, the dealer believed and relied upon the false representation made by appellant that the loan made on the automobile by the finance company had been fully paid. The evidence received at the trial of this cause, showing as it does a course of conduct on the part of appellant teeming with fraud and replete with intrigue, deception and duplicity, was amply sufficient to warrant the trial court in finding appellant guilty of the charge of grand theft.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concurred.

54 Cal.App.2d 339

ANDRADE v. NEWHOUSE.

Civ. 13660.

District Court of Appeal, Second District,
Division 1, California.

Sept. 4, 1942.

1. Bastards 🔑78

In action by mother to establish the paternity of her minor children, in judgment for their support provision for medical and hospital expenses incurred by mother at birth of the children and for an additional sum per month for mother for her care of children while she was not working was error. Civ.Code, § 196a, as amended by St.1939, p. 1758.

2. Bastards 🔑92

In action by mother to establish paternity of her minor children, on defendant's contention that plaintiff's testimony was so inherently improbable as to be unworthy of belief, in face of conflicting evidence appellate court would not attempt to determine weight of evidence or the credibility of witnesses but would decide only whether upon the face of all the evidence it could be held that sufficient facts could not have been found to warrant the conclusion arrived at by the trier of facts. Civ.Code, § 196a, as amended by St.1939, p. 1758.

3. Appeal and error 🔑1001(1)

Where the circumstances in evidence reasonably justified a judgment of the trial court, the opinion of a reviewing tribunal that the circumstances might also reasonably be reconciled with a verdict for the opposite party does not warrant interference with the determination of the trial court.

4. Appeal and error 🔑1001(1)

On appeal, before a judgment can be set aside on the ground of insufficiency of the evidence, it must clearly appear that upon no hypothesis is there sufficient substantial evidence to support the trial court's conclusion and before it may be set aside on the plea that it was founded upon "inherently improbable evidence" appellate court must be able to say that to believe such evidence would be to assume that something has been done which it would not seem possible could be done under the circumstances described or that such evidence involved conduct that no one but a person of a seriously calentured mentality would be likely to do.

See Words and Phrases, Permanent Edition, for all other definitions of "Inherently Improbable Evidence".

5. Bastards 🔑92

In action by mother to establish paternity of her minor children, testimony relating to defendant's association with mother was not so "inherently improbable" as to require a reversal of a judgment against defendant. Civ.Code § 196a, as amended by St.1939, p. 1758.

6. Bastards 🔑65

In action by mother to establish paternity of her minor children, in the trial of which court was aided by presence of the children and was enabled to observe their appearance, actions, characteristics and resemblance to defendant, conflicting evidence sustained judgment against defendant. Civ. Code, § 196a, as amended by St.1939, p. 1758.

7. Appeal and error 🔑1002

An appellate court may not disturb findings of fact based on conflicting evidence and test is not how a court would find the facts to be, but whether there was substantial evidence strong enough to justify the conclusion reached.

8. Bastards 🔑16

The statute relating to illegitimate children creates an obligation of a father to support his illegitimate child. Civ.Code, § 196a, as amended by St.1939, p. 1758.

9. Bastards 🔑94

The amendment to the statute relating to actions to enforce obligation of father to support his illegitimate child which amendment permitted an award of attorney fees in such an action pendente lite primarily concerned matters of procedure for the purpose of enforcing the obligation which procedure is permissive and auxiliary to other procedure and was not exclusive so as to bar an award of attorney's fees as a part of the judgment as permitted under the statute before amendment. Civ.Code, § 196a, as amended by St. 1939, p. 1758.

10. Bastards 🔑19

Statutory provision that court "shall have power" to enforce performance of father's obligation to support illegitimate child by virtue of other statutes referred to in such statute does not of itself import an exclusive method of enforcing performance of the obligation. Civ.Code, § 196a, as amended by St.1939, p. 1758.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall Have Power".

11. Bastards ⚿94

In action by mother to establish paternity of her minor children, under statute relating to enforcement of father's obligation to support illegitimate children as amended, award of attorney's fees could be made at time of judgment or pendente lite. Civ.Code, § 196a, as amended by St. 1939, p. 1758.

12. Bastards ⚿94

In action by mother to establish paternity of her minor children and to enforce alleged father's obligation to support them, the measure by which attorney's fees are to be gauged is the defendant's financial ability to pay and the character and amount of the services rendered. Civ.Code, § 196a, as amended by St.1939, p. 1758.

13. Bastards ⚿94

In action by mother to establish paternity of her minor children, where defendant admitted earning between $150 and $200 per month and services rendered by plaintiff's attorney consisted in filing case, taking deposition of defendant, interviewing witnesses and preparing for trial, attending trial for five days and performing necessary services subsequent to trial, an award of $600 attorney's fees payable in $50 monthly installments was reasonable. Civ.Code, § 196a, as amended by St.1939, p. 1758.

◆

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Consuelo Andrade against George W. Newhouse on behalf of her two minor sons to establish their paternity. From a judgment for plaintiff, defendant appeals.

Modified and as modified affirmed.

Melvin Simon, David Licker, and Alexander L. Oster, all of Los Angeles, for appellant.

DeForrest Home, of Los Angeles, for respondent.

WHITE, Justice.

[1] The plaintiff and respondent, Consuelo Andrade, is the natural mother and parent of George Winfred Andrade and Mario Henry Andrade, minors. Plaintiff brought this action on behalf of said minors, against defendant and appellant, George W. Newhouse, to establish the paternity of said children. After trial before the court sitting without a jury, the court made findings determining that the defendant was the father of the minors, and judgment was entered accordingly. The judgment also provided for the support of said minors and for attorney's fees for plaintiff's attorney in the sum of $600, and court costs of $50. The judgment further provided for medical and hospital expenses incurred by plaintiff at the birth of said two children in the sum of $250 and "the additional sum of $10 per month for the plaintiff herein for her care of said children while she is not working." Respondent concedes the error of this last award, as well as the award for medical and hospital expenses, and at the oral argument of this cause consented that, if the judgment be found otherwise free from reversible error, it might be affirmed as modified by striking therefrom the aforesaid concededly erroneous provisions.

Briefly, the facts testified to and upon which the judgment rests are that plaintiff, an unmarried woman, thirty-five years of age at the time of the trial, and the defendant, an osteopathic physician and surgeon, who was thirty-one years of age at the time of trial, were introduced to each other in the latter part of 1936. The defendant had recently theretofore opened his office in the neighborhood of Watts in Los Angeles County, where the plaintiff was well acquainted, having been employed by several doctors in that locality. Soon thereafter the plaintiff went to work for the defendant as a receptionist during the afternoons, it being understood that she was to be employed without compensation until such time as the defendant could afford to pay her. She told the defendant that she knew many people and that she could help him "build up" his practice. She continued under this arrangement until July, 1937, when she discontinued working for him. During this period, however, the parties became very friendly, and from time to time they engaged in sexual relations. The defendant was married but separated from his wife. A divorce action was pending in February, 1937, when, according to plaintiff, defendant told her he was going to get a divorce and marry her. During the week of August 14, 1939, plaintiff had sexual intercourse with defendant at his office, at which time, she stated, she remained there all night. The next time she saw him was on or about October 1, 1939. In September, 1939, she discovered that she was pregnant, and on May 6, 1940, the first child, George Winfred Andrade, was born. After the first child was born, plaintiff claims that she again had sexual intercourse with the defendant on August 23 and September 13, 1940. From March, 1940, to August, 1940, the plaintiff did not see the defendant at any time. During the months of August, 1939, to November, 1940, when the plaintiff again became pregnant, defendant was living with his wife. Defendant admitted having sexual intercourse with the plaintiff in the years 1936 and 1937, but denied such relations during the years 1938, 1939, 1940 and 1941. Plaintiff testified to having had sexual relations with the defendant during the years 1937 to 1940 inclusive.

It is the contention of appellant that the testimony of the respondent is so inherently improbable as to be unworthy of belief, in that she did not contact appellant from March, 1940, to August, 1940, during which time she was pregnant and gave birth to a child on May 6, 1940; that she did not charge appellant with the paternity of the child until August, 1940, at which time she asked him to acknowledge its paternity, which appellant refused to do; and further, that it is not reasonable to assume that after he so refused to sign the "paternityship papers" she would again submit to acts of sexual intercourse with appellant and as a result give birth to a second child.

[2-5] In answer to appellant's contention in this regard, it may well be said that one thing is certain; if the respondent told the truth when she testified that from about the time she first met appellant up to the time of trial she never had sexual relations with anyone other than appellant, then he must be the father of the child, whether or not she is correct as to dates. And in the face of conflicting evidence, this court will not attempt to determine the weight of evidence or the credibility of witnesses, but will decide only whether upon the face of all the evidence it can be held that sufficient facts could not have been found to warrant the conclusion arrived at by the trier of facts. If the circumstances in evidence reasonably justify the judgment of the trial court, the opinion of a reviewing tribunal that these circumstances might also reasonably be reconciled with a verdict for the opposite party will not warrant interference with the determination of the trial court. Before a judgment can be set aside on appeal on the ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below; while before we can interfere with a judgment on the plea that it is founded upon evidence "inherently improbable," we must be able to say that to believe such evidence is to assume that something has been done which it would not seem possible could be done under the circumstances described, or that such evidence involves conduct that no one but a person of a seriously calentured mentality would be likely to do. We are not warranted in applying any such strictures to the evidence in the case at bar.

[6, 7] In the trial of the case now under consideration, the court was also aided by the presence of the involved children, whereby the court was enabled to observe their appearance, actions, characteristics and resemblance to the appellant. One such characteristic was a birth mark upon the neck of one of the children which corresponded to a like mark of identification on the back of appellant's neck. True, the record herein presents a conflict, but that merely presents a situation in which the trial court is best qualified to make the proper determination. As was appropriately stated in the case of Parker v. Riddell, 41 Cal.App.2d 908, 913, 108 P.2d 88, 91:

"The rule is that an appellate court may not disturb findings of facts based on conflicting evidence. The trier of facts has the opportunity of observing the witness and his general demeanor. The appellate court simply reads the record in cold type and sometimes does not obtain from it the impression received by the hearer of the spoken word. The tongue is simply the means or method of conveying thought. An impulsive or unconscious gesture, the intonation of the voice, a hesitant or an alert answer may possibly exclude an inference otherwise reasonably drawn from the written record. In considering an attack upon the findings, the test is 'not how we would find the facts to be', but whether there was substantial evidence strong enough to justify the conclusion reached. * * *" (Citing cases.)

Appellant's next major contention is that the trial court erred in awarding respondent attorney's fees for prosecuting the action where no award of such fees was made pendente lite. Reference to the history of section 196a of the Civil Code, under which this action was brought, will prove helpful in arriving at its true meaning in the form in which it now appears. The section came into existence by enactment in the Statutes of 1913, page 218, and was amended by the Statutes of 1939, page 1758. Said section is hereinafter set forth, and, for purposes of clarity, the matter added by the amendment is italicized:

"The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, *or by a guardian ad litem appointed upon the written application or with the consent of his mother; provided, that such application or consent shall not be necessary if the mother is dead or incompetent,* and in such action the court shall have power to order and enforce performance thereof, the same as under sections *137, 137.5,* 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife."

[8] The first sentence of the statute creates the obligation of the father to support his illegitimate child. This portion of the statute has remained unchanged from the time of its original enactment. The case of Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163, holds that inasmuch as this sentence of section 196a of the Civil Code required a father to support his child, the trial court had power to order him to pay attorney's fees in the action brought to enforce that obligation.

The case of Kyne v. Kyne, 38 Cal.App.2d 122, 132, 100 P.2d 806, 811, in referring to the Arais case, says: "The Arais case determined that it was proper to allow the attorney's fees as part of the judgment. Since they are allowed as part of the judgment it is obvious that they must be allowed after the services have been rendered."

It must be borne in mind that both of these cases interpret said code section before the 1939 amendment became effective; hence the law at that time was that attorney's fees were allowable as part of the final judgment, and the Kyne case specifically held in the following language that they were not allowable pendente lite: "Appellant, while recognizing the holding in the Arais case, contends that it is not proper to make such allowance after the services have been performed. Certain cases involving the allowance of fees in divorce actions have been thus interpreted. See, 1 Cal. Jur., p. 998, sec. 51. This rule has no application here. In cases under section 196a of the Civil Code the allowance of attorney's fee is predicated upon the theory that such legal services are part of the child's right to support. In Schallman v. Haas, 33 Cal.App. 28, 164 P. 336, it was held that the court is without power to allow such fees *before* judgment. * * *"

The Supreme Court has recently construed the effect of the 1939 amendment to section 196a, supra, in the case of Carbone v. Superior Court, 18 Cal.2d 768, 770, 117 P.2d 872, 874, 136 A.L.R. 1260 wherein it is said:

"Under the plain language of section 196a as amended the court in an action to enforce the obligation of a father to support an illegitimate child has the same power to order the performance of that obligation as it has to order the performance of a husband's obligation under section 137 in a suit for divorce by a wife. Under section 137 the court, when an action for divorce is pending, may in its discretion order the husband to pay as alimony any money necessary to enable the wife to support herself and her children or to prosecute the action. Therefore it may likewise in its discretion order the payment of money necessary for the support of the illegitimate child and the prosecution of the action pending its determination. See 28 Cal.L.Rev. 442, 446.

"Not only is the amendment clear and explicit in its terms, but its purpose to provide for an award *pendente lite* is apparent from the previous interpretation of section 196a. Although it was held that the final judgment might include provision for attorney's fees (Kyne v. Kyne, 38 Cal.App.2d 122, 100 P. 2d 806; Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163) and support of the illegitimate child from the date of filing the complaint (Kyne v. Kyne, supra; Mathews v. Hornbeck, 80 Cal.App. 704, 252 P. 667), the right to counsel fees, costs, and support pending the final determination of the action was denied. Schallman v. Haas, 33 Cal.App. 28, 164 P. 336. The legislature in adopting the amendment presumably had these decisions in mind and intended to change the law."

Manifestly, the Supreme Court has held that the 1939 amendment by its reference to Civil Code section 137.5 gives the court the power to allow attorney's fees pendente lite, which power the court did not have before the amendment.

The question here presented is whether this amendment precludes attorney's fees as part of the final judgment; that is, whether by reason of the 1939 addition to section 196a of the Civil Code, the law as it existed prior thereto and as it was interpreted by the courts is now obsolete so far as attorney's fees awarded for the first time in a final judgment are concerned, or whether the 1939 amendment gave an added and alternative method by which attorney's fees could be assessed either pendente lite or by inclusion in the final judgment.

[9, 10] The portion of section 196a following the first sentence thereof (and containing the enacted amendments) primarily concerns matters of procedure for the purpose of enforcing the obligation contained in the first sentence. This procedure is permissive and auxiliary to other procedures and is not exclusive. The statute itself thus provides when it says: "A civil suit to enforce such obligations *may* be maintained * * * and in such action the court *shall* have power * * *." (Emphasis added.) The mere fact that the court *shall have power* to enforce performance by virtue of the other clauses set forth in section 196a does not of itself import an exclusive method of enforcing performance of the obligation. Nor is this the holding in the case of Carbone v. Superior Court, supra. That case decided but one point, viz.: that pendente lite awards were proper in an action brought under section 196a. The Legislature left unchanged the basic support law, as contained in the first sentence of section 196a (and which is the foundation of the rulings in the Kyne and Arais cases, supra); but, through the additions in the remainder of said section, the Legislature enlarged the right to receive support and attorney's fees pendente lite. This merely provided an additional remedy for procuring the basic support provided in the first sentence of section 196a. The plaintiff in an action brought under said section might not desire to accept the auxiliary remedy provided in pendente lite proceedings because of the measure of proof necessary. It is practically equivalent to the necessity of two complete trials on the paternity issue. It is not the simple matter of an ordinary divorce case where the validity of the marriage and the legitimacy of children are admitted.

[11] In the light of the foregoing, it seems reasonable to assume that, confronted with the decision in the case of Schallman v. Haas, 33 Cal.App. 28, 164 P. 336, and subsequent decisions following the rule there enunciated, the Legislature by the 1939 amendment, as we view it in the light of the holding of our Supreme Court in Carbone v. Superior Court, supra, simply undertook to permit the allowance of attorney's fees in actions brought under section 196a of the Civil Code *not only* at the time of the final judgment, but pendente lite as well.

Appellant's final contention is that the award of $600 attorney's fees is excessive, in view of the evidence as to appellant's earnings, and ability to pay; that although the amount of the award lies within the discretion of the court, the discretion exercised must not be an arbitrary one (Arnold v. Arnold, 215 Cal. 613, 12 P.2d 435; and that the award in this case, where the appellant's earnings are between $150 and $200 per month, is excessive and amounts to an abuse of discretion.

[12] In Kyne v. Kyne, supra, the measure by which attorney's fees are to be gauged is thus stated: (1) defendant's financial ability to pay, and (2) the character and amount of services rendered. Appellant testified that he earned from $150 to $200 per month; that his wife was working; that respondent owned, as she admitted, four pieces of property with an assessed valuation of "probably three or four thousand dollars" and from which she enjoyed an income of $60 or $65 per month. Appellant further testified that he was the owner of two automobiles free and clear of encumbrance.

[13] When consideration is given to the nature and extent of the services rendered by respondent's attorney, consisting as they did of filing the action in question, taking the deposition of appellant and being present at the taking of the deposition of respondent; conducting all the necessary interviews with witnesses and others in preparing the case for trial; spending five days in the trial thereof, and performing the necessary services subsequent to trial, coupled with appellant's proven financial ability; and, in addition, the wide latitude and discretion vested in the trial court, we are not disposed to hold that the award of $600 for attorney's fees is so unreasonable as to constitute an abuse of discretion. This is especially so when, as here, the

court directed that the attorney's fees should be paid in monthly installments of $50 extending over a period of one year.

It was agreed between the parties that the judgment herein should be corrected and amended to show the date of the birth of George Winfred Andrade as May 6, 1940, instead of May 6, 1941.

For the foregoing reasons, the judgment appealed from is modified by inserting therein the date of May 6, 1940, instead of May 6, 1941, as the date of the birth of the minor child George Winfred Andrade, and by striking from the judgment the provision contained therein reading: "and the additional sum of $10 per month for the plaintiff herein for her care of said children while she is not working"; and by further striking from said judgment the words: "and it is the further order of this court that the defendant George W. Newhouse pay to plaintiff the sum of $250 for medical and hospital expenses incurred at the births of said two children." As so modified, the judgment appealed from is affirmed, neither party to recover costs on appeal.

DORAN, J., concurred.

YORK, P. J., concurred in the judgment.

WEST KEY NUMBER SYSTEM

54 Cal.App.2d 288

McAULIFFE v. KANE, County Controller.

Civ. 12056.

District Court of Appeal, First District, Division 1, California.

Sept. 2, 1942.

Hearing Denied Oct. 29, 1942.

1. Officers 🔑100(1)

The constitutional provision forbidding increase in compensation during term of office implies that there must be a law in force fixing compensation of every county and township officer at date of his election, and the provision forbids any increase of that compensation by a law subsequently enacted. Const. art. 11, § 5.

2. Officers 🔑100(1)

New legislation, increasing compensation to be paid to incumbent officer of county, must be postponed until commencement of new term of office. Const. art. 11, § 5.

3. Justices of the peace 🔑15

Where legislative act of county board of supervisors providing for an increase in salary took place, and the judicial classification of the justice court was had, after commencement of petitioner's term of office, legislative act of board of supervisors providing for the increase was not operative during petitioner's term of office. Code Civ.Proc. § 81, as amended by St. 1939, p. 1493; Const. art. 11, § 5.

4. Justices of the peace 🔑2

The statute authorizing classification of justices' courts according to population was not intended to provide for creation or establishment of any new or separate court but was intended only to clarify a situation which had arisen with respect to matter of jurisdiction. Code Civ. Proc. § 81, as amended by St.1939, p. 1493.

5. Officers 🔑100(1)

An officer who accepts an office at fixed salary or compensation is deemed to undertake to perform the duties thereof for such stipulated salary though it is inadequate, and if proper authority increases his duties by addition of others germane to the office, the officer must perform them without extra compensation. Const. art. 11, § 5.

6. Justices of the peace 🔑15

A justice of the peace was not entitled to extra compensation for additional services required by reason of changing classification of his court from a class B justice's court to a class A justice's court under statute authorizing classification of justices' courts according to population, even though salary might be inadequate remuneration for work required of him after change of classification. Code Civ. Proc. § 81, as amended by St.1939, p. 1493; Const. art. 11, § 5.

7. Justices of the peace 🔑2

The classification of justices' courts into class A and class B according to population as authorized by statute did not constitute an adoption of a system of inferior courts for counties, within provision of charter of San Mateo county authorizing board of supervisors to discontinue offices of justices of the peace and constables if legislature shall establish some other system of inferior courts for counties. Code Civ. Proc. § 81, as amended by St. 1939, p. 1493.

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Appeal from Superior Court, San Mateo County; Ernest D. Wagner, Judge assigned.

Mandamus proceeding by Edward I. McAuliffe against Thomas J. Kane, as county controller, etc., to recover salary allegedly due petitioner as justice of the peace of the Third Judicial Township of San Mateo County. From a judgment in favor of petitioner, the respondent appeals.

Reversed.

Gilbert D. Ferrell, Dist. Atty., of Redwood City, for appellant.

John W. Coleberd, of South San Francisco, Edmund Scott, of Redwood City, and F. E. Hoffmann, of San Mateo, for respondent.

KNIGHT, Justice.

This appeal involves the question of whether petitioner, as justice of the peace of the Third Judicial Township of San Mateo County, is entitled to the increase in salary provided for by a county ordinance enacted more than two years after petitioner's term of office began. The trial court held that he was, and the controller of the county has appealed.

The facts are not disputed, and for all the purposes of the appeal may be stated as follows: San Mateo County is governed by a freeholders' charter, adopted pursuant to section 7½ of article XI of the state Constitution, which provides, among other things, that it should be competent in all charters framed under the authority thereto to provide "For the number of justices of the peace and constables for each township, or for the number of such judges and other officers of such inferior courts as may be provided by the Constitution or general law, for the election or appointment of said officers, for the times at which and the terms for which said officers shall be elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors, and if appointed, for the manner of their appointment; * * *." Pursuant to the authority thus granted the Charter of San Mateo County provides: "Article VIII. Township Officers. Section 1. Judicial Townships and Justices of the Peace. The county shall be divided into five judicial townships, which shall be identical with the existing supervisorial districts. Each such township shall have one justice of the peace, who shall be elected in the manner provided by general law for a term of four years and shall hold office until his successor is elected and qualified. Each justice of the peace shall devote his entire time to the duties of his office, if and when required by ordinance of the board of supervisors. * * * Section 3. Compensation of Justices of the Peace and Constables. The compensation of justices of the peace and of constables shall be fixed by the board of supervisors and must be salaries only and in such amounts as may be commensurate with their respective duties. Such salaries need not be uniform in amount for the several townships nor proportionate to population therein. Their duties and qualifications shall be such as now are, or may hereafter be prescribed by law." Stats. 1933, p. 2972.

Petitioner was elected justice of the peace of the Third Judicial Township on August 30, 1938, for a four-year term which began January 1, 1939. At the time he was elected and on the date of the commencement of his term of office the salary of the office of justice of the peace of the Third Judicial Township was fixed by county ordinance at $2,100 a year. Also at the time he was elected and when his term of office began, section 81 of the Code of Civil Procedure provided: "Justices' courts in cities, towns and judicial townships, having a population of 30,000 or more, shall be known, and may be designated, as 'Justices' courts of Class A.' Justices' courts in cities, towns, and judicial townships having a population of less than 30,000 shall be known, and may be designated, as 'Justices' courts of Class B.' Determination of Population. For the purpose of determining the jurisdiction of any justice's court therein, the population of a judicial township shall be deemed to be above or below thirty thousand as may have been found by the Supreme Court of this State to be the fact in any proceeding in mandamus, prior to January 1, 1931, to compel the justices of such townships to exercise original jurisdiction in certain causes; otherwise such population shall be deemed to be as shown by the last preceding census taken under the direction of the Congress of the United States." In 1939, St.1939, p. 1493, said section was amended by striking out that portion thereof last above quoted and inserting in lieu thereof the following: "to be the fact in any proceeding in mandamus brought in a court having jurisdiction thereof." After petitioner had served more than half of his four-year term, and on May 29, 1941, the board of supervisors of said county enacted an ordinance whereby for the first time it fixed salaries for justices of the peace of Class A justices' courts. They were fixed at $3,600 a year for the fiscal year commencing July 1, 1941; and on July 28, 1941, the superior court of said county, in a mandamus proceeding instituted for that purpose under the provisions of section 81 of the Code of Civil Procedure (1) determined that the population of said Third Judicial Township was then in excess of 30,000, (2) declared the justice's court of the Third Judicial Township, by reason of the increased population, to be a justice's court of Class A, and (3) commanded petitioner as justice of the peace of said Third Judicial Township to forthwith assume full responsibility and complete jurisdiction of a justice's court of Class A. On September 2, 1941, petitioner demanded that the controller draw petitioner's salary warrant for the month of August, 1941, for $300, the amount provided for by the ordinance enacted after petitioner's term of office began, and the controller refused to issue the warrant for any greater sum than $175, the amount fixed by the ordinance in effect at the time petitioner was elected and began his term of office. Thereupon the present proceeding in mandamus was instituted.

The state Constitution and the Charter of the county of San Mateo prohibit any increase in the salary of a township officer after he is elected and during his term of office. The constitutional provision is as follows: "* * * The compensation of any county, township or municipal officer shall not be increased after his election or during his term of office * * *." § 5, art. XI. The Charter provision reads: "The compensation of any elective county or township officer shall not be increased nor diminished during the term for which he was elected, nor within ninety days preceding his election." § 1, art. XIII. As will be noted, the foregoing provisions are unconditional and prohibit every increase in compensation, without exception; and here the undisputed facts show that the legislative act of the board of supervisors providing for the increased salary to which petitioner claims to be entitled, was passed long after the commencement of petitioner's term of office. Therefore the increase is not available to petitioner.

[1-3] The case presented is the same in principle and similar in most of its essential facts to Kilroy v. Whitmore, 115 Cal. App. 43, 300 P. 851, 853, hearing by Supreme Court denied. There by state law the judicial townships of Stanislaus County were classified according to population, using as a basis of calculation the number of registered voters therein; and the salary of the justice of the peace for each class was fixed by the same legislative act. The petitioner in that case was elected justice of the peace of Turlock township, which then had a population of between 8,000 and 15,000. Consequently it was a township of the second class, and the salary of the justice thereof was fixed at $100 a month. After petitioner began his term of office the Legislature amended the law whereby an additional classification was created, designated as class 1½. It included townships having a population of between 11,000 and 15,000, and the salary of the justice of the peace thereof was fixed at $150 a month. Thereafter the board of supervisors made an order based on the number of registered voters in the Turlock township, declaring that said township belonged to class 1½. The incumbent justice of the peace demanded the larger salary. It was refused, and he instituted a proceeding in mandamus to recover the same. The proceeding was decided in his favor, but on appeal the judgment was reversed, the court holding that the situation fell within the inhibition of the constitutional provision against increase in compensation during the term of office. In so holding the court said: "The Constitution (section 9, art. 11) clearly implies that there must be a law in force fixing the compensation of every county and township officer at the date of his election, and it imperatively forbids any increase of that compensation by a law subsequently enacted. Smith v. Mathews, 155 Cal. 752, 103 P. 199. It has been uniformly and consistently held that, whenever new legislation is made which will have the effect, actually or presumptively, to increase the compensation to be paid to an incumbent officer of a county, such legislation is to be postponed in its effect until the commencement of the new

term of office to which the successor of the incumbent may be elected. Williams v. Garey, 19 Cal.App. 769, 127 P. 824." In applying the foregoing legal principles to the facts of that case, the court went on to say: "* * * had the act of the Legislature creating townships of the one and one-half class been enacted before respondent was elected and took office, then the increase in his salary would have been automatic upon an increase of population to the extent required to constitute it a township of the one and one-half class. But the increase in respondent's salary was not brought about automatically, but by an act of the Legislature enacted after his election, and after he entered upon the term of his office." And later the court said: "When respondent was elected justice of the peace of Turlock township, his salary was fixed by law at $100 per month. This was the salary he contemplated receiving when he accepted the office, and it was this salary that the people who elected him contemplated that he would receive during his term of office. By an act of the Legislature, passed after the commencement of his term of office, a new and different classification was made of his township, and an increased salary for the office of justice of the peace for that township was provided." And so here, when petitioner was elected, his salary as justice of the peace of the Third Judicial Township was fixed at $175 a month. "This was the salary he contemplated receiving when he accepted the office, and it was this salary that the people who elected him contemplated that he would receive during his term of office." Kilroy v. Whitmore, supra. The legislative act of the board of supervisors providing for the increase in salary took place, and the judicial classification of the justice court was had, after the commencement of petitioner's term of office. Therefore, as held in the Kilroy case, it was not an automatic increase in salary, and consequently the legislative act of the board of supervisors providing for the increase was not operative during his term of office.

Another case closely resembling the present one and upon which both parties place more or less reliance, and which is reviewed but differentiated in the Kilroy case, supra, is Puterbaugh v. Wadham, 162 Cal. 611, 123 P. 804. That was a proceeding in mandamus to compel the city auditor of the city of San Diego to draw his warrant in payment of petitioner's salary, as justice of the peace of the city of San Diego. He had been appointed to this office in 1909, at which time the said city was a city of the third class and the office of justice of the peace carried a salary of $2,000 per annum. In November, 1910, he was elected for the full term beginning the first Monday in January, 1911. At the time of his election, and when the term of his elective office began, the city of San Diego had passed, by reason of its increased population, from the third to the second class, and justices of the peace, under said last-named classification, were entitled to a salary of $3,600 per annum. It was held that the incumbent was entitled to the increased compensation. But in so holding the court pointed out that the constitutional inhibition against increases in compensation during the term of office is directed against increases brought about by legislative acts, as distinguished from automatic increases; and the court then went on to show that in that case all of the legislation necessary to take care of the contemplated automatic change, to-wit, the statute creating the classification of the court and fixing the salaries of justices of the peace of all classes, had already been enacted and was in full force and effect prior to petitioner's election and the commencement of his term of office. Furthermore, and most important, it was pointed out that at the time petitioner was elected and when the term of his elective office began the city of San Diego had already passed by reason of its increased population into the higher classification; hence it was held that the change was automatic. Here the situation was entirely different. Both the legislative act of the board of supervisors increasing the salary, and the judicial determination classifying the court according to population, took place more than two years after petitioner's term of office began.

[4] Petitioner contends that the "office of justice of the peace of a Class A court is totally different and distinct from the office of justice of the peace of a Class B court, and therefore the change in salary" herein is not affected by either the constitutional or the charter provision; and in support of such contention he points out that the jurisdiction of a Class A justice's court differs from that of a Class B justice's court criminally, civilly, and territorially, and that the qualifications for

the office of justice of the peace thereof are different. It appears, however, from an examination of the code sections bearing upon this question and from the history thereof that by the enactment of said section 81 of the Code of Civil Procedure authorizing the classification of justices' courts there was no intent to provide for the creation or establishment of any new or separate court and that all the Legislature intended to do was to clarify a situation which had arisen with respect to the matter of jurisdiction; and the following cases may be cited as fully sustaining this view: In re Jacobson, 16 Cal.App.2d 497, 60 P.2d 1001; Shipp v. Superior Court, 209 Cal. 671, 673, 289 P. 825; Los Angeles County v. Justice's Court, 208 Cal. 429, 281 P. 611; People v. Justice's Court, 212 Cal. 603, 299 P. 731; Van Horn v. Justice's Court, 216 Cal. 235, 13 P.2d 704. In other words, as pointed out in In re Jacobson, supra, before the year 1929 the jurisdiction of the justices' courts throughout the state was uniform. In that year the Legislature amended section 1425 of the Penal Code, St.1929, p. 861, by providing different criminal jurisdiction for justices' courts in townships having a population of 30,000 or more, and in 1931 the Legislature amended section 112 of the Code of Civil Procedure, St.1931, p. 409, by enlarging the civil jurisdiction of the justices' courts having a population of 30,000 or more. Evidently for the purpose of clarifying that situation the Legislature in 1933 added section 81 to the Code of Civil Procedure, St.1933, p. 1810, by which justices' courts were divided into two classes, to be known as Class A and Class B, the line of demarcation being that Class A should consist of courts in those townships having a population of 30,000 or more; and accordingly said section 1425 of the Penal Code and section 112 of the Code of Civil Procedure were amended so as to define the jurisdiction of each class. Nothing is to be found in either the wording of the code sections themselves or in the decisions which have been rendered construing them to justify the conclusion that the purpose of the enactment of said section 81 was to provide for the establishment of a new or different court, or a new or different office for the incumbent justice. The office to which he is elected is "Justice of the Peace" of a certain township, not justice of the peace of any designated class of justice's court, and even though afterwards the court of that particular township, by reason of increased population, is classified as a Class A justice's court, the title of his office remains unchanged.

[5, 6] It is further contended that "as a justice of the peace of a Class A court, petitioner has new and additional duties imposed upon him which are without the scope and range of the office of a Class B court, and therefore the salary provided by ordinance 523 does not constitute an unconstitutional or unlawful increase." It has been definitely held in this state, however, that "An officer who accepts an office at a fixed salary or compensation is deemed to undertake to perform the duties thereof for such stipulated salary, though it be inadequate; and if the proper authority increases his duties by the addition of others germane to the office the officer must perform them without extra compensation." Vogel v. White, 134 Cal.App. 252, 25 P.2d 233, 234; Kilroy v. Whitmore, supra. Here the duties imposed upon the justice of the peace in question do not involve performance of duties foreign to or not within the range or scope of the office of justice of the peace. As justice of the peace of a Class B justice's court it was his duty to hear and determine causes within the jurisdiction of that court. As justice of the peace of a Class A justice's court it is his duty to hear and determine causes within the jurisdiction of that court. In substance, there has been no imposition of new duties, but merely an increase in the burden of the existing duties, that is, they are all germane to the duties of the office to which he was elected; therefore, under the doctrine above stated, he cannot claim additional compensation for the discharge of those duties even though the salary may be inadequate remuneration for the work now required of him. Petitioner calls attention to certain cases involving administrative officers wherein it was held that the addition of new duties justified the allowance of increased compensation. But the facts of those cases show that the duties so added were not germane to the duties of the office to which the incumbent was elected. In the decision in one of the cases so cited, San Luis Obispo County v. Felts, 104 Cal. 60, 37 P. 780, certain general language is used which tends to support petitioner's position, but such language must be applied to the facts of that particular case, which are essentially different from those here presented.

[7] Petitioner's final contention is that he is entitled to the increased salary by reason of the provisions of section 5 of article VIII of the county Charter. An examination thereof demonstrates, however, that it has no bearing whatever upon the question here presented. It is therein provided that "If the Legislature of this State shall establish *some other system* of inferior courts for counties, then the board of supervisors may discontinue the offices of justices of the peace and constables, if such discontinuance be allowed by law, and shall provide for such inferior judicial officers as may be required by such other system." (Italics ours.) Petitioner argues that another system of inferior courts has been established as a result of the classification of justices' courts into Class A and Class B; but as already pointed out there is no merit in such argument. There has been no other system of inferior courts established since the adoption of the county charter.

The judgment is reversed.

PETERS, P. J., and WARD, J., concurred.